

Hate Speech: Competing Rights to Freedom of Expression

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I: INTRODUCTION

Legislation restricting hate speech is said to be the most serious challenge to the liberal orthodoxy prevailing in the West with respect to the philosophy of freedom of expression.¹ By restraining freedom of expression, such legislation seeks to uphold the rights of racial minorities to equality and dignity and to live free from discrimination and persecution. The controversy over which right should prevail is currently highlighted by the fervent debate occurring in Australia over the federal Racial Hatred Bill.

This article aims to determine how New Zealand's legislation fares in balancing the conflicting rights which underlie it and ultimately whether there should be any legislative intervention in this area. It will begin by outlining the background to New Zealand's legislation, how it operates in practice, and the criticisms made in relation to it. The two ideological positions underpinning the criticisms will be identified and the philosophical and practical arguments upon which the criticisms are founded will be considered in detail. The Supreme Court of Canada's attempt to address these arguments will then be examined, as will the attempt of New Zealand's legislature to reconcile the competing rights. Finally, the author offers an opinion as to whether there should be any legislation against racist speech and, if so, what form it should take.

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1 Sadurski, "Offending With Impunity: Racial Vilification and Freedom of Speech" (1992) 14 Syd LR 163, 191-192.

II: THE NEW ZEALAND LEGISLATION

New Zealand has had legislation specifically prohibiting the incitement of racial disharmony since the enactment of the Race Relations Act 1971. Prior to this, various legal means were used to prevent acts which might promote racial disharmony. For example, the Crimes Act 1961 created the offence of sedition which required danger to public safety² and a criminal libel offence³ which concerned libel towards individuals rather than groups (although this was basically obsolete).⁴ Further, there were provisions in the Police Offences Act 1927 which related to procuring disorder, violence or lawlessness.⁵

However, no single comprehensive offence existed to cover speech or literature which incited racial disharmony, but that was not a direct threat to public safety. In order to satisfy article 4(a) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ratified by New Zealand in 1971), Parliament enacted s 25 of the Race Relations Act and created the offence of inciting racial disharmony. This section read:

(1) Every person commits an offence...who with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons-

(a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or

(b) Uses in any public place ... or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

Under s 26 no prosecution could be brought under s 25 without the consent of the Attorney-General.

In 1979 a racial disharmony provision was inserted into the Race Relations Act,⁶ making acts committed under s 25 unlawful and subject to civil proceedings. However, unlike s 25, there was no intent requirement. In 1989 the provision was repealed because, without an intent requirement, the standard of "likely to excite hostility or ill-will against, or bring into contempt or ridicule" was too low a threshold test. The Race Relations Office had been swamped with trivial complaints and prevented from dealing with complaints under other provisions.⁷

² Section 81(1)(c).

³ Section 211.

⁴ Bracegirdle, *Race Relations in New Zealand* (1975).

⁵ Section 34.

⁶ Section 9A.

⁷ Chen, "Reforming New Zealand's Anti-Discrimination Law" [1992] NZLJ 172.

The Race Relations Act was repealed by the Human Rights Act 1993, which contains the same offence of inciting racial disharmony (s 131) and a similar racial disharmony provision (s 61). However, the provision removed the elements of ill-will and ridicule.

1. The New Zealand experience

Section 25 of the Race Relations Act was only judicially considered in the *King-Ansell v Police*.⁸ This involved a defendant who was a member of the New Zealand National Socialist Party and who printed and published 9000 copies of a pamphlet espousing Nazi ideology. The only question of law considered by the Court of Appeal was whether Jews were included as a group within the phrase “colour, race or ethnic or national origins.” Mills J’s decision at first instance that “ethnic origins” could apply to Jews, was upheld by the Court of Appeal.

While a liberal construction of the crucial phrase was desirable, the judgments are unsatisfactory because they do not adequately consider the *actus reus* of the offence. The words were found to be insulting, but the Crown should have been required to prove the objective likelihood that hostility, ill-will, contempt or ridicule towards Jews would be created. Mills J found that the pamphlet was likely to excite hostility against Jews because two Jewish witnesses found it derogatory and offensive. However, Hodge points out that this proves only that the pamphlet was likely to, and did, excite ill-will against the disseminators of the pamphlet, not the target group.⁹ Hodge suggests that to establish the requisite illegal effect, the Judge should have looked for some factual possibility of a recipient of the pamphlet being moved in the political direction urged.

In *Neal v Sunday News Auckland Newspaper Publications*,¹⁰ the Equal Opportunities Tribunal gave detailed consideration to the effects prohibited under s 9A of the Race Relations Act (the same as those prohibited under s 25). *Neal* involved an article which made jokes about Australians. The Tribunal focused on the group in New Zealand likely to buy and read a populist Sunday newspaper with a down-to-earth and robust style like the defendant’s. It found, on the balance of probabilities, that the article would not be likely to excite ill-will or contempt. The element of ridicule was more closely analysed and the Tribunal defined it as connoting belittling or denigrating in circumstances where the humorous aspect takes second place.¹¹ Given the history of good-natured and friendly rivalry between Australia and New Zealand, the Tribunal concluded that the article had not gone beyond the reasonable bounds of good humour.

8 [1979] 2 NZLR 531 (CA).

9 Hodge, “Incitement to Racial Hatred in New Zealand” (1981) 30 I&CLQ 918, 924; “Incitement to Racial Disharmony: *King-Ansell v Police*” [1980] NZLJ 187, 189.

