



DEMOCRATIC & PARTICIPATORY RIGHTS: FREEDOM OF EXPRESSION, MEDIA FREEDOM, ASSOCIATION AND ASSEMBLY

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A REVISION CLASS: HOW DO CIVIL AND POLITICAL RIGHTS WORK?

- Absolute rights
- Limited rights
- Qualified rights

- *Non-derogable* rights
- *Derogable* rights

UNDERSTANDING RIGHTS

Rights work in five different ways. Each has a different test:

- Absolute prohibition on interference
- Absolute necessity
- Strict necessity
- Necessary in a democratic society
- Reasonable in the public interest

KEY HUMAN RIGHTS PRINCIPLES

“Living Instrument”

- Human rights treaties are dynamic documents
- They are “living instruments” to be interpreted in the light of modern day circumstances

KEY HUMAN RIGHTS PRINCIPLES

“Practical and Effective”

- Rights are not illusory and meaningless
- They must be practical and effective
- They must therefore be given substance and efficacy in domestic law

RESTRICTING RIGHTS

- Any restriction on civil and political rights must be prescribed by law: *Legality*
- The restriction must be justified by one of the recognised aims: *Justification*
- The restriction must be shown to be “necessary in a democratic society”: *Necessity and Proportionality*
- Any qualification to rights cannot be applied in a discriminatory fashion: *Non-discrimination*

RECOGNISED GROUNDS FOR RESTRICTING RIGHTS: JUSTIFICATION

These include:

- (i) protection of the rights and freedoms of others
- (ii) national security
- (iii) public safety
- (iv) public health and morals
- (v) prevention of public disorder or crime.
- (vi) economic well-being of the country

There is no scope to infer grounds for restrictions which are not explicitly stated

“NECESSARY IN A DEMOCRATIC SOCIETY”: NECESSITY AND PROPORTIONALITY

The restriction must:

- (a) fulfil a pressing social need
- (b) have a very good reason
- (c) be proportionate

A democratic society is based upon concepts of “pluralism, tolerance and broadmindedness”

PROPORTIONALITY

Proportionality should:

- Impair as little as possible the right in question
- Be carefully designed to meet the objectives in question

They must not be arbitrary, unfair or based on irrational considerations

Proportionality requires a determination of whether an interference which is aimed at promoting a legitimate public policy is either:

- unacceptably broad in its application; or
- has imposed an excessive or unreasonable burden on certain individuals.

NECESSITY AND PROPORTIONALITY

Competing Rights:

The relative importance of the protected right: aspects of some rights are of more protected than others. For example, the media's right to free speech; the criminalisation of identity for gay men; prisoners' correspondence with their lawyers; surveillance - the dangers of destroying democracy under the guise of trying to preserve it.

Fair trial rights can trump free speech rights; or religion has been given precedence over expression

Competing Interests:

Where a competing interest (such as crime prevention) seeks to take precedence over a human right, the fundamental status of the protected right has to be observed and the necessity and proportionality of the competing interest must be firmly established.

SCENARIO

Under Ireland's constitution abortion was illegal. A women's counselling service is prevented from giving information to pregnant women about legal abortion services in other jurisdictions. Irish pregnant women who wish to terminate their pregnancy travel to the UK.

The counselling service argues that the ban on giving information is a disproportionate interference with their right to freedom of expression.

Are they correct?

DISCRIMINATION

A distinction will be considered discriminatory if:

- 1 it has no objective and reasonable justification;
- 2 as such, it does not have a very good reason;
- 3 it is disproportionate.

FREEDOM OF EXPRESSION |

Article 19, ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

FREE SPEECH PROTECTS DEMOCRACY

- One of the essential foundations of a democratic society, without which it may not be possible to enjoy many of the other rights protected by international human rights law
- The media in particular attracts special protection because of their role as a public watchdog
- Restrictions of freedom of expression are subjected to very close scrutiny and must be convincingly established

IS ALL EXPRESSION EQUALLY PROTECTED?

