



Government has no place in determining the truth for all

Justice Centre for Constitutional Freedoms Submission on Bill C-19
to the Standing Senate Committee on Legal and Constitutional Affairs

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Bill C-19 has a worthy objective

Holocaust denial is vile speech. Antisemitism is a scourge that has inflicted incalculable and immeasurable suffering on Jews throughout history. Antisemitism has also degraded and abused those who have practiced it and those who have condoned it. Bill C-19 would criminalize the wilful promotion of antisemitism by condoning, denying or downplaying the Holocaust. Bill C-19 does this by adding to section 319 of the *Criminal Code* a new provision that specifically criminalizes the wilful promotion of antisemitism through the denial, minimalization or downplaying of the Holocaust. The objective of combatting antisemitism and Holocaust denial is laudable. The question is not whether to combat this evil, but rather, the best ways of doing so.

Asking the difficult questions

As an advocate for the fundamental *Charter* freedoms of conscience, religion, expression, association and peaceful assembly, and as someone who abhors both antisemitism and Holocaust denial, I find Bill C-19 an exceedingly difficult topic to address.

Assessing existing and proposed legislation requires looking not only at the objective or intent of the law, but also its practical effects and consequences.

I suggest that the following are questions which should be considered by Parliament:

- 1) Is the law necessary, in the context of other laws that already exist?
- 2) Will the law create a precedent for the passing of more laws that are similar? If yes, is that desirable, and what would be the effect of those additional laws?
- 3) If a law does meet its goal, in whole or in part, does it also produce negative consequences? If yes, do those negative consequences outweigh the benefits?

Existing *Criminal Code* provisions already prohibit hate speech

The existing section 319 *Criminal Code* prohibition on the wilful promotion of hatred against a group that can be identified on the basis of (among other criteria) national or ethnic origin, race and religion already prohibits antisemitic speech. In similar fashion, section 318 of the *Criminal Code* already addresses antisemitism by prohibiting the advocacy and promotion of genocide.

Criminal Code section 718.2 allows judges to use evidence that an offence was motivated by bias, prejudice or hate as an aggravating circumstance in sentencing considerations. Human rights legislation is another tool that can be used, and has been used, against antisemitism.

Bill C-19 proposes to extend existing prohibitions on antisemitic speech by establishing by law -- on pain of criminal sanction -- an historical truth. Is it necessary and beneficial for Canada's government to enter into this new realm of declaring what is historically true, and punishing the public expression of historical falsehoods, when existing laws already clearly criminalize antisemitic speech and conduct?

Only authoritarian regimes dictate truth on behalf of all

The truth of the Holocaust should not blind us to the danger of truth being legislated by government, by way of criminalizing the public expression of falsehoods.

In the "free and democratic society" which the *Canadian Charter of Rights and Freedoms* holds out as its ideal, it is the Canadian people themselves, not their governments, who determine what is true or false, right or wrong, good or evil. When governments declare -- and impose -- what they deem to be true in the realms of science, philosophy, art, culture, literature, politics, theology, medicine or history, the result is authoritarianism rather than freedom. Repressive regimes around the world, past and present, impose their own conception of truth on citizens. Jailing people for expressing opinions the regime deems to be false is the hallmark of totalitarian and authoritarian regimes.

Whether the authoritarian regime is right-wing fascist, left-wing communist, or some form of theocracy, the regime violates the fundamental freedom of individuals to express their opinions and challenge prevailing orthodoxies. Of equal or greater significance, authoritarian regimes also rob their citizens of the fundamental human right to hear, listen, consider, ponder, and decide for themselves as to the merit (or lack thereof) of competing opinions, assertions, theories and analyses.

The societal good which flows from freedom of expression consists in facilitating the progress and advancement of science, philosophy, art, culture, literature, politics, theology, medicine and history, to name only a few of the fields which benefit from the free exchange of ideas. The free exchange of ideas necessarily means that ideas which are demonstrated (immediately or eventually) to be wrong or false can be rejected in the marketplace of ideas by thinking people. The expression and consideration of competing ideas in a free society is very different from what takes place in an authoritarian state, where people refrain from expression based in whole or in part on their legitimate fear of criminal sanctions for saying what the authorities, by force of law, have deemed to be false.

Unintended consequences

The wilful promotion of antisemitism is already criminalized by sections 318 and 319 of the *Criminal Code*. Criminalizing the denial, minimalization or downplaying of the Holocaust is new legislative territory, and could have the unintended consequence of fostering antisemitism by providing an example of a law which appears to benefit Jews only, to the exclusion of non-Jews. It is likely that antisemites, on this basis, will make use of the new law to further their cause.

