John_Kopyto

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WHAT RIGHTS?

We support this freedom of expression because of a conviction, supported by experience, that individual creativity, whether in the arts or in the human- ities or in science or in technology, constitutes our social capital. In art, it gives measure to our culture.

-- Supreme Court of Canada Chief Justice Bora Laskin, in decision on obscenity

WHAT RIGHTS?

THE ROAD TO TOTALITARIANISM: THE STORY OF HARRY KOPYTO

BY JOHN RICHARDSON (C) 1986

Toronto lawyer Harry Kopyto was convicted of "scandalizing the court" in a judicial decision which should scandalize every Canadian who believes in freedom of expression.

Here is why!

DEMOCRACY

Democracy is that form of government which results when a majority of people control the law making process through elected representatives. It is clear that there is nothing about a democracy in and of itself that ensures freedom or freedom from coercion by the state. All that democracy ensures is that it is the majority (and not some dictator or monarch) that imposes its will on the minority.

DOES FREEDOM EXIST IN A DEMOCRACY?

It is important to recognize that the idea that Parliament is supreme only tells us who shall be entrusted with the coercive power of government. There is nothing about this concept that ensures freedom. In the words of John K. Williams:

> "Perhaps the most invidious expression of our forgetfulness is our equation of the 'free society' with 'democracy.'" (1)

Some democracies value "liberty" and some do not. Those that do recognize that though laws must be made by the majority, some individual interests are so important that, with respect to these interests, the majority should not impose its will on the minority. It is through this process that freedom may exist with respect to some very important human interests.

To ensure freedom, the majority may entrench basic individual rights in a constitution. The entrenchment of these basic rights operates in such a way that the majority cannot use the political process to impose its will on the minority with respect to these basic interests. For example a constitutional right to freedom of expression is necessary so that the majority (and therefore the government) is not able to silence the opposition. Procedural rights of "due process" are necessary so that the majority cannot simply jail anyone it wants. A constitutional right to leave a country is necessary to prevent a government from prohibiting certain people from leaving the country. A constitutional guarantee of citizenship is necessary to prevent the majority from stripping its enemies of membership in the political community. The United States and India are examples of major democracies which also ensure freedom by having individual rights entrenched in the constitution.

DEMOCRACY IN CANADA PRIOR TO 1982

The form of government in Canada has always been a democracy. The majority has been able to enact laws and generally ensure that its priorities govern. The minority has been taught that democracy is the best form of government. The will of Parliament was supreme. The majority (through their elected representatives) were free to enact whatever laws they chose. This absolute supremacy of Parliament is the leading feature of British democracy on which Canada's political tradition is based. Prior to April 17, 1982, Canadians had no constitutional rights.

DEMOCRACY IN CANADA FROM APRIL 17, 1982

On April 17, 1982, the Canadian Charter of Rights and Freedoms became part of the Constitution of Canada. For the first time, Canadians had constitutionally entrenched rights. Canada now had a constitution that recognized both freedom and democracy as important values. The Charter was thought to be necessary to prevent future governments from using a majority in the political process to tyrannize the minority and thereby deny freedom to that minority. Section 1 of the Charter states:

> 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.

That this is one of the basic purposes of the Charter was recognized by Chief Justice Dickson of the Supreme Court of Canada. In interpreting the Charter, the Chief Justice held that:

> "A second contextual element of interpretation of Sec. 1 is provided by the words 'in a free and democratic society.' Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic." (2)

In an earlier case, Chief Justice Dickson described the kind of freedom that the Charter is to protect in the following words:

> "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. ...Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that subject to such limitations as are necessary to protect public safety, order, health, or morals, no one is to be forced to act in a way contrary to his beliefs or his conscience." (3)

Section 52 of the Constitution of Canada provides that any law which violates an individual's constitutional rights is void and to the extent of the violation, of no effect.

WHAT RIGHTS ARE SET OUT IN AND GUARANTEED BY THE CHARTER?