- Public Interest & Political Expression
- Expressing Morals & Religious Belief
- Artistic Expression
- Commercial Speech
- Valueless and Offensive Speech

CRITICISM OF POLITICIANS AND GOVERNMENT OFFICIALS

- Those who hold office must always be open to criticism
- Limits of acceptable criticism are wider than regards a private individual
- Attempts to stifle such criticism amounts to political censorship
- A politician's conduct, may be relevant factors in assessing his fitness to exercise political functions, and should be subject to comment

SCENARIO

O is a journalist and the editor of a periodical magazine. He is convicted for insulting a right-wing politician who is also the leader of a political party.

The article refers to a speech made by the politician in which he praised all the soldiers who had fought during the Second World War. O then describes the politician as an ‘idiot’ but not a ‘Nazi’.

Is it acceptable to criticise politicians in this way?

PUBLIC INTEREST & POLITICAL EXPRESSION AND INCITEMENT TO VIOLENCE OR WHEN DO YOU LOSE THE RIGHT TO FREE SPEECH?

- Political speech in the context of terrorist activity can be limited, however context is everything.
- As a general rule, speech that falls short of incitement to hatred and incitement to violence is lawful, and further more, needs to be protected.

LIMITS OF FREEDOM OF EXPRESSION: OR WHAT IS NOT INCLUDED

- Only information that is volunteered is protected
- There is no general right of access to information, although is this changing?

The right includes access to information concerning an individual's private life

TRUTH, OPINIONS AND ACTING IN ‘GOOD FAITH’

Freedom of expression protects the right to:

- criticise,
- speculate,
- have opinions and
- make value judgements.

It is not limited to “true” statements.

In relation to political expression: once statements are presented as fact, it must be established whether the author:

- acted in good faith,
- according to the standards of professional journalism,
- sought to comply with the obligation to verify the facts.

SCENARIO

A journalist publishes two articles in a newspaper alleging police brutality and that unnamed officers are “beasts in uniform.” He is told about a paralysed victim of police brutality and he writes about him. The journalist reports stories that there are many unknown victims of police beatings and bullying. In the article he calls for an effective police complaints body. It turns out that the story concerning the paralysed victim is not true.

He is convicted of criminal defamation against unspecified police officers and fined.

Does the conviction violate his freedom of expression rights?

DUTIES AND RESPONSIBILITIES

- Freedom of expression carries with it “*special duties and responsibilities*” (see Article 19)
- What duties and responsibilities are engaged?
- Who is exercising freedom of expression (or attempting to) and what are their duties and responsibilities?
- What is the technical means used to exercise freedom of expression. For example, writing in an obscure journal is different than airing the same matter on prime time TV.

RESTRICTIONS ON FREEDOM OF EXPRESSION: *CHILLING EFFECT*

- Preventing publication
- Censorship
- Defamation proceedings
- Protecting journalists' sources
- Criminal penalties

Criminal law as an obstacle to freedom of expression: can freedom of expression justify breaking the law?

- Criminalising contact with terrorists

JUSTIFICATIONS FOR RESTRICTING FREEDOM OF EXPRESSION

- National Security
- Territorial Integrity
- Public Safety
- Prevention of Disorder or Crime
- Protection of Health or Morals
- Protection of the Reputation or Rights of Others
- Preventing the Disclosure of Information Received in Confidence
- Maintaining the Authority and Impartiality of the Judiciary

FREEDOM OF EXPRESSION V PRIVACY

- Freedom of expression can clash with another's exercise of other equally important rights, eg. privacy.
- Proportionate defamation laws that protect privacy rights and the reputation others can limit freedom of expression.

FREEDOM OF EXPRESSION AND THE PROHIBITION OF ABUSE OF RIGHTS

- Article 5, ICCPR prohibits the abuse of rights to destroy the rights of others
- Human rights require that advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law
- Relationship between freedom of expression and criminalising the glorification of terrorism and apologists for terrorism
- The incitement to violence is required

SCENARIO: ABUSE OF RIGHTS

The applicant is a member of an extreme right wing political party. He displays in his window a large poster with a photograph of the Twin Towers in flames with the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The applicant is convicted of a public order offence. He argues that the poster referred to Islamic extremism and was not abusive or insulting, and that to convict him was an infringement of his right to freedom of expression.

