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Constitutional Law Around the Globe: Fundamental Rights, the Freedom of Speech and “Hate Speech” in Canada

Direito Constitucional ao redor do globo: Direitos Fundamentais, Liberdade de Expressão e “Discurso de Ódio” no Canadá

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Abstract

This paper exploring the Freedom of Speech in Canadian Constitutional Law is part of the series “Constitutional Law Around the Globe”. This chapter of the series focuses on “Fundamental Rights and Freedom of Speech” in contemporary democracies. Second in the row, this paper analyses the Freedom of Speech in Canadian Constitutional Law and how it has been shaped by the Supreme and lower courts over time, specially on the so-called “hate speech”. A final paper will approach the legal systems composing the series in a comparative perspective.

Keywords: fundamental rights; freedom of speech; hate speech; Supreme Court of Canada; Constitution Act.

Resumo

Este artigo, analisando a Liberdade de Expressão no Direito Constitucional Canadense, faz parte da série “Direito Constitucional ao Redor do Globo”. Esta parte da série tem por foco “Direitos Fundamentais e a Liberdade de Expressão” em democracias da atualidade. Segundo da série, este artigo analisa a Liberdade de Expressão no Direito Constitucional Canadense e como ela tem sido delineada pela Suprema Corte e tribunais inferiores ao longo do tempo, especialmente no que diz respeito ao denominado “discurso de ódio”. Um artigo final abordará os sistemas jurídicos componentes da série em uma perspectiva comparada.

Palavras-chave: direitos fundamentais; liberdade de expressão; discurso de ódio; Suprema Corte do Canadá; Constituição do Canadá.

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1. INTRODUCTION

This paper exploring the Freedom of Speech in a comparative perspective is part of a series named “Constitutional Law Around the Globe”.¹ This chapter of the series focuses on Fundamental Rights and their interpretation and enforcement by courts. In other words, the aim is to scrutinize how courts shape Constitutional and Fundamental Rights in jurisdictions around the world.

Second in the row, this paper focuses on Freedom of Speech in Canada, following a first paper on Freedom of Speech in the United States. In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the Freedom of Speech in Brazilian Constitutional Law in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such as in Canada, South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.²

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Ecuador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.³

Certainly, the notion of a Constitution comprises the interpretation and enforcement of rights. Therefore, a Constitution is not only a solemn declaration of rights. In fact, the content of a Constitution derives also from the actual interpretation and enforcement by a specific institution. In modern democracies, this role of interpreting

¹ ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the “writ of certiorari”. **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020; ARAUJO, Luiz Henrique Diniz. Constitutional Law around the globe: selection of justices for the Supreme Court of Canada. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 22, n. 89, p. 57-73, jul./set. 2022.

² KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts**. Judicial Roles in Global Perspective. New York: Cambridge University Press, 2013, p. 1.

³ COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. New York: Cambridge University Press, 2010, p. 142.

and enforcing constitutional provisions are courts that end up shaping constitutional rights.⁴

In parallel, the use of new interpretative constitutional methods has made possible the shape of meaning of constitutional norms, with no need to rewrite the text by means of constitutional amendments⁵. This is a reality in many jurisdictions, including Canada and Brazil.

In this broad picture, Supreme Courts (and also the lower courts and judges) have been playing a very important role in the democratic process. In several jurisdictions, this has led to many important decisions involving gay marriage, abortion,⁶ assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, freedom of speech, equal clauses,⁷ among many others.

Section 2(b) of the Canadian Charter of Rights and Freedoms holds that everyone has the following fundamental freedoms: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The text embodies Canada’s recognition of the fundamental importance of the right to freely express oneself.⁸ (p 375)

Although constitutionally entrenched as a fundamental freedom under the Charter, the right to freely express oneself is not absolute. All Charter rights enjoyed by Canadian citizens are subject to the reasonable limitations that can be demonstrably justified in a free and democratic society as set out in section 1 of the Charter.