The Charter recognizes six broad categories of rights which by virtue of being constitutionally protected are outside the control of the government. These are "Fundamental Freedoms," "Democratic Rights," "Mobility Rights," "Equality Rights," and "Language Rights." Volumes can be (and in fact are being) written on each of the categories of rights. What unites all these rights is that they protect individuals in areas that are essential to the dignity, freedom, and fulfillment of the individual. My question is, was Harry Kopyto's Charter right to freedom of expression violated by his conviction?

"Fundamental Freedoms" are defined in Section 2 of the Charter in the following way:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly;
> (d) freedom of association.

WHY WAS THE PROTECTION OF FREEDOM OF EXPRESSION GIVEN CONSTITUTIONAL STATUS?

Freedom of expression is essential to both democracy and freedom. It furthers democracy because the communication of ideas is essential to the informed and intelligent exercise of one's right to vote. It furthers freedom because freedom of expression is necessary to self-fulfillment. Self-fulfillment is what free men strive for. In the words of Emerson:

> "The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature." (4)

The fact that freedom of expression furthers both freedom and democracy underscores its importance as a Charter right. It will be remembered that a Charter right can be limited only by Section 1 of the Charter!

THE FACTS

For a number of years Mr. Kopyto acted for a Mr. Ross Dowson. Kopyto's contention was that the RCMP were breaking the law in the manner they conducted their investigation of Mr. Dowson. After a lengthy and unsuccessful attempt to ensure that criminal charges were brought against the RCMP officers involved, Mr. Kopyto (on behalf of Mr. Dowson) brought an action against the officers in Small Claims court. Judge Zuker barred the action from continuing because of the limitations provisions in the Public Authorities Protection Act. (A limitations provision is a law that puts a limit on the amount of time that a person has in which to commence a lawsuit.) Mr. Kopyto wasted no time in venting his frustration to a Globe and Mail reporter. The highlights of his statement to the reporter were:

> "This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it. ...Mr. Dowson and I have lost our faith in the judicial system to render justice. ...We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together that you'd think they were put together with Krazy Glue." (5)

For expressing these views, Mr. Kopyto was charged with the common law offence of "scandalizing the court" which carries a maximum penalty of five years in prison.

That Kopyto was charged makes two things clear:

1. The majority, through the Attorney General, were using coercive power against an individual; and

2. Coercive power was being brought to bear on Kopyto for the sole reason that the Attorney General did not like the content of his statement. It is simply impossible that Kopyto would have been charged if he had said, "this is a wonderful decision which reinforces my lasting faith in our judicial system."

WHAT IS THE CRIME OF SCANDALIZING THE COURT?

The offence of "scandalizing the court" is a form of the common law offence of "contempt of court." The fact that it is a common law offence means that it is not written in the Criminal Code of Canada. Nobody can look it up and see what it means. Its meaning can be determined only by reading the decisions of judges.

In addition, "contempt of court" (of which "scandalizing the courts" is a specific instance), is the only common law offence for which one can still be prosecuted in Canada.

The classic common law definition of the offence of "scandalizing the court" was given by Lord Russel of Killowen in The Queen v. Grey, (1900) (2 Q.B. 36). The definition is:

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of court. The former class belongs to the category which Lord Hardwicke, L.C. characterized as "scandalizing a Court or a judge." (6)

It is important to note that Kopyto was charged for saying things. On the basis of this definition, it is clear that Kopyto would be in violation of the law if his words were calculated to bring a court or a judge of the court into contempt or to lower his authority.

WHAT WAS THE JUDGE'S DECISION ON THE FREEDOM OF EXPRESSION ISSUE?

At the hearing, a number of Charter challenges were brought against the constitutionality of the crime of "scandalizing the court." One of these challenges was that the charge was based on words that Kopyto used, and therefore the charge itself violated Kopyto's Charter right to

freedom of expression. Mr. Justice Montgomery presided over the hearing. The way that he dealt with the argument that Kopyto's right to freedom of expression was being violated was frightening. He first followed the decision of Mr. Justice Quigley in the prosecution of Jim Keegstra. In considering the scope of the "rights" in the Charter, Mr. Justice Quigley held:

> "The nature and extent of these rights and freedoms may attract or repel potential immigrants, but at the very least they should prevent anyone from harbouring a misguided belief that the Canadian concept of "freedom and rights" is an absolute one. Whatever meanings these expressions may convey when used in other nations, it is my view that in relation to Canada, they are not to be equated to meaning unlimited licence." (7)

After concluding that Kopyto's right to freedom of expression was not absolute, Montgomery held that:

> "The right of the individual to freedom of expression must be balanced by the right of society to maintain confidence in its administration of justice." (8)

Mr. Justice Montgomery then simply proceeded on the assumption that Kopyto's comments were destructive of public confidence in the administration of justice and held that there was no violation of Kopyto's Charter right to freedom of expression. It is worth noting that Justice Montgomery was able to dispose of Kopyto's claim that his right to "freedom of expression" was violated without having to rely on Section 1 of the Charter.

WHAT ARE THE PRACTICAL EFFECTS OF THE JUDGE'S DECISION?

The first effect is that public criticism of judges or the courts is a criminal offence. The government would take the position that the administration of justice can be criticized in an appropriate forum. A scholarly law journal would presumably be an appropriate forum. Since no member of the public will read a law journal, it is clear that criticism of the judicial system cannot be channeled through any medium which is directed to the general public!

The second effect is that the one group that is uniquely qualified to criticize the administration of justice has been silenced. It is shocking that a member of the Bar of Ontario can be subjected to criminal proceedings for criticizing the administration of justice.

There are two obvious reasons for this. The first reason is that lawyers are the one group in society that has expert knowledge of the legal system. It is therefore reasonable to expect lawyers who have a social conscience to contribute to public discussion on the legal system. In fact, the rules of professional conduct impose an obligation on them to do so.

The second reason is that the decision is destructive of the principle that lawyers should be independent of the government. This is because lawyers often act for clients who oppose the government. When it is convenient for them to do so, the Law Society of Upper Canada has made much of this idea. The Society's contribution to this debate is most notable by its absence.

Since it is appropriate for lawyers to comment on the administration of justice, it is crucial that this comment be effective. In order for comment to be effective, it must be heard. It is not possible for effective comment to be restricted to scholarly law journals, collecting dust in libraries never visited by the public.

The third effect of the successful prosecution of Kopyto is to "chill" comment on public affairs. The Attorney General has served notice that the coercive power of the state will punish those who criticize the administration of justice.

WAS THE JUDGE CORRECT? WAS KOPYTO'S RIGHT TO FREEDOM OF EXPRESSION NOT VIOLATED?

The Supreme Court of Canada has indicated that "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter ..."(9) The Court also identified some values and principles essential to a free and democratic society. These are:

> 1. A commitment to social justice and equality.
> 2. Faith in social and political institutions which enhance the participation of individuals and groups in society. (10)

It seems reasonable that if the purpose of Charter rights is to further these values, that the Charter should be interpreted in a way that does further these values. In addition, to the extent that a law that punishes speech is destructive of the values or principles which are essential to a free and democratic society, the violation of the right becomes more severe.

Freedom of speech cannot be upheld as an absolute except as it is subsumed under the general rights of property of the individual (... including property right in his own person).

-- Murray Rothbard, FOR A NEW LIBERTY

Is Mr. Justice Montgomery correct in his view that the charge of "Scandalizing the Court" did not violate Kopyto's right to "freedom of expression?"

KOPYTO WANTS TO ENHANCE SOCIAL JUSTICE AND EQUALITY

If, as Mr. Kopyto contends, the RCMP are above the law and ordinary citizens are not above the law, then Kopyto's comments simply serve to draw attention to this fact. Kopyto's point is that the law is not being applied to the police in the same way that it is being applied to other citizens. Kopyto is drawing attention to this fact for the purpose of ensuring that both police and ordinary citizens are treated equally under the law. Surely this enhances both equality and social justice.

KOPYTO WANTS TO ENHANCE FAITH IN COURTS AND POLICE

Kopyto is calling the public's attention to a problem with

the administration of justice. His comments were about the courts and the police. It is clear that both the courts and the police are important social and/or political institutions in our society. He was simply calling attention to a problem, which is the first step toward rectifying it. Once again, it seems clear that Kopyto was using his "expression" in order to work toward improving faith in the courts and police. For these reasons, it is my view that Mr. Justice Montgomery should have held that the charge of "scandalizing the court" did violate Kopyto's right to "freedom of expression."