The idea of government criminalizing the public expression of false ideas is attractive when one considers Holocaust denial. However, when government exercises its coercive criminal law power to ban the expression of what is historically false, this necessarily opens the door to government enforcement of what government deems to be true in regards to other historical events. The study of history, and debates on the nature and causes of historical events, will become even more politicized than what they already are.

Demands for further criminalization of other historical falsehoods

If Bill C-19 is passed into law, it is likely that some Armenians, Ukrainians, Tutsis and members of other ethnic groups, in Canada and abroad, would demand that Canada's *Criminal Code* also prohibit the denial, downplaying or minimization of genocides perpetrated against their own ethnicity. This, in turn, would politicize historical debate in an unhealthy fashion, taking the focus away from the study of history and the education of the public by enticing people to focus instead on advocacy to change the law -- law which has now entered the new realm of declaring and enforcing historical truth.

For example, in 2016 France [criminalized](#) the denial of the 1915 genocide perpetrated by the Ottoman (Turkish) Empire against Armenians. No doubt there are some, perhaps many, who would seek to criminalize the denial of the Holodomor ("killing by starvation") perpetrated on Ukrainians by Stalin's communist regime in the 1930s. While individual examples of governments enforcing a particular historical truth may remain attractive, the larger trend is toxic to the preservation of a free society in which citizens are challenged to think, and are asked to decide for themselves what is true or false, rather than looking to government.

It is possible and even likely that some Canadian aboriginals would demand that the denial, downplaying or minimalization of the negative residential school experience of aboriginals, sometimes referred to as "cultural genocide" and even as "genocide," should be criminalized.

Government declarations of truth in other fields besides history

There is no solid basis for assuming that government will not seek to extend its new power to declare truth in the realm of history into other realms such as science, philosophy, art, culture, literature, politics, theology and medicine. The use of coercive state power to criminalize what the government deems to be false is the hallmark of authoritarian regimes, and the antithesis of a free and democratic society in which citizens freely debate what is true or false, right or wrong, good or evil.

The chilling effect on Canadians' free expression

Bill C-19's criminalization of the "downplaying" and "minimalization" of the Holocaust (as opposed to the "denial" of the Holocaust) is particularly problematic because this legislative language could have an unintended chilling effect on the free and unfettered discussion of other historical genocides, and necessary efforts to educate society about them. Historians, academics, students and all Canadians should not have to be concerned about criminal consequences when discussing various historical genocides, out of fear of inadvertently "downplaying" or "minimalizing" the Holocaust.

General laws garner more respect than laws which appear to favour one group

Current *Criminal Code* prohibitions against advocating genocide (section 318), and wilfully promoting hatred (section 319) are fairly broad-based, and do not provide special or different protection for members of any one race, ethnicity or religion. Beyond the generic description of "race, ethnicity, religion" no examples are mentioned. Nor do current criminal laws single out hatred on the basis of age as being worse (or as being less bad) when directed at one particular age group (the old or the young, for example). Nor is the promotion of hatred based on mental or physical disability deemed to be especially egregious when hatred is directed at those with a particular kind of disability; the *Criminal Code* broadly states "mental or physical disability" which necessarily includes all kinds of disabilities.

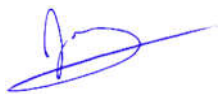
Bill C-19 represents a departure from broad and general legislation by identifying one particular group for special protection: Jews. This may lead to accusations of "special status" existing for this one group, which in turn can have the undesired consequence of increasing antisemitism rather than reducing it. Apart from potentially fostering resentment in respect of perceived special status, Bill C-19 will likely lead to calls for further *Criminal Code* additions that target not only antisemitism but Islamophobia, homophobia and transphobia (to name only three examples), even though these issues are already addressed by existing *Criminal Code* provisions. Civic peace and societal harmony are better served by general laws that apply broadly to all, rather than by laws which appear to elevate (or diminish) any one particular group.

Better alternatives

Ultimately, the best cure for antisemitism and Holocaust denial is a robust and deeply-rooted understanding of history, culture and human nature, combined with the public's embrace of the highest standards of virtue, morality and enlightenment. While it is possible for the criminalization of Holocaust denial to co-exist with public education efforts, the former has the negative consequence of chilling the free expression on which democracy depends for its very survival. The latter, in contrast, enhances the free society and encourages people to think rather than simply accepting authority.

It has been argued that the existing *Criminal Code* prohibitions on the public expression of antisemitism have not been rigorously enforced. This Committee, and Parliament as a whole, have the ability and the authority to consider this claim, and if it is well-founded, to ensure that existing laws are enforced appropriately and impartially.

Respectfully submitted on behalf of the Justice Centre for Constitutional Freedoms,



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