Canada’s federal and provincial governments, the Supreme Court of Canada, and courts across the nation have continually recognized justifiable limitations on the freedom of expression enumerated under section 2(b) of the Charter. One such limitation, and focus of this paper, is the restriction on the public dissemination of hate.⁹

⁴ ROUSSEAU, Dominique. **Droit du contentieux constitutionnel**. Paris: Montchrestien, 2010. p. 540.

⁵ BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo: Malheiros. 2007, p. 458; GARCÍA LÓPEZ, Luísa Fernanda. Constitutional interpretation and Constitution substitution: oscillating between the juridical and the political. **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 3, p. 755-771, set./dez. 2020; BENÍTEZ-ROJAS, Vicente F. Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-amending Case Law in Colombia. **Revista de Investigações Constitucionais**, Curitiba, vol. 9, n. 2, p. 269-300, maio/ago. 2022.

⁶ PENTEADO, Taís Sofia Cunha de Barros. Equality-based arguments for the decriminalization of abortion in Brazil: towards new legal opportunities. **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 2, p. 451-472, maio/ago. 2020.

⁷ BUCCI, Maria Paula Dallari. As ações afirmativas no Supremo Tribunal Federal: conexões entre direito e política na difícil promoção da equidade racial no Brasil. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 21, n. 83, p. 51-74, jan./mar. 2021.

⁸ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. **Asper Review of International Business and Trade Law**, Manitoba, v. 19, p. 375-414, 2019.

⁹ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. **Asper Review of International Business and Trade Law**, Manitoba, v. 19, p. 375-414, 2019, p. 375-376.

The *problem* under scrutiny is how Fundamental Rights are shaped by courts in a set of democratic jurisdictions in comparative perspective. Freedom of speech is deemed a Fundamental Constitutional Right in many democracies. However, its actual content varies from one legal system to another depending on how it is shaped by courts.

The *aim* of the chapter Fundamental Rights of the Series Constitutional Law Around the Globe is to analyse how Fundamental Rights are shaped in democracies in a comparative perspective. This will shed light on their content in order to compare the different legal systems.

The *hypothesis* of the series is that Fundamental and Constitutional Rights in many democracies are shaped by courts and their content considerably varies from jurisdiction to jurisdiction. Understanding those differences and nuances allows the comprehension of Fundamental Rights in democracies around the world.

The *methodology* used is consultation of references (primary and secondary sources – books, papers and judicial decisions).

2. FREEDOM OF SPEECH AND LEGAL FRAMEWORK IN CANADA

Freedom of speech is strongly based on the marketplace of ideas. According to it, the more the speech is free, the more ideas can appear and circulate, with evident gains to society. However, the marketplace approach may be too narrow because it attends only to instrumental effects of free speech. Another doctrine contends that freedom of speech has an independent value linked to dignity and development of individuals as such. Free participation in public discourse, in accordance with this doctrine, potentially values every persons' speeches and ideas.¹⁰

Another set of arguments contend that free speech is essential as a check on government power, because it sheds light on abuses of state power and its eventual occupants. Besides, free speech, allowing the free flow of ideas and opinions, is a means of preventing a government from entrenching itself. It can also be conceived as a prevention from violence in political dissent, allowing it to be manifested rather by words.¹¹

On the other hand, it is also broadly accepted that if government is in many situations not allowed to regulate content of speech, it can regulate time, place and manner of speeches. For instance, is a person allowed to turn on her loudspeaker at midnight in a residential neighbourhood to express her views on whatever issue? Can a

¹⁰ FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fifth Edition. New York: Oxford University Press, 2018, p. 61.

¹¹ REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. **California Law Review**, Berkeley, n. 82, pp. 341/388, 2009, p. 351.

group parade in the middle of street during rush time to protest traffic policies?¹² There seems to be a broad consensus that government may sometimes limit the freedom of speech in order to prevent disturbance of others, violence or other grave harm. The question is when.¹³

Certainly, in a free and democratic society, great value is placed on the freedom to express oneself. This freedom is regarded as enabling the discovery of truth, as an instrument to achieve personal fulfillment and as a vital characteristic of a democratic society. The freedom to exchange ideas, express religious beliefs and speak out against government action is fundamental to permit citizens to be active participants in a healthy and vibrant democracy.¹⁴