10 (1985) EOC 76299.

11 *Ibid.*, 76304.

2. Criticisms of the Legislation

Requiring that words be likely to create hostility, ill-will, contempt or ridicule towards the target group is pivotal to the underlying arguments and controversy surrounding this type of legislation.

New Zealand's legislation has been criticised for encroaching too greatly upon freedom of expression. Keith comments that the necessary consequences of hostility, ill will, contempt or ridicule are broadly stated.¹² Further, he considers that the terms "contempt" and "ridicule" are more appropriate in the law of defamation. Keith believes that a public order element (such as a breach-of-the-peace test) is important because it limits the restraint placed on speech and introduces a comparatively certain, objective element into an area of subjectivity. Bracegirdle suggests that ill-will and hostility contain this public order element, while contempt and ridicule are more subjective and may make the incitement of racial disharmony offence wider than article 4(a) of the Convention for which it was enacted.¹³

However, there is a practical argument against defining consequences narrowly and focusing simply on public order. In Britain, s 6 of the Race Relations Act 1965 (U.K) had a higher threshold than our equivalent provision. It required racial *hatred* to be both intended and probable. According to Lester and Bindman, this caused people who had previously used virulent racial invective to adopt far more restrained and rational language.¹⁴ Apparently this more "reasonable" racial propaganda was more effective in influencing public opinion. However, New Zealand's broader provision, could probably catch the less extreme propaganda.

Alternatively, encroachment upon freedom of expression could be limited if words are required to *actually* excite hostility or ill-will, or bring the target group into contempt or ridicule. This removes the need to establish probabilities. Thus, the process which Braun¹⁵ describes as subjective and politically speculative is avoided. When prosecutions depend simply on the *likelihood* of prohibited consequences occurring, the decision to prosecute and the court's decision on whether the requisite likelihood existed, may appear arbitrary or political.

This issue was discussed by Dickson CJ in the Canadian Supreme Court. He recognised that:¹⁶

[I]t is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely debilitate the effectiveness of s 319(2) in achieving Parliament's aim.

Requiring actual proof would make vast amounts of expert evidence necessary and lengthen trials. Further, the test of actual effects would not fully remove the appearance of politisation. Indeed it would probably involve more speculation and

12 Keith, "The Race Relations Bill" in McKean (ed), *Essays on Race Relations in New Zealand* (1971) 57, 73-74.

13 *Supra* at note 4.

14 Lester and Bindman, *Race and Law* (1972) 371.

15 Braun, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes? *Regina v Zundel*" (1987-8) 11 *Dalhousie LJ* 471.

16 *R v Keegstra* (1991) 61 CCC (3d) 1, 58-59.

subjectivity since it would be necessary to assess the recipients prior feelings towards the target group and any changes following the comments. Thus, to a large extent, a conviction would depend on the nature and background of the recipients and not the words themselves. A more rational, well-educated group may be less influenced.

Even the requirement of a “likelihood” is said to be too restrictive upon the protection given to target groups.¹⁷ In Britain the prosecution is required to prove that people in the audience are open to persuasion or likely to feel racial hatred. This follows Lord Parker CJ’s remark that “presumably, the speaker or publisher must take his audience as he finds them.”¹⁸ This approach is similar to that advocated by Hodge¹⁹ and adopted in the *Neal* decision.²⁰ However, Seemann argues that the approach is unreasonable and counterproductive and that it has caused straight-forward prosecutions to fail in Britain.²¹ She says that the effect on the immediate audience is not necessarily relevant since the rest of the public could also be influenced towards the prohibited consequences.

Britain’s most recent formulation of the offence is s 18 of the Public Order Act 1986 (U.K). This retains the requirement of “likelihood to stir up racial hatred”, but adds an alternative to the offence. Now it is also an offence if there is an intent to stir up racial hatred, *whether or not it is likely* to occur. This change was justified because:²²

[T]he more level-headed the recipients of racially inflammatory material, the more difficult it is to show that racial hatred is likely to be stirred up.

Thus Britain has moved towards more, rather than less, protection for target groups.

III: THE IDEOLOGY BEHIND THE DEBATE

The criticisms of the British and New Zealand provisions reveals two diametrically opposing ideological positions which exist in this contentious civil rights debate. First, there is the libertarian ideology which gives priority to freedom of expression. It regards free expression as an almost absolute human right and the cornerstone of democracy because all rights and freedoms depend on an effective right of dissent. Constraints are only considered justified in situations where unrestricted freedom of expression poses an immediate danger to society.

17 Seemann, “Racial Vilification Legislation and Anti-Semitism in New South Wales: The Likely Impact of the Amendment” (1990) 12 Syd LR 596.

18 [1963] 2 QB 744, 749.

19 *Supra* at note 9.

20 *Supra* at note 10.

21 *Supra* at note 17.

22 *Review of Public Order Law* (1985), Cmnd. 9510, para 6.6.

Thus, legislation specifically prohibiting hate propaganda is not favoured and a public order test is advocated as the only restraint on expression. The perspective is summarised by Lester and Bindman:²³

Democracy stands (and some would say, may fall) on the conviction that unpopular ideas should be freely expressed, and that, if they are false or evil, they will ultimately be defeated, not by censorship or prosecution, but by public education and debate.