JUDGE'S DECISION IS DESTRUCTIVE OF VALUES ESSENTIAL TO A FREE AND DEMOCRATIC SOCIETY

It is my view that Mr. Justice Montgomery's refusal to find a violation of the right to "freedom of expression" was in fact destructive of the same values and principles essential to a free and democratic society that Kopyto helped enhance. As was previously indicated, the public will interpret this decision to mean that the courts (which are a vitally important social institution) are immune from criticism. This will serve only to lower the faith that the public has in this particularly important institution. In addition, it seems reasonable for the public to interpret this whole chain of events to mean that the law does not apply equally to the police.

In addition, Justice Montgomery has stamped this chain of events with the judicial seal of "good-housekeeping." The public will interpret the message on the "seal" to be that the law does not apply equally to the police. There can be no social justice where there is no perception of social justice.

CONCLUSION

Since April 17, 1982 democracy in Canada is subject to the constitutional rights of the individual. The inclusion of "freedom of expression" as one of these rights forbids the government from punishing those who say things it does not like. To date, the government has proven that it is unwilling to obey the command of the Charter. The prosecution of Kopyto, Zundel, and Keegstra are proof of this. All three are unpopular people who were prosecuted for expressing their unpopular views.

It is time that Attorneys General across the country learn that the price we pay for freedom is that there will be people we don't like who say things we don't like. The public must register its disgust with the prosecution of Kopyto at the next election. If this is not done, it will not take long for the government to punish any of us who say anything the government doesn't like.

Don't laugh! In the 1700's, England (from which Canada gets its political tradition) had a crime called "seditious libel." In effect, any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem was a seditious libel. The rationale for the crime of seditious libel was expressed by Chief Justice Holt in Tuchin's case (1704) in the following way:

> " ... a reflection on the government must be punished because, if people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."

FOOTNOTES:

(1) John K. Williams, "The Forgotten Dream," pg. 417. (This article appears at page 416 of the November 1986 issue of The Freeman.

(2) Her Majesty The Queen and David Edwin Oakes pg. 37. (Supreme Court of Canada)

(3) Her Majesty The Queen and Big M Drug Mart Ltd. pg. 55. (Supreme Court of Canada)

(4) Franklin, Mass Media Law pg. 11. (Published by Foundation Press)

(5) pages 3 and 4 of Justice Montgomery's decision.

(6) page 40 of Justice Montgomery's decision.

(7) page 14 of Justice Montgomery's decision.

(8) page 17 of Justice Montgomery's decision.

(9) Her Majesty The [illegible] and David Edwin Oakes pg.

(10) ibid.

EPILOGUE

This article was written in the first week of December 1986. Since that time, some interesting things have happened.

First, on December 18, 1986, the Supreme Court of Canada handed down its decision in the Dolphin Delivery case. Mr. Justice McIntyre, writing for the majority, had the following comments to make about Freedom of Expression.

> "It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance; and protection of speech and expression has been firmly accepted as a necessary feature of modern democracy."

In Dolphin Delivery the court held that picketing was a form of expression that is protected by Section 2(a) of the Charter. The court reasoned that all picketing involves some form of expression. It is therefore hard to see why the verbal communications of Kopyto, Zundel, and Keegstra were held not to be protected by Section 2(a) of the Charter.

Second, on January 23, 1987, the Ontario Court of Appeal handed down its decision in the Zundel appeal. According to the Globe and Mail, the court held that the charging of Mr. Zundel with distributing "hate literature" did not violate his Charter right to freedom of expression. In my view, it is difficult to see why "picketing" is a form of freedom of expression that is protected by the Charter when verbal communication is not.

Third, in early January, Mr. Kopyto attempted to get the NDP nomination in Ian Scott's constituency (St. David). This would have ensured that he would be able to run against Mr. Scott in the next provincial election. Mr. Kopyto did not succeed in this endeavor.