Section 2(b) of the Canadian Charter of Rights and Freedoms holds that everyone has the following fundamental freedoms: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The text embodies Canada’s recognition of the fundamental importance of the right to freely express oneself.¹⁵

Although constitutionally entrenched as a fundamental freedom under the Charter, in Canada the right to freely express oneself is not absolute. All Charter rights enjoyed by Canadian citizens are subject to the reasonable limitations that can be demonstrably justified in a free and democratic society as set out in section 1 of the Charter. Freedom of expression is no exception. Section 1 reads: “1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Canada’s federal and provincial governments, the Supreme Court of Canada, and courts across the nation have continually recognized justifiable limitations on the freedom of expression enumerated under section 2(b) of the Charter. One such limitation, and focus of this paper, is the restriction on the public dissemination of hate.¹⁶

¹² FEINMAN, Jay M. *Law 101. Everything you need to know about American Law. Fifth Edition.* New York: Oxford University Press, 2018, p. 65/66.

¹³ DORF, Michael C.; MORRISON, Trevor W. **The Oxford Introductions to U.S. Law.** Constitutional Law. New York: Oxford University Press, 2010, p. 167/8.

¹⁴ On the topic of freedom of expression and hate speech in a Brazil-Germany comparative perspective, see: HARFF, Graziela; DUQUE, Marcelo Schenk. *Discurso de ódio nos contextos alemão e brasileiro.* **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 21, n. 84, p. 199-225, abr./jun. 2021.

¹⁵ SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions.* **Asper Review of International Business and Trade Law**, Manitoba, v. 19, pp. 375-414, 2019, p. 375.

¹⁶ SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions.* **Asper Review of International Business and Trade Law**, Manitoba, v. 19, pp. 375-414, 2019, p. 375/6.

The first underlying assumption for the Canadian system of freedom of speech is that truth will prevail in a free and open encounter with falsehood. Furthermore, the freedom to exchange opinions and views in a spirit of tolerance is necessary to secure and develop the democratic system. The second premise holds that it is necessary to reach a balance between the right to freedom of expression and the harms that might result from certain speeches, as that the right to exercise free expression does not include the right to unjustifiably harm others. The third premise relates specifically to the harms of hate speech and the price society is required to pay when it tolerates such speech.¹⁷

In a legislative level, in Canada hate speech is banned by the Criminal Code and it was also prohibited by the Canadian Human Rights Act. Hence the legal provisions:

- *Hate speech ban in the Criminal Code*¹⁸

318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, identifiable group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

¹⁷ COHEN-ALMAGOR, Raphael. Ethical Considerations in Media Coverage of Hate Speech in Canada. **Review of Constitutional Studies**, v. 6, no. 1 pp. 79-100, 2001.

¹⁸ CANADA. Criminal Code. Available at <https://laws-lois.justice.gc.ca/PDF/C-46.pdf>. Access on 6th October, 2020.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

- Canadian Human Rights Act (section 13 – repealed in 2013)¹⁹

Hate messages

13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Cf. Prohibited grounds of discrimination

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

The attempt to establish a constitutional balance between freedom of expression and the protection of vulnerable groups from hateful speech has been a

¹⁹ CANADA. Canadian Human Rights Act. Available at <https://laws-lois.justice.gc.ca/eng/acts/H%2D6/section-13-20021231.html>. Access on 6th October, 2020.

subject of great debate in Canada. The Supreme Court of Canada has addressed the issue in the context of the Criminal Code and in the context of civil human rights legislation, specially in three landmark cases that we will approach next.²⁰

3. THE SUPREME COURT OF CANADA. LANDMARK CASES

By section 1 acting as a limitation on section 2, the Charter of Rights and Freedoms leads courts to weigh the interests of the people involved in the case before determining whether an imposition on civil rights is permissible. If so, courts must establish the degree and content of the limitation.

To do that, Canadian courts have adopted a two-step analysis. First, courts must establish if an activity is constitutionally protected. If it is so, the second step is to scrutinize if the aimed restriction is reasonable according to Section 1 of the Charter.