The second ideological position is labelled egalitarian. It gives priority to rights of equality, dignity of the person and racial harmony and it accepts “reasonable limits” on freedom of expression to safeguard these rights. Egalitarians argue that freedom of expression does not mean the right to vilify. They believe that hate propaganda has no redeeming social value and that it is inherently harmful to target groups and societal order. Criminal charges prohibiting such propaganda and public trials are generally supported.

1. A Critique of the Libertarian Ideology

Even in a democracy there can be no untrammelled rights and freedoms. If a society had totally unabridged individual freedom, there would be no laws and no rights, since the freedoms of every individual would extend to the infringement of the freedoms of every other individual. Thus, there would not actually be untrammelled freedoms. Inextricably linked to the concept of freedom, is the responsibility not to use your freedom to infringe another’s. It could be suggested that an individual should always be prevented from using a right or freedom to infringe another’s right or freedom. Yet this is not a sophisticated analysis because it overlooks the fact that some rights and freedoms are inherently more important than others.

By proposing a public order test, the libertarian ideology implies that freedom of expression is so important that the law will only intervene when there is an extreme infringement of others’ rights; that is, when there is an immediate threat of violence. This suggests that any other harms and costs which may occur are not serious enough to warrant legal intervention.

It may be that freedom of expression is more important and outweighs other costs and harms. However, the writer finds certain conceptual inadequacies in the libertarian ideology because it assumes that freedom of expression is superior to other rights. It is not acceptable to say that freedom of expression must enjoy preferential treatment because it is necessary to a democracy. There are other freedoms and rights which are fundamental to a democracy, such as freedom of thought, the right to vote and, the right attacked by hate speech, to respect and recognition of the intrinsic value of all humanity. Where there is a conflict between rights or freedoms, why is freedom of expression any more important?

What is required is a deeper analysis of where the balance should lie. The optimal point at which the law should intervene is where any further gains in the

23 *Supra* at note 14, at 358.

values underlying one right, by protecting it, would be outweighed by the costs to the values underlying another right, by infringing it. Departing from this point, in either direction, will cause marginal cost to exceed marginal gain and produce a net loss. This is called consequentialism by philosophers, a moral/political theory telling us to always prefer the outcome which maximises value on the whole. It means that where fundamental rights conflict, it is necessary to specify and weigh up the values underlying them.

IV: THE RATIONALES BEHIND FREEDOM OF EXPRESSION

The vital role of full participation and debate in democratic government is one justification for upholding freedom of expression. In the Ontario Court of Appeal Cory J stated:²⁴

A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions.

A less predominant justification is expressed by Bollinger²⁵ who states that freedom of expression promotes the “right” attitudes of tolerance among the audience and performs a “self-reformation function for the general community”.²⁶ This occurs, regardless of the word’s social value, because the audience’s capacity for general tolerance is enhanced. Prohibiting speech is acceptable only where self-restraint cannot reasonably be expected.

A third rationale is that freedom of expression promotes self-development and personal fulfilment. This view considers that freedom of expression possesses an intrinsic value, not just as a means to an end, but as an end in itself. Its premise is that the development of human personality and the achievement of self-realisation are dependent upon opportunities to form and communicate beliefs and thoughts to others.

A fourth theory is that propounded by Mill.²⁷ He argued that freedom of expression allows the advancement of knowledge and the discovery of truth. This theory was the basis of Holmes J’s famous dissent in the Supreme Court of the United States in *Abrams v US*.²⁸ Holmes J argued that free speech should be protected to provide a free trade of ideas from which all truth or knowledge is derived. Through competition in this market the validity of new ideas are tested. However, to maximise the effectiveness of this system, all opinions and ideas, including false or pernicious views, must be available to the general public for evaluation.

²⁴ *R v Kopyto* (1987) 47 DLR (4th) 213, 226.

²⁵ Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

²⁶ *Ibid*, 134.

²⁷ Shields (ed), *On Liberty* (1956).

²⁸ (1919) 250 US 616.

1. A Critique of the Rationales Behind Freedom of Expression

The above rationales have been criticised by many commentators. They have defects both in the abstract and when applied to hate propaganda.

The first rationale, relating to democratic government, has been questioned as a justification for the free expression of non-political issues. Regel writes that:²⁹

Even granted that freedom of speech on political issues is necessary in a democracy it follows only that freedom of speech on political issues should be protected. It does not follow that free speech on non-political issues is any more worthy of protection in a democracy than in a dictatorial state, let alone that freedom of speech should enjoy preferential status on non-political issues.

He anticipates the counter-argument that it is sometimes difficult to distinguish between political and non-political issues and that there may be a “chilling effect” on political debate. He answers that his discussion is about why non-political speech should not be protected *in principle*, not *in fact*. However, Regel’s political/non-political dichotomy would pose a significant problem for the courts since group-vilifying speech cannot avoid the political arena.³⁰

Regel can be further criticised for assuming that only political speech influences how a person votes or exercises democratic choices. Meiklejohn³¹ has recognised that it is not simply the discussion of “political” issues which is important in a democracy. He said:³²

[D]emocracy requires that citizens be free to receive all information that may affect their choices in the process of collective decision-making and, in particular, in the voting process.

