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This article appeared in:
Consent #31, January 2001

Anti-"Hate" Legislation: A Threat to Academic Freedom

- Kenneth Hilborn

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Last January, on behalf of the Board of Directors, SAFS President Doreen Kimura wrote to the federal Minister of Justice to express our alarm about proposals reported in the press for amendments to the "hate propaganda" provisions of the Criminal Code. The changes said to be under consideration included one empowering police to seize computer hard drives alleged to contain material promoting "hate," another making it a crime to possess "hate" literature for the purpose of distributing it to others, and a third that would exclude truth as a defence when a person was charged with promoting hatred through denial of any "historically recognized act of genocide."

Moreover, the "identifiable groups" to be protected under the revised law were to include those distinguished by age, mental or physical disability, sex or sexual orientation, as well as the present "colour, race, religion or ethnic origin." Would it become risky to criticize too strongly the validity of claims made by the "learning disabled" for academic "accommodations"?

Even the existing "hate propaganda" provisions of the Criminal Code (Sections 318-320) are potentially dangerous to academic freedom, as well as to freedom of expression in society at large. For example, it is by no means clear how far a person can go in criticizing the average performance of a protected group, or in attributing to it undesirable tendencies (such as a high rate of violence), without running at least a theoretical risk of being charged with promoting hatred.

There are supposed to be exemptions for statements established to be true or judged to be "relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds [the accused] believed them to be true." The exemptions are less than reassuring. Not only is the content of "truth" often debatable, but opinions may differ widely on what is beneficial to the public and on what constitutes "reasonable grounds" for believing something to be true.

As for "genocide," the present Section 318 defines it as "killing members" of a group with intent to destroy the group "in whole or in part." How many members? How large a part? On those points the Criminal Code is silent -- a serious problem if the denial of alleged genocides were to be made a crime.

Did lynchings in the American South amount to "genocide"? If it was alleged that they did, after the proposed amendments had been adopted, anybody who called the allegation misleading or exaggerated might face prosecution for promoting "hate" against blacks by denying the "genocide" in question, and the defence of "truth" would be ruled out. In such a case, the text of the law would offer no protection for freedom of historical debate. Everything would depend on the changeable attitudes of prosecutors, judges and juries -- that is, on the political climate of the moment.

The requirement that an alleged act of genocide be "historically recognized" would not necessarily provide an adequate safeguard against abuse. Being human, historians are by no means immune from national, ethnic, or religious bias, nor are they immune from politically-motivated fads and fashions.

Did the United States commit "genocide" in Vietnam? Did the Soviet Union do so in Ukraine during the 1930s, or in Afghanistan during the 1980s? Opinions on such issues can be expected to fluctuate in response to fluctuating political currents.

Disagreement among historians regarding the reliability and interpretation of evidence is a normal part of the process of historical inquiry. The right to offer new interpretations of old evidence, as well as to seek out and publish new evidence that calls prevailing views into question, is indispensable to the pursuit of truth in all academic fields, history clearly among them. What is "historically recognized" can mean only what the prevailing view is at a particular time. It may be difficult enough for a scholar to challenge a dominant opinion without having to face the fear that some group favoured by it may put pressure on the government to have him prosecuted on criminal charges.

The proposal to outlaw possession of "hate" literature for purposes of distribution could also be used to strike directly at the freedom of historians, among others. In a course on German history or 20th Century ideologies, one might wish to acquaint students with excerpts from Nazi writings or speeches, without having to exclude statements expressing hate. And what about the presence of Hitler's Mein Kampf on open shelves in libraries?

Among the other fields threatened, perhaps still more than history, are sociology and psychology. Even certain topics in a subject like physical education might pose a problem. However strong the evidence, would it be prudent to distribute material stating that any "identifiable group" was on average superior to any other in an athletic activity? For a sociologist, literature examining differences among "identifiable groups" in rates of crime or out-of-wedlock births might create a risk.

Psychology is Prof. Kimura's field -- or should the word be "minefield"? She pointed out to the Minister of Justice that because of possible feminist hostility, certain studies of mental differences between human males and females could become grounds for "hate propaganda" accusations. So could discussion of the reasons for homosexuality.

The danger is not that police will swoop down on libraries and universities a few hours after new legislation takes effect. A much more likely scenario is that the pressure groups agitating for more draconian "hate" laws will use them as a means of intimidation: "There's a law against what you're doing, and if you don't stop it, we'll go to the authorities and demand that you be prosecuted."

Even if no prosecution actually occurs, the mere threat of it may have a chilling effect on research and debate in controversial areas, particularly on topics where a substantial number of people feel a strong political or emotional commitment.

Because federal officials were working on possible anti-"hate" amendments in consultation with the provinces, I wrote (in late February) a letter of protest to the Attorney General of Ontario. More than two months later, in May, the Assistant Deputy Attorney General (Criminal Law Division) sent me an unexpectedly long and detailed response. It included ominous passages, one of which made the point that according to the Supreme Court "unfettered freedom of expression is not completely desirable in Canadian society. Some expression is harmful to the values of tolerance and equality and, as such, there can be legitimate limits to expression."

The official added that one Supreme Court ruling "questioned the need for a defence of truth. If the aim is to prevent the harm associated with the promotion of hatred, what difference should it make to that harm whether the statements made were true?" Thus, according to the Supreme Court's interpretation of the Charter of Rights and Freedoms, "the defence of truth could be removed or modified."

In other words -- the implication was clear -- the public has no right to hear a truth that might lead it to adopt incorrect attitudes, and perhaps should be actively shielded by governments against truth of that kind.

Nevertheless, the Attorney General's subordinate went on, "Ontario does not support the idea of an outright repeal of the defence of truth." In a further attempt to be reassuring, he drew a distinction between "legitimate historians" and those using history "as a vehicle to give legitimacy to their ultimate and underlying objective" of promoting hatred against an identifiable group. Presumably the same distinction would apply to sociologists, psychologists, biologists, etc. Prosecutors, judges and juries would decide who was a "legitimate" scholar or scientist and who was not, with only the latter having anything to fear.

What would be the criterion of "legitimacy"? An appointment at a reputable university, or the political acceptability of the statements made? The Assistant Deputy Attorney General did not say.

My reply (which ended the correspondence) pointed out that when Prof. Philippe Rushton put forward his theory about racial differences, his status as a legitimate psychologist had not pre- vented him from becoming the target of a lengthy investigation. For a considerable period he felt himself -- not unreasonably -- to be under the threat of governmental action. Thus I questioned whether even legitimate scholars could be safe from the law "if their conclusions are sufficiently distasteful to certain

segments of society" and if the law "provides any possible basis for repressive action." I argued that it was "best to put freedom first by excluding such possibilities from the law to begin with."

SAFS members were by no means alone in objecting to the federal government's reported plans, and at the time of writing (early September) it is not known how much, if anything, the Minister of Justice will propose to Parliament. Whatever the decision regarding early legislative action, the pressure groups that have been advocating tougher "hate" laws are likely to carry on their campaign to impose more and more restrictions on freedom of expression. Academic freedom will therefore continue to be in peril from government, as well as from the forces of "political correctness" within universities. SAFS must remain on the alert.

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