In order to determine a standard of constraints on the civil right under scrutiny, Canadian courts have adopted a three-part proportionality analysis. According to it, a limitation is considered reasonable if the government can show that “the measure adopted is rationally connected to the objective”; “the measure impair as little as possible the right or freedom in question”; and “there [is] proportionality between the effects of the measure and the objective”.²¹ This framework is commonly named as the Oakes test, after the case in which it was first elaborated.²²

We will be analyzing next three landmark cases in which the Supreme Court of Canada decided for the possibility of limitations on the freedom of expression.

- **R. v Keegstra**²³

James Keegstra, a high school teacher, was convicted for describing Jews in his classes as “treacherous,” “money-loving child-killers” and “sadistic”. He was convicted under section 319(2) of the Canadian Criminal Code, which states:

319......

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

²⁰ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. **Asper Review of International Business and Trade Law**, v. 19, p. 375-414, 2019, p. 376.

²¹ STARK, Sarah. The Expansion of Canadian Hate Speech Legislation. **Law and Business Review of the Americas**, v. 10, no. 4, p. 807-818, Fall 2004, p. 809.

²² MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, v. 45, n. 3, p. 455-532, Spring 2018, p. 500.

²³ CANADA. R. v Keegstra, [1990] 3 S.C.R. 697

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Keegstra was depicted by the Supreme Court as deeply offensive, hurtful and damaging to target group members (Jews). Hate speech promoters were described as “hate mongers” with the aim to “subvert”, “repudiate” and “undermine” democracy.²⁴ The Supreme Court’s decision in Keegstra provides a framework for hate speech laws’ justification, despite the limits they impose to the freedom of expression.²⁵

The Supreme Court understood that the expression of Keegstra was under the scope of protection by Section 2(b). On the other hand, the prohibition in Section 319(2) of the Criminal Code works as a limitation on the right. The Court then addressed the issue whether the Criminal Code limitation could be justified according to Section 1 of the Charter.²⁶

In applying the Oakes test in Keegstra, Chief Justice Dickson, writing for the majority, considered that there was extensive evidence on the existence of hate propaganda in Canada and the harms caused by that type of expression on the individual members of identifiable minority groups.²⁷(502)

Chief Justice Dickson also mentioned that social science evidence also demonstrated that hate speech has harmful consequences for society as a whole. Besides, hateful views may help foster discrimination and even violence against the target groups, and also harms values of tolerance, equality and respect for human dignity. He also remarked that this had happened in Germany with the rise of the Nazi party and increasing discrimination and violence against Jews. The Court also examined the definition of prohibited speech in Section 319(2) and considered that only a very narrow category of willful expression towards a particular purpose and against an identifiable group is captured.²⁸

In this seminal case, Keegstra’s conviction was upheld by the Supreme Court, though in the end he received a suspended sentence and a small fine. Since then, the

²⁴ COHEN-ALMAGOR, Raphael. Ethical Considerations in Media Coverage of Hate Speech in Canada. **Review of Constitutional Studies**, Edmonton, v. 6, no. 1 pp. 79-100, 2001, p. 94/95.

²⁵ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 502.

²⁶ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 502.

²⁷ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018.

²⁸ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 503/505.

law and its application has been challenged many times and the Supreme Court has followed its track to uphold its constitutionality.²⁹

- **Canada (human Rights Commission) v Taylor, [1990] 3 SCR 892³⁰**

In 1979, the Canadian Human Rights Tribunal (the “Tribunal”) heard a number of complaints alleging the Western Guard Party (“WGP”) and its leader, Mr. Taylor, had contravened section 13 of the Canadian Human Rights Act (“CHRA”) for repeatedly communicating hateful messages about members of the Jewish religion via a telephone service established in Toronto.

The Tribunal concluded that Mr. Taylor and the WGP had contravened section 13 of the CHRA and ordered Mr. Taylor and the WGP to stop their discriminatory practice. However, Mr. Taylor and the WGP did not comply with the mandatory order. As a next step, the Canadian Human Rights Commission filed a cease and desist order to the Federal Court in 1983. The question ended up before the Supreme Court of Canada in 1989.

The Supreme Court had the task to evaluate if section 13 of the CHRA infringed Mr. Taylor’s section 2(b) Charter right to freely express his ideas. If the conclusion was affirmative, the Court had to decide if the infringement was justifiable in a liberal democracy.