Thus Meiklejohn appreciated the importance of public discussions regarding issues of public concern, including philosophy, literature and the arts. Non-political expressions can influence our ultimate choices in a democracy and unfortunately this includes racist diatribe. However, racist expression can still be prohibited without undermining the democratic government theory. For racist expression does not enhance democratic government but subverts it by attacking other rights and freedoms fundamental to it.³³

The tolerance theory is implausible. Moreover, it is questionable whether tolerance, except to avoid violence, is desirable in this area. If people are complacent and do not assert themselves in disagreement, the “market-place of ideas” theory is undermined. Sadurski also criticises the tolerance theory because it is used to justify both the protection and the prohibition of speech.³⁴ Freedom of expression is justified because it achieves tolerance, but some sorts of speech are deemed too inflammatory to warrant toleration. Thus, an individual’s liberty is

²⁹ Regel, “Hate Propaganda: A Reason to Limit Freedom of Speech” (1984-85) 49 Sask LR 303, 308.

³⁰ This proximity is noted by Sadurski, *supra* at note 1, at 192.

³¹ Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

³² *Ibid*, 177.

³³ See Dubick, “Freedom to Hate: Do the Criminal Code Proscriptions Against Hate Propaganda Infringe the Charter?” (1990) 54 Sask LR 149, 160.

³⁴ *Supra* at note 1, at 176.

restricted “for their own good” and this creates a form of paternalism. Further, Sadurski questions whether it is reasonable to expect the target of hate propaganda to exercise self-restraint when confronted by such words.³⁵

In relation to the self-fulfilment theory, Sadurski notes that it derives from a general understanding of an individual’s autonomy and therefore must share its limits.³⁶ Even if punching someone is the best way to express oneself, it cannot be seriously argued that it is desirable to allow people to exercise their autonomy in this way. Thus, not all expression can be justified using this theory.

Furthermore, one commentator has noted that hate propaganda does not *in fact* enhance self-development because a racist lives in a self-limiting world of ignorance and social isolation:³⁷

[B]igotry, and thus the attendant expression of racism, stifles, rather than furthers, the moral and social growth of the individual who harbours it.

At the same time, such speech seeks to deny other members of society the opportunity to develop and flourish.

The most powerful justification for freedom of expression is based on the discovery of truth and advancement of knowledge. Braun notes that the most extreme racial and social intolerance of minorities, particularly Jews, have historically not occurred in Western democracies which have enjoyed the greatest freedom of speech.³⁸ Rather, it has occurred in polities such as Nazi Germany and the former Soviet Union and Eastern Bloc countries which have failed entirely at political democracy. Thus, freedom of expression does not drive social intolerance, rather intolerance stifles freedom of expression. Braun acknowledges that it could be argued that such regimes were based on the suppression of social truths, not falsehoods. However, he responds that once it is acceptable for one group to invoke the machinery of the state to suppress falsehoods, it leaves the right open for future groups holding power to censor speech.³⁹

To allow complete freedom of expression reflects confidence in the public’s ability to distinguish between truth and falsehood. Braun suggests that “speech paternalism” (ie that the state knows best and should think for the people and dictate the truth to them) attacks the premise of democratic government and is the germ of tyranny.⁴⁰ Moreover, there is value in what Braun describes as the *process* of the free of expression itself:⁴¹

If freedom of expression protected only those seeking and speaking social truth and never those seeking and speaking social falsehoods...the social significance of truth would eventually be lost and its social vulnerability become unappreciated...The *process* of vigorous clash and interplay of social truth with social falsehood rejuvenates the message of truth.

³⁵ Supra at note 1, at 178.

³⁶ Supra at note 1, at 174.

³⁷ Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling” (1982) 17 Harv CR-CLL R 133, 176.

³⁸ Supra at note 15.

³⁹ Supra at note 15, at 476.

⁴⁰ Supra at note 15, at 482-483.

⁴¹ Supra at note 15, at 474-475.

Thus, while the harbouring and expression of racial attitudes may not contribute to individual development and fulfilment, the process of recipients ascertaining for themselves what the truth is may be of value in this respect.

V: LEGISLATIVE INTERVENTION

1. Arguments Against Legislative Intervention

The extensive publicity given to hatemongers through news reports of their trials has raised questions about the appropriateness of criminal charges and public trials. It is argued that the potential for damage created by giving a public platform to such people outweighs any beneficial educative and deterrent functions served by conviction and punishment. The criminal process and the procedural and evidentiary advantages afforded the defendant, give a degree of moral equivalence or dignity of innocence and thus credence to the defendant's views. Moreover, what emerges from the trial is a repackaged version of the message, rehearsed and sanitised. The hatemonger is not seen in his or her natural state.

Prosecuting propagators may also cause them to be perceived as martyrs and harden racial attitudes. This is explained by Lester and Bindman:⁴²

Public attention is diverted from considering whether racialist propaganda is morally wrong or factually inaccurate to whether it is illegal. In such a climate, the demagogue's cowardly attack upon a defenceless minority can all-too-readily be interpreted as courageous conduct, carrying a real risk of prosecution and imprisonment, while members of the minority are regarded not as victims but as a privileged group, immune to criticism.

This attitude was reflected in a November 1994 Parliamentary debate on Australia's Racial Hatred Bill, when the Labour Member of Parliament Graeme Campbell stated that:⁴³

The main driving force behind the Bill has clearly been the Zionist lobby, [which is] disproportionately composed of authoritarian zealots [who] due to a combination of money, position, relentless lobbying and the manipulation of their victim status, have a very powerful influence.

