

Freedom of Expression -The Clash of Rights

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ABSTRACT

This article will examine the shift in the role of freedom of expression based on recent events, observing how the right to freedom guaranteed by law has shifted into a coercive political tool in modern democracy. The results of this article show that, freedom of expression has been melted and shaped from a shield into a sword. This has changed from what was traditionally a negative role to guarantee people's freedom from arbitrary exercise of power, to a positive role in which people can exercise their liberties against their own rights.

Keywords: Freedom of expression, Clash of rights, Law as political tool, Coercive politics

INTRODUCTION

This paper will examine the shifting of the role of freedom of speech in light of recent events, observing how the right of freedoms guaranteed by law has shifted into a coercive political tool in modern day democracy. This paper will begin by first discussing the traditional conceptions of the freedom of speech and will then analyse the shift of the role of freedom of speech from a negative to a positive role. Following an examination of two examples of where the freedom of speech is used in the positive role, we will attempt to briefly consider the role of the law in adjudicating the dilemma of what we observe is the 'clash of rights'. The paper will finally conclude with an answer as to our observances of the shifting of freedom of speech; from the shield to the sword.

Freedom of Expression as Traditionally Conceptualized

Under Article 19 of the Universal Declaration of Human Rights, it is stipulated that *'Everyone has the right to freedom of opinion and expression; this right includes freedom of opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'*¹

One can confer that traditionally, rights of individuals are protective mechanisms; a kind of shield against arbitrary use of power². It is a manifestation of the principles of liberty and freedoms that most modern day democracies hold dear, or at least claim to do so. The most prevalent of its emanation and of which this paper will pay particular attention to is that of the freedom of speech.

¹ Universal Declaration of Human Rights, to be found at <http://www.un.org/en/documents/udhr/index.shtml#a19> (United Nations, 17 December 2011)

² Campbell, T., *Rights: A Critical Introduction*, Oxon 2006

John Stuart Mill advocates that freedom of speech as being a way to promote truth which is essential in the wider society³. He believes that it justifies belief. In that belief is justified only if it has been subjected to unimpeded criticism; something that requires freedom of speech and actual conflict of expressed opinion⁴.

A similar rationale is that if the democratic government is that one that is chosen by voters then it is only natural that the government is put under scrutiny by the citizens; it is here that freedom of speech ensures the accountability of that government⁵. If one is to accept that the notion of democracy entails consensus and equal rights of participation for its subjects, then freedom of speech is integral in the functioning of the system in that it allows the free expression of ideas and concerns for public deliberation.

In strict legal context however it is perhaps sufficient to appreciate that the freedom of speech guarantees the citizen the right to hear and be heard. Theory aside however, in practice the notion of freedom of speech when given a legal context opens a flood-gate of debate as to the scope of its exercise. The most prevalent question is to determine what should be considered as expression that should be granted protection and those forms of speech that should be curtailed. It is within this context that freedom of expression begins to depart from its traditional form.

Departure from Traditional Notions

Hayek believes that notion of liberty derived from freedom is dangerous when it is used as a reason for an ability to do whatever the individual wants to do⁶. In that the notion of freedom is able to create the delusion that people have the power to change their surroundings as they see fit. It is under this confusion that Hayek argues that argument of freedom can be used to support measures which destroy individual liberties in that 'no end to the tricks by which people can be exhorted in the name of liberty to give up their liberty.'⁷ It is therefore an even greater danger when that delusion enters the political realm.

With society settling into the democratic way of life, a gradual shift in the role of the notions of freedoms particularly that of speech is becoming more apparent. The freedom of expression guarantees and promotes the free expression of one's opinion and protects such opinions from those who dissents from it. As we have earlier discussed, such guarantees is necessary in guaranteeing that the state does not attempt to oppress those that does not agree with it. It remains however that in light of recent events, the freedoms is no longer exclusively used in the vertical sense, but used by the people against the people. This is where the freedoms adopt a positive role which begins to depart from traditional notions. It is here that the freedoms ensured by law, become a tool of politics. Where people abuse the freedom of expression to coerce and force their views towards others infringing the freedoms of those who dissents.

To gain a clearer illustration of this coercive practice we now move to observe two examples.

³ Ibid

⁴ Ibid, 143

⁵ Ibid, 144-145

⁶ Hayek, F., 'Freedom and Coercion' in: Miller, D., *Oxford Readings in Politics and Government: Liberty*, Oxford 1991, 80-99

⁷ Ibid, 85-86

Coercive Politics

The first and perhaps the most famous of recent example, is that of Fitna. Geert Wilders a Dutch politician employed the freedom of expression to fine use and published Fitna, a short video which aims to propagate the Islamization of The Netherlands and attempts to provoke fear and hate through its depictions of the 9/11 World Trade Centre attack and ingenious selections of Quran verses tailored for its purposes⁸. This is perhaps the most controversial and blatant attempt to utilize the freedoms as a political vehicle. Wilders is able to use the freedom as a shield against criticisms of hate speech. By doing so, he is creating a tension between a right of expression and that not only of a right to religious freedom but also that of security, a right to live without fear. Of note however, that Wilders by usage of freedom of expression as his escape clause, has found political success.

A second and perhaps equally worrying example is that of Indonesia. After years of dictatorial suppression of the fundamental freedoms guaranteed by the 1945 constitution, the ideals of freedom of speech broke through and emanated by spearheading the 1998 May protests where thousands of students and sympathizers took to the streets of Jakarta in defiance against the military strongman Suharto⁹. With the passing of time however, one may observe that the freedom of expression has become an arsenal in the persecution of minorities.