The decision was unanimous for the first part. All seven justices agreed that section 13 of the CHRA infringed section 2(b) of the Charter. Nevertheless, the justices divided 4-3 on whether section 13 represented a justifiable limitation under section 1 of the Charter. The majority of the Court, led by Chief Justice Dickson, held section 13 was a reasonable and justifiable limitation on freedom of expression.³¹

Writing for the majority, Dickson C.J. explained how Charter rights often conflict with one another and that courts and legislatures must consider principles that are central to a free and democratic society and compatibilize them when they act in apparent shock. Regarding the case, the core principle declared by Dickson C.J. is the protection of minority groups from the intolerance and expressions of hate.³²

Although both majority and minority (conducted by Justice Beverly McLachlin) agreed that the objective of section 13 was to promote more tolerance in Canada, the majority found section 13 not overbroad or excessively vague in language and

²⁹ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. *Hastings Constitutional Law Quarterly*, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 506.

³⁰ Canada (human Rights Commission) v Taylor, [1990] 3 SCR 892

³¹ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, pp. 375-414, 2019, p. 379.

³² SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, pp. 375-414, 2019, p. 379.

considered that the expressions “hatred or contempt” used in the provision refers only to the “unusually strong and deep-felt emotions of detestation, calumny and vilification.”³³

The dissenting justices disagreed, viewing section 13 as vague and overbroad due to the use of the words “hatred and contempt”. The minority also considered that without an intent requirement, section 13 was not “rationally connected” to its objective and was overbroad in its application because it restricted speech that was not intended to discriminate. Answering to this objection, Justice Dickson C.J. argued that section 13 is a provision under civil human rights legislation, not criminal legislation, and the intent requisite is not necessary. Contrary to criminal provisions, he argued, the purpose of civil human rights legislation is not to punish, but to prevent discriminatory conduct.³⁴

The majority also developed its arguments on the real threat hate speech can pose to Canadian society, determining section 13 is an important mechanism to protect Canada’s tolerant, respectful and multicultural society. It was only two decades later, in 2011, that the Supreme Court revisited the constitutional debate over civil hate speech legislation and freedom of expression in a case entitled *Saskatchewan (Human Rights Commission) v Whatcott*, that we will be exploring next.

- **Saskatchewan Human Rights Commission v Whatcott, 2013 SCC 11**³⁵

Four individuals filed complaints concerning Mr. Whatcott’s distribution of four flyers in Saskatoon and Regina before the Saskatchewan Human Rights Commission (the “Commission”), alleging that the flyers distributed targeted homosexuals and promoted hatred on the basis of sexual orientation. They argued these acts contravened section 14 of The Saskatchewan Human Rights Code (the “SHRC”), that states:

Discriminatory publications prohibited

14(1) *No person shall publish or display, or cause or permit to be published or displayed, before the public any statement, publication, notice, sign, symbol, emblem or other representation:*

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under the law; or

³³ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, p. 375-414, 2019, p. 381.

³⁴ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, p. 375-414, 2019, p. 382.

³⁵ *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11.

(b) that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law on any subject.

A Tribunal was appointed to hear the complaints. The Tribunal held the flyers contravened section 14(1)(b) of the SHRC by exposing homosexuals to hatred and ridicule because of their sexual orientation. The Tribunal also held that section 14(1)(b) of the SHRC was a reasonable restriction on Mr. Whatcott's rights to freedom of religion and expression guaranteed by sections 2(a) and (b) of the Charter. Mr. Whatcott appealed the Tribunal's decision to the Saskatchewan Court of Queen's Bench, that dismissed the appeal based on the ideas of "hatred and contempt" from Taylor.³⁶

Mr. Whatcott appealed this decision to the Court of Appeal, that stated that the SHRC provision was constitutional. However, the Court decided that the flyers did not contravene Section 14(1)(b) of the SHRC, but that they were a part of the debate about teaching homosexuality in public schools. The Commission applied for and was granted leave to appeal to the Supreme Court of Canada.³⁷