In situations where the Attorney-General refuses to allow a prosecution, or if a prosecution is unsuccessful, the deterrent effect of the legislation may be undermined. For the views in question may appear morally vindicated and thus the material may become more attractive and persuasive. Legislation may also create a "chilling effect" which deters people from making legitimate and legal expression because they fear prosecution. Further, rather than eliminating racist propaganda, legislation may simply send it underground where, in the absence of contrary public opinion, such views are likely to thrive.

⁴² *Supra* at note 14, at 372.

⁴³ Reported in *Australia/Israel Review*, Vol 19 No 21, 6-13 December 1994, at 5.

Some have said that propagandising provides a cathartic outlet. Thus, freedom of expression is advocated because it is thought to delegitimise the use of force and reduce the likelihood of harmful acts against targets. If legislation prohibited hate speech, acts of intolerance may be viewed as understandable frustration.

Finally, it is unclear whether censoring racist speech counters racism or has any impact on hate groups.⁴⁴ Measures such as state sponsored education and culture, use of government speech to condemn racist ideas, and government funding of equality-seeking anti-racist groups may be more effective.

2. Arguments For Legislative Intervention

Even if an absence of legislation created no more direct incidents against a target group, there might be more indirect effects. Such speech can create an atmosphere conducive to acts of racism which are either violent or discriminatory.

A second argument for legislative intervention lies in the *Report of the Special Committee on Hate Propaganda in Canada*.⁴⁵ This noted that propagators usually play on the emotions of their recipients, letting them believe that they blame the target group for their plight of their own accord. Often the message is not picked up on a conscious level, but by subliminal messages. Therefore, the recipients may not realise that they have been provoked to respond in a particular way. Regel believes that this prevents the recipients from considering the issue rationally and thus it infringes the recipient's freedom of thought (affirmed in s 13 of the New Zealand Bill of Rights Act 1990).⁴⁶

The most popular argument for legislation intervention is the affront to the target group's dignity which causes it to suffer detrimental effects. Such effects include self-abasement, a lack of group pride and disassociation from the group. The target group may even be provoked towards committing acts of violence. However, legislation can prevent a group's exposure to propaganda, even if the propaganda is only driven underground. Further, it can symbolise the general public's condemnation of racist views.

Libertarians believe that the offence of people is an insufficient reason to prohibit expression. But Sadurski argues that the libertarian view fails to grasp the severity of the harm.⁴⁷ He argues that libertarians subsume group vilification under the broader category of offensiveness. Thus, they easily dispense of it because they fail to recognise that it is not "mere offence", but offence which threatens the target's identity.

⁴⁴ Contrast Neier, *Defending my Enemy: American Nazis, The Skokie Case and the Risks of Freedom* (1979) which says there is no empirical evidence to suggest it does, and Kanlen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 Windsor Yearbook of Access to Justice 46 which says the opposite.

⁴⁵ *Report of the Special Committee on Hate Propaganda in Canada* (1966) (Cohen Report), 2nd Appendix.

⁴⁶ *Supra* at note 29, at 311.

⁴⁷ *Supra* at note 1, at 186.

3. A Decision of the Supreme Court of Canada: *R v Keegstra*

James Keegstra was an Alberta school teacher who taught his pupils that Jews have various evil qualities and thus he made frequent anti-Semitic statements.⁴⁸ He was charged under s 319(2) of the Canadian Criminal Code (“the provision”), which prohibits the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion, or ethnic origin.

On appeal to the Supreme Court in 1990, the Court had to decide, first, whether the provision infringed s 2(b) of the Canadian Charter of Rights and Freedoms (“the Charter”) which guarantees “freedom of thought, belief, opinion, and expression...”. Second, if there was an infringement, the Court had to decide whether the infringement could be justified under s 1 of the Charter which uses the words: “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

All seven judges agreed that the provision infringed the guarantee of freedom of expression. However, they were split 4:3 at the second stage of the analysis. The majority judgment, written by Dickson CJ, presented an egalitarian view and upheld the constitutionality of the provision. The dissenting judgment, written by McLachlin J, favoured a libertarian view and found the infringement of freedom of expression not justified by s 1 of the Charter. The following is not intended to be a comprehensive analysis of the judgments, but will focus on some of the main issues.

Dickson CJ's analysis of s 2(b) was brief. He cited the convictions justifying freedom of expression,⁴⁹ as summarised in *Irwin Toy Ltd v Quebec (Attorney-General)*:⁵⁰

(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

At this point, he did not consider the plausibility of these rationales, nor their interrelationship, nor the degree to which they are reflected in hate propaganda.

After concluding that s 2(b) was infringed, Dickson CJ analysed s 1 using the approach formulated in *R v Oakes*.⁵¹ The first stage of this analysis is to establish whether the infringing legislation is based on an objective of pressing and substantial concern in a free and democratic society. The judge concluded that there were two harms caused by hate propaganda which represented a substantial and pressing concern. The first is the emotional damage, humiliation and degradation of the target group. The second is the influence of individuals which can cause discord, discrimination and perhaps even violence and thus effects society at large. Further, he believed that his conclusions were supported by both

⁴⁸ *Supra* at note 16.

⁴⁹ *Supra* at note 16, at 22.

⁵⁰ (1989) 58 DLR (4th) 577, 612.

⁵¹ (1986) 26 DLR (4th) 200.

international human rights instruments and other sections of the Charter (specifically s 15 relating to equality, and s 27 to multiculturalism).