Is he correct?

THE RIGHT TO ASSOCIATION AND TO PEACEFUL ASSEMBLY



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

ARTICLE 21, ICCPR

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22, ICCPR

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

THREE RIGHTS ARE GUARANTEED:

- Peaceful assembly - or the right to protest
- Freedom of association - or the right to be actively political
- The right to form a trade union

Relationship with Economic and Social Rights and Labour Rights (International Labour Organisation)

SCOPE OF PEACEFUL ASSEMBLY

The Right to Protest

- Peaceful protest can be the most effective mechanism to promote change: as such it is vital to a functioning democratic society
- Peaceful assembly and public protest provides a direct means for allowing democratic participation to occur outside of elections.
- Peaceful assembly underpins the democratic process, but it can also be an attempt to circumvent it.
- Protest cannot be used to destroy the rights and freedoms of others
- A purpose for the assembly is required
- The right to protest is principally engaged in relation to assemblies that are concerned with the discussion and promotion of ideas

SCOPE OF PEACEFUL ASSEMBLY

- Obligation on the State to take peaceful and appropriate measures to protect peaceful protest
- Includes the right to march as well as static gatherings
- An assembly whose motive is peaceful, but which subsequently turns violent is still protected
- An unlawful assembly, if peaceful, can still be protected
- Protest controls are lawful, but should not discourage the protest
- A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. Banning orders must therefore be strictly justified.
- No right to 'hang out' and share the company of others
- Peaceful assembly in private space - i.e. shopping malls

SCOPE OF FREEDOM OF ASSOCIATION

What is an Association?

- There needs to be a formal association and a deliberate effort to set up an organisational structure.
- An Association is a voluntary grouping of people for a common goal. Freedom of association is a 'general capacity for the citizens to join together without interference by the State in order to attain various ends'.
- Requirements to register or license the association are compatible so long as these schemes do not impair the activities of the association and have a chilling effect.
- Associations should not be banned on the basis that once they are up and running they could lawfully be banned if they carried out certain activities. They need to be given the benefit of the doubt in the first instance.
- No right to be a member of a particular association, and generally speaking associations are free to regulate their own membership and activities.

SCOPE OF FREEDOM OF ASSOCIATION

Freedom of Association does not regulate associations of a public law character.

Political Parties

Essential to democracy.

Any interferences with political parties must be strictly justified.

If a political party is not rejecting democratic principles it should not be restricted.

Proscribing and listing organisations: when is it justified?

The Right to Form and Join Trade Unions

Includes a negative right of freedom not to associate - a right not to join a trade union.

State must protect against the dominant position of a union.

Trade unions' rights do not guarantee a right to strike or a right to be consulted.



SCENARIO

A political party is dissolved on the orders of the Constitutional Court. Additionally some members of the party, who were politicians were prohibited from sitting in Parliament for a period of five years as a consequence of their involvement with the party.

The Court justifies its actions on the basis that the party, and the relevant members, were advocating for the removal of the constitutional requirement of secularism.

Did the Court fully take into account freedom of association rights of the party and the politicians?

REFAH PARTISI V TURKEY: RESTRICTING RIGHTS TO ASSOCIATION

- The State has a duty to protect its institutions
- It is lawful and Convention-compliant for a political party to campaign for change in the law and the structure of the State
- However, those political parties must satisfy:
 - the means used must be legal and democratic in every respect;
 - the changes proposed must be compatible with fundamental democratic principles

EXPRESS LIMITS ON THE RIGHT TO ASSOCIATE

The Armed Forces, the Police and Civil Servants

- These groups are excluded from the general protection of the Right to Associate
- Restrictions on the activities must therefore only be lawful and non-arbitrary
- A ban on the political activities of the police (in relation to freedom of expression) is justifiable on the basis that a politically neutral police force is in the public interest
- Not all those involved in the administration of the State will be excluded from the Right to Associate: only those that are essential to it