Justice Rothstein, writing for a unanimous Court, outlined that the application of the provision is based on a reasonable person standard. It means that it does not depend on the subjective views of the publisher or the victim of the hate speech, but rather on an objective application of the test.³⁸

The Court also asserted that the focus is not on the nature of the ideas, but rather the discriminatory effects of the expression, and how those effects constitute the harms discussed in Keegstra. It also outlined that hate speech marginalizes and delegitimizes individuals based on their membership in a group.³⁹

The Court also reiterated that no Charter right is absolute and discussed the importance of balancing competing rights and concluded the objective of section 14(1)(b) of the SHRC is the protection of vulnerable groups. The Court revised the text of section 14(1)(b) of the SHRC by removing the words "ridicules, belittles or otherwise

³⁶ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, p. 375-414, 2019, p. 384.

³⁷ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, p. 375-414, 2019, p. 384.

³⁸ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. *Hastings Constitutional Law Quarterly*, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 507.

³⁹ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. *Hastings Constitutional Law Quarterly*, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, 508.

affronts the dignity of”.⁴⁰ By doing this, the Supreme Court held that section 14(1)(b) of the SHRC represented a minimal restriction on freedom of expression.

4. THE REPEAL OF SECTION 13 – CANADIAN HUMAN RIGHTS ACT (CHRA)

Before the *Whatcott* decision was released, Brian Storseth, a Conservative Member of Parliament (“MP”) within the Harper Government presented a private member’s bill before the House of Commons (Bill C-304). This Bill called for repeal of Section 13 of the Canadian Human Rights Act, then Canada’s only federal civil hate speech provision. The Bill received royal assent on June 26, 2013.⁴¹

The Saskatchewan Human Rights Commission filed for leave to appeal *Whatcott* to the Supreme Court of Canada on April 23, 2010. The Supreme Court granted leave to appeal on October 28, 2010, and the appeal was set to be heard on October 12, 2011. Bill C-304 was introduced in the House of Commons for first reading on September 30, 2011. The Bill went before the Senate from June 6, 2012, to June 26, 2013. During this time, on February 27, 2013, the Supreme Court released its decision in *Whatcott*. The Senate passed Bill C-304 and the bill received royal assent on June 26, 2013, repealing Canada’s only federal civil hate speech provision.⁴²

Prior to the passage of Bill C-304, Section 13 of the CHRA was Canada’s only piece of civil legislation that granted protection against hate speech in the internet. In the provincial level, only Saskatchewan, Alberta, British Columbia and the Northwest Territories have enacted hate speech provisions into their respective human rights codes. Nevertheless, none of these provincial hate speech provisions protects Canadians against hate speech transmitted on the internet.⁴³

As a consequence, the Criminal Code now remains the only mechanism available to protect Canadians against hate speech conveyed through any medium in Manitoba, Quebec, Ontario, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island,

⁴⁰ SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions*. **Asper Review of International Business and Trade Law**, San Francisco, v. 19, p. 375-414, 2019, p. 385.

⁴¹ SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions*. **Asper Review of International Business and Trade Law**, Manitoba, v. 19, p. 375-414, 2019, p. 392/393.

⁴² SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions*. **Asper Review of International Business and Trade Law**, Manitoba, v. 19, p. 375-414, 2019, p. 393.

⁴³ SCHARFSTEIN, Lauren E. *The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions*. **Asper Review of International Business and Trade Law**, Manitoba, v. 19, p. 375-414, 2019, p. 408/409.

Yukon, or Nunavut (the provinces without hate speech legislation enacted in their provincial codes).⁴⁴

5. CONCLUSION

It was asserted in the introduction of this paper that this text is part of a series of articles that analyzes Constitutional and Fundamental Rights around the globe, specially focusing on how Supreme and lower Courts shape them in contemporary democracies.

This paper of the series sheds light on how courts in Canada, specially the Supreme Court, over time shaped the Freedom of Speech entrenched Section 2 of the Charter of Rights and Freedoms and the so-called "hate speech". At the end of the series, a final paper will compare most important issues among the systems under scrutiny.