In the second stage of the *Oakes* s 1 analysis, the court must focus on the proportionality between the legislation's objective and the measure adopted. Dickson CJ did not believe that this analysis could ignore the extent to which an expression promoted the principles underlying freedom of expression. Thus, in contradistinction to the libertarian view expressed by McLachlin J, Dickson CJ examined whether, and to what extent, the expressive activity in question promoted the values underlying freedom of expression.

Dickson CJ believed that at the heart of freedom of expression lies the need to ensure the attainment of truth. He concluded that:⁵²

[E]xpression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated market-place of ideas. There is little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world.

In response to the "self-fulfilment" justification, Dickson CJ commented that hate propaganda advocates an intolerance and prejudice which inhibits individual self-development and the human flourishing of all members of the society. Further, in response to the suggestion that freedom of expression is crucial to the political process, Dickson CJ recognised that the "suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process."⁵³ However, he thought that:⁵⁴

[G]iven the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s 2(b) rationale.

After these preliminary considerations, Dickson CJ discussed the first limb of the second stage of the *Oakes* test, ie whether there is a rational connection between the objective and the measure adopted. In his opinion, the provision serves to illustrate the reprobation of society. Prosecutions comfort the target group and remind the whole community of the importance values such as multiculturalism, equality and dignity of person. Thus he concluded that there was a rational connection.

Regarding the second limb of minimal impairment, Dickson CJ considered that s 319(2) was neither overbroad nor vague. He believed that the provision contained definitional limits such as the use of the words "wilfully" and "hatred", the exclusion of private communications, the focus on an identifiable group and the provision for defences in s 319(3). Dickson CJ also considered whether there

⁵² *Supra* at note 16, at 49.

⁵³ *Supra* at note 16, at 50.

⁵⁴ *Supra* at note 16, at 50-51.

were more appropriate methods to achieve Parliament's objective. Although he acknowledged that Parliament's objective was best achieved through a range of diverse measures, he did note the special function of criminal prosecutions which can send out strong messages of condemnation and deterrence.

Finally, Dickson CJ considered the third limb of the *Oakes* test. This requires the court to evaluate the proportionality between the legislation's objectives and its effects. Dickson CJ had little trouble concluding that the legislation's effects were not sufficiently deleterious to outweigh the extreme importance of the objective.

McLachlin J began her s 2(b) analysis by considering the three rationales which support freedom of expression and which Dickson CJ had discussed. She recognised that the political process theory (a variant of which holds freedom of expression to be the pivotal freedom on which all others depend) justifies only a narrow sector of expression.

In relation to the "search for truth" justification, McLachlin J acknowledged that freedom of expression does not guarantee that truth will prevail. However, she did not believe that this negated the value of the "market-place of ideas" concept, nor did she believe that truth and human creativity would not be promoted. Moreover she noted that there are opinions and ideas which are incapable of being proven true or false.

McLachlin J then considered whether freedom of expression is an end in itself. For freedom of expression may encourage the self-realisation of speaker and listener and therefore it may contain an intrinsic value. Although she considered this justification to be too amorphous to found constitutional principle or warrant an enhanced status for freedom of expression, she considered it a useful supplement to the instrumental rationales outlined above.

McLachlin J concluded that each rationale provided guidance regarding the scope and content of s 2(b). Further, she believed that the expression in question fell within the protection of s 2(b). Thus, she proceeded to consider the test of justification under s 1.

McLachlin J agreed with Dickson CJ on the harms caused by hate propaganda. However, she gave them scant consideration and maintained that the legislation's objective (to prevent the promotion of hatred towards identifiable groups) was sufficiently grave to justify limits on a constitutionally protected freedom. Nevertheless, McLachlin J considered the real question to be whether the means contained in the legislation were proportional and appropriate to the ends of suppressing hate propaganda in order to maintain social harmony and individual dignity.

Before applying the second stage of the *Oakes* test, McLachlin expressed the libertarian view that freedom of expression is unique amongst constitutionally protected rights and freedoms for two reasons. First, it is fundamental to the democratic process and thus to all other rights and freedoms. Second, if limitations are placed on freedom of expression there tends to be a "chilling effect" which restricts legitimate expression and thus limits creativity and the beneficial exchange of ideas.

In considering the "rational connection" element of the proportionality test, McLachlin J concluded that the legislation may fail to achieve its goal. Indeed, she believed that it may produce an effect which is quite contrary to that intended. For

McLachlin noted that prosecutions attract extensive media coverage. Frequently the accused is cast as a martyr and consequently, the process frequently generates public sympathy for the accused. This argument was explicitly rejected by Dickson CJ.⁵⁵

On the issue of “minimal impairment”, McLachlin J found that the provision failed the test on two grounds. First, she believed that its drafting was vague and over broad. Second, she believed that criminalisation was an excessive response since other remedies, such as human rights legislation focusing on reparation, may have been more appropriate and effective. Her concern was that, together, these two grounds created a formidable “chilling effect”.

In the final element of the proportionality test, McLachlin weighed the infringement on freedom of expression against the legislation’s benefits. Again she concluded that, although the infringement was of the most serious nature, the legislation’s benefits were questionable. Thus, McLachlin J considered that the legislation failed all three elements of the proportionality test and could not be saved by s 1.⁵⁶

4. The Judgments Compared

Some suggest that the main reason for the divergent judgments is the Judges very different, but largely unarticulated, understandings of the importance of freedom of expression to an individual’s search for truth and consequent self-development.⁵⁷

Dickson CJ questioned the assumption of human rationality which underlies the doctrine of freedom of expression. He did not have faith that the truth will always prevail in a “market-place of ideas”. However, faith in human reason lies at the heart of the liberal-democratic commitment to freedom of expression. To discount such an assumption leaves the freedom with an uncertain foundation. Why not suppress all claims which the government considers to be false? In this respect, it is interesting to note a case decided by the Canadian Supreme Court in the year following the *Keegstra* decision. The case of *R v Zundel*⁵⁸ struck down the offence of spreading false news because it unjustifiably infringed freedom of expression.

⁵⁵ Supra at note 16, at 52-54.

⁵⁶ Since the time of writing, the Supreme Court of Canada in *Ross v New Brunswick School District No 15* have essentially reaffirmed the analysis and conclusions of Dickson CJ in *Re Keegstra*. In the only judgment delivered, La Forest J stated the “core” values underlying freedom of expression are “the search for political, artistic and scientific truth, the protection of individual autonomy and self development, and the promotion of public participation in the democratic process” (para 89). In relation to the principle of the search for truth, La Forest J stated that a free society must accommodate and value all divergent views equally. However, to protect views which attack and silence others’ views and beliefs undermines the free exchange of ideas. Similarly, expression inciting contempt for one group hinders their ability to develop a sense of self identity and belonging. Such expression also impedes the group’s participation in social and political decision-making, an end which is “wholly antithetical to the democratic process” (para 93).

⁵⁷ Moon, “Drawing Lines in a Culture of Prejudice: *R v Keegstra* and the Restriction of Hate Propaganda” (1992) 26 *Uni of Brit Col LR* 99.

⁵⁸ (1992) 95 *DLR* (4th) 202.

Unlike McLachlin J, Dickson CJ overlooked part of Mill's theory.⁵⁹ Mill acknowledged that there is no guarantee that truth will prevail. However, he believed that the process of searching for truth was valuable. Mill believed that individuals must know and understand the truth, not just acquiesce to it, for this develops the capacity for human reason.

Weinrib believes that the egalitarian/libertarian dichotomy fundamentally divides the two judgments.⁶⁰ While the majority considered the Charter's objective to be the protection of individual rights and freedoms in a free and democratic society, the dissent focussed on maintaining the democratic process and thereby subverted the inherent dignity of the individual. McLachlin J failed to focus on the individual and favoured democratic ordering and social progress. She viewed expression as the primary freedom because she believed that democratic political functioning is the end of constitutionality. Yet she failed to recognise that this functioning is the means by which an individual flourishes in society. Her Honour applied a utilitarian analysis to the rationales behind freedom of expression. Thus, although she acknowledged that there was value in considering false ideas, she considered that the value lay in the development of a more vibrant and progressive society and not in the individual's capacity for reasoning. This utilitarian analysis led to reliance upon weak and speculative empirical grounds and ignored the normative function of the criminal law.

5. The New Zealand Legislation Revisited in the Light of *R v Keegstra*

This article does not intend to conduct a detailed examination of the New Zealand courts' approach to the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). However, it is important to ascertain the applicability of the *Keegstra* decision to a potential case under s 131 of the Human Rights Act 1993.

There is little doubt that a defendant would argue that he or she was exercising the freedom of expression embodied in s 14 of the Bill of Rights. In Bill of Rights cases, the courts have paid particular attention to cases decided under the Canadian Charter. However, the two enactments fundamentally differ because the rights and freedoms contained in the Charter are entrenched and the rights and freedoms contained in the Bill of Rights are merely affirmed.⁶¹ Thus, unlike the Canadian judiciary, New Zealand judges are not entitled to "strike down" inconsistent legislation.

Nevertheless, both enactments contain a justified limitations test (s 5 in the Bill of Rights). Further, the principles formulated in *R v Oakes*⁶² were applied to s 5 in *Zdrahal and Moffatt v Wellington City Council*.⁶³ This case held that an abatement notice under s 322(1)(a)(ii) of the Resource Management Act 1991 which ordered the removal of two swastikas painted on a house was a reasonable and demonstrably justified incursion on freedom of expression.

⁵⁹ Supra at note 27 and accompanying text.

⁶⁰ Weinrib, "Hate Promotion in a Free and Democratic Society: *R v Keegstra*" (1991) 36 McGill Law Journal 1416.

⁶¹ See s 4.

⁶² Supra at note 51.

⁶³ High Court, Wellington, 16 December 1994 AP 99/93 Greig J.

If the *Oakes* test was applied to s 131 of the Human Rights Act ⁶⁴ the court would find the provision's objective sufficiently important. This is because of the emphasis placed on multiculturalism within New Zealand society and New Zealand's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ratified in 1971) and the International Covenant on Civil and Political Rights 1966 (ratified in 1979).

However, the provision could fail the proportionality test. The particular concern of this writer is the comparatively low threshold of hostility, contempt, ill-will, or ridicule, which impairs freedom of expression more than minimally. Ridicule is particularly restrictive and unnecessary to prevent the harms associated with hate propaganda. Moreover, unlike Canada and New South Wales, the legislation contains no defences based on bona fide discussion for academic, artistic, scientific, or other public interest purposes. However, such a defence would be desirable. On the other hand, unlike s 131, the Canadian legislation does not require proof that the prohibited consequences are likely. Whichever way a court decides, although they could not declare the provision void, a statement regarding its constitutionality would no doubt be significant.