If in one hand Section 2 of the Charter of Rights and Freedoms guarantees civil fundamental rights to every canadian citizens (including the freedom of speech), on the other hand Section 1 of the Charter allows limitations on those fundamental rights. It is under this scope that Canadian courts in general, and specially the Supreme Court of Canada, have decided cases on pieces of legislation that entrench limitations on freedom of speech in order to prohibit hate speech conducts.

In order to determine a standard of constraints on the civil right under scrutiny, Canadian courts have adopted a three-part proportionality analysis. According to it, a limitation is considered reasonable if the government can show that "the measure adopted is rationally connected to the objective"; "that the measure impair as little as possible the right or freedom in question"; and "that there [is] proportionality between the effects of the measure and the objective".⁴⁵ This framework is commonly named as the Oakes test, after the case in which it was first elaborated.⁴⁶

The system conceived by Canadian courts in general and specially the Supreme Court of Canada reflects the emphasis on equality as a substantive right and the privileging of multiculturalism.⁴⁷ Some landmarked cases decided by the Supreme Court of Canada were analyzed in order to show aspects of limitations on hate speech in Canada.

⁴⁴ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. *Asper Review of International Business and Trade Law*, Manitoba, v. 19, p. 375-414, 2019, p. 409.

⁴⁵ STARK, Sarah. The Expansion of Canadian Hate Speech Legislation. *Law and Business Review of the Americas*, v. 10, no. 4, p. 807-818, Fall 2004, p. 809.

⁴⁶ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. *Hastings Constitutional Law Quarterly*, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 500.

⁴⁷ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. *Hastings Constitutional Law Quarterly*, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, p. 510.

In **R. v Keegstra**⁴⁸, The Supreme Court understood that the expression of Keegstra was under the scope of protection by Section 2(b). On the other hand, the prohibition in Section 319(2) of the Criminal Code works as a limitation on the right. The Court then considered that the Criminal Code limitation could be justified according to Section 1 of the Charter⁴⁹.

In **Canada (human Rights Commission) v Taylor, [1990] 3 SCR 892**⁵⁰, the Supreme Court decision was unanimously decided that section 13 of the Canadian Human Rights Act infringed section 2(b) of the Charter. Nevertheless, the justices divided 4-3 on whether section 13 represented a justifiable limitation under section 1 of the Charter. The majority of the Court, led by Chief Justice Dickson, held section 13 was a reasonable and justifiable limitation on freedom of expression.⁵¹

In **Saskatchewan Human Rights Commission v Whatcott, 2013 SCC 11**⁵², Justice Rothstein, writing for a unanimous Court, outlined that the application of section 14 of The Saskatchewan Human Rights Code is based on a reasonable person standard. It means that it does not depend on the subjective views of the publisher or the victim of the hate speech, but rather on an objective application of the test.⁵³ The Supreme Court held that section 14(1)(b) of the SHRC represented a minimal restriction on freedom of expression.

In many cases it is quite hard the task imposed to Canadian Courts in general and to the Supreme Court of Canada in particular to rule on freedom of speech cases. This is no easy task to reconcile the exercise of freedom of speech with national and provincial statutes that limit this right in order to protect groups from hate speeches.

So far, the Supreme Court of Canada has upheld important pieces of legislation that constrain hate speech. However, with the **the Repeal of Section 13 of the Canadian Human Rights Act** by Bill C-304 in 2013, Canada has lost an important legal device to set limitations on speech (specially in the internet domain) that target fragile groups of people with hate content.

⁴⁸ CANADA. R. v Keegstra, [1990] 3 S.C.R. 697.

⁴⁹ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, p. 455-532, Spring 2018, 502.

⁵⁰ Canada (human Rights Commission) v Taylor, [1990] 3 SCR 892.

⁵¹ SCHARFSTEIN, Lauren E. The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions. **Asper Review of International Business and Trade Law**, v. 19, pp. 375-414, 2019, p. 379.

⁵² Saskatchewan Human Rights Commission v Whatcott, 2013 SCC 11.

⁵³ MARTIN, Craig. Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada. **Hastings Constitutional Law Quarterly**, San Francisco, v. 45, n. 3, pp. 455-532, Spring 2018, p. 508.

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