Even if the *Oakes* test was not formally applied, the court would not look favourably upon legislation which encroached on freedom of expression more than minimally. In *O'Connor v Police* ⁶⁵ Thomas J stated that:

[F]reedom of expression is restricted only in so far as is necessary to protect some countervailing right or interest.

Finally, it is important to note that s 6 of the Bill of Rights requires interpretation consistent with the rights and freedoms embodied within it. This would probably make the *King-Ansell* ⁶⁶ decision unacceptable. The British approach of requiring proof that the recipients would be likely to respond in the prohibited way would probably be followed.

VI: CONCLUSION

The libertarian viewpoint has been criticised for *assuming* that freedom of expression should be given enhanced status, but the question of whether it should remains open.

As earlier recognised, the most powerful justification for freedom of expression is the creation of a market-place of ideas where people can exercise their own discretion and determine for themselves what is true and right. However, the writer shares Dickson CJ's scepticism regarding the rationality of humans and his lack of faith in each individual's ability to reach the "right"

⁶⁴ It is not even certain that s 5 would be considered, since three different opinions of its role were given in *Ministry of Transport v Noort* [1992] 3 NZLR 260, including that of Cooke P and Gault J who found it was of no relevance to an enactment.

⁶⁵ [1990-2] 1 NZBORR 259, 275.

⁶⁶ *Supra* at note 8.

conclusion. The defect in Dickson CJ's judgment is his failure to state why the failure of human reason does not justify the suppression of *all* falsehoods and undesirable speech. Further, unlike McLachlin, he did not address the fact that, even if the "wrong outcome" is reached, the process of evaluating both true and false ideas is valuable in itself.

However, it is submitted that, in relation to hate propaganda, there is too much at stake to take the risk of human reason failing and the wrong outcome eventuating. Market failure has huge tangible and intangible costs. McLachlin J recognised that:⁶⁷

[A]s history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.

Notwithstanding the aside, she continued to consider the value of the market-place. Equality and individual dignity are surely the two most fundamental values in a democratic society and the end to which all rights and freedoms are aimed. These values are subverted by hate propaganda, a fact which cannot be brushed aside. As has been noted,⁶⁸ libertarians downplay the psychological harms to the target group.

In the author's opinion, the benefit derived from the process of evaluating true and false ideas does not justify the risks. Further, it is submitted that any gains made are outweighed by the harm caused by hate propaganda. First, if the process fails and the recipient adopts the abhorrent beliefs espoused, how well has the individual really developed his or her capacity for reasoning? Even if self-development occurs it is countered by the harbouring of racist attitudes and the consequent hindering of social and moral growth. Second, even if the process succeeds and the message is outwardly rejected, there is evidence that the idea of racial or religious inferiority may persist in the recipient's mind. Third, support for the process is based on the assumption that there is enough debate and education to combat false ideas, yet often this is not the case. Finally, is not education similar to indoctrination, since it also offers an alternative to censorship based on the assumptions that the state knows best and that certain beliefs are desirable and should be instilled in people?

Therefore, although the process of evaluating true and false ideas may have value in the abstract, its foundations become shaky when it is applied to hate propaganda. Even if racist speech was completely prohibited there would still be some undesirable speech in the "market-place of ideas." Thus, individuals could still exercise their capacity to reason. The application of the philosophies underlying freedom of expression to justify the toleration of racist speech is therefore rejected.

There are valid practical arguments against legislative intervention. Education and public debate are valuable but they are not mutually exclusive with legislation. Criminalisation could also be replaced by civil actions in the form of human rights complaints or group defamation actions. In relation to the former, the focus is on

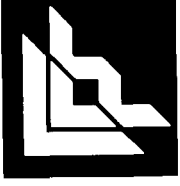
67 *Supra* at note 16, at 79.

68 *Supra* at note 47 and accompanying text.

conciliation. However, it is submitted that conciliation only serves to legitimate the discussion and does not judge one side to be wrong. A group defamation action which focuses on the harm caused to members of the group and which offers both compensatory and injunctive remedies, has advantages and may be preferable to a human rights action.

Although there may be a place for civil actions, the author strongly favours criminalisation provided the particular offence impairs freedom of expression minimally. Section 131 may fail the test of minimal impairment. If criminal trials were held in camera, or at least not televised, many arguments against criminalisation would be undermined, since the publicity given to the hatemongers' views would be limited. However, these measures would further encroach upon freedom of expression. Even without these measures, the deterrent, punitive and educative effects of the criminal law would outweigh any "benefits" to the defendant, if indeed any exist. Section 132 of the Human Rights Act prevents a prosecution from being brought without the Attorney-General's consent. Thus, there is protection against indiscriminate use of the offence. However, a question remains over whether this offence belongs in human rights legislation and not in the Crimes Act 1961.

Legislation prohibiting hate propaganda is a necessary evil in a democratic society which aspires to the preservation and enhancement of the equality and individual dignity of its citizens. The growth of right-wing extremist activity around the world has emphasised the need to take preventative measures against such movements. It has caused many people to question how far individual liberties can be upheld before they undermine individual security. At a time when racial tensions in New Zealand are high, it is naive to believe that increasing extremism would never happen here. Indeed, increased extremism is currently manifesting itself in similarly liberal and tolerant societies such as Canada, the United States, and Australia. Prohibiting racist speech is one proactive mechanism by which governments can prevent irresponsible individuals from disseminating their message of vilification.



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