For sake of context, we must note before proceeding that though boasting the world's largest Muslim population, Indonesia guarantees the freedom of expression and freedom of religion in its constitution¹⁰.

February 6, 2011, The Ahmadiyyan (a religious minority which are perceived as dissidents from mainstream Islam) village of Cikeusik was attacked by a mob of what seemed to be an attack of religious extremism¹¹. The video of the attack where six people were brutally beaten to death was circulated throughout social networking websites; bringing significant debate in the largely Muslim Indonesian population and sparked nation-wide uproar. Though the plight of the Ahmadi can be traced to the nation's founding; the event that took place in Cikeusik was unprecedented. One may observe that it is becoming of increasing concern that freedom of expression has given life to campaigns of hate that if left unchecked manifests itself in violence. In a climate of religious conservatism, there appears to be a noticeable growth of intolerant views¹², in that the once suppressed organizations in the dictatorial period of Indonesia viewed as extremists, are now free to spread its views and is even protected by the constitution in their endeavour. It has become a public paradigm that if one is to give voice against the views of the extreme, they would be viewed as non-religious and that he is a dissident of already established

⁸Dutch Film Against Islam is Released on Internet, to be found at:

<http://www.nytimes.com/2008/03/28/world/europe/28dutch.html> (New York Times, 17 December 2011)

⁹ Indonesian Opposition leader tries to call off Protests, to be found at:

<http://edition.cnn.com/WORLD/asiapcf/9805/19/indonesia.pm/index.html> (CNN.com, 17 December 2011)

¹⁰ Indonesian 1945 Constitution, Article 28 F to be found at:

<http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf> (Indonesian Embassy, Fourth Amendment of 2002)

¹¹ 'Six Killed in Clash Between Villagers and Ahmadiyah Followers' to be found at:

<http://www.thejakartapost.com/news/2011/02/06/six-killed-clash-between-villagers-and-ahmadiyah-followers.html> (The Jakarta Post, 17 December 2011)

¹² Hardliners Ambush Monas Rally, to be found at: <http://www.thejakartapost.com/news/2008/06/02/hardliners-ambush-monas-rally.html> (The Jakarta Post, 17 December 2011)

common social norms; disregarding the question of whether such a view is correctly held by the majority.

It is unfortunate that the silence of the majority gives opportunity to the loudest to oppress the minority. This is all the more ironic if we consider that the freedoms which were originally to protect the minority are now used against them. Moreover, the reluctance of limiting the freedoms only adds to the problem. On several occasions public authorities have allowed what some reasonable person would perhaps observe as a persecutory rally to occur¹³. It seems that as long as they express their opinions peacefully, the message is unimportant, even if it is that of hate. This brings into question a fundamental debate of the law; can its exercise be in breach of the rights of its citizens?

FINDING THE BALANCE

With Freedom of speech becoming a potentially ideal political vehicle for those with oppressive intent, the situation places the judiciary and law enforcement authorities in a difficult position to balance the exercise of the freedoms, where in some instances culminating in the dilemma as to which freedom should be prioritized.

But perhaps we are asking the wrong question; it appears to be a misconception that a right can be hierarchically organized as to prioritize one over another. If we are to turn to the traditional conceptions of the freedom of expression, we can perhaps note that as it is originally created to act as a shield of the people, it would perhaps be prudent to limit its exercise only to such enterprise. It appears a far-fetched concept that a freedom, particularly that of speech is used against a fellow citizen. The freedoms are after all a fundamental element to democracy; and if we accept that democracy is not a system of who screams loudest, then such exercise would be contrary to our notions of democracy.

It would therefore seem to be appropriate for the law to act in a positive role to ensure that the freedoms do not exceed its purposes; for it to act as a balancing measure. It remains however, that the traditional conceptions of rule of law and liberty has enshrined the freedoms to an extent that *prima facie*, the law cannot restrict its exercise except in very serious situations. John Rawls suggest; *'the priority of liberty implies that the free political speech cannot be restricted unless it can be reasonably argued from the specific nature of the present situation that there exists a constitutional crisis in which democratic institutions cannot work effectively and their procedures for dealing with emergencies cannot operate'*¹⁴. We must note here that the context of what Rawls was suggesting is that of the restriction of freedom of speech in the vertical sense; between the individual and the state. Such a high criteria for the purposes of adjudicating the balance of freedoms appears to offer little help.

¹³ Indonesian Hardliners Rally Against Bogor Church's Arrogance, to be found at: <http://www.thejakartaglobe.com/news/indonesian-hardliners-rally-against-bogor-churchs-arrogance/481768> (The Jakarta Globe, 17 December 2011)

¹⁴ Rawls, J, Fried, C, Sen, A, Schelling, T, McMurrin, S., *Liberty Equality and Law*, Cambridge 1987

Though finding that ideal balance and the precise position to be taken by the courts is beyond this paper; for our part, we can perhaps infer that the ruling of the Dutch court which acquitted Wilders¹⁵ is a step in the wrong direction.

As Bald de Vries has suggested in *Anger and Courage*¹⁶, it appears that it is becoming increasingly proper for the legal forum to take an active role in the prevention of the abuse of freedoms. A step forward would first be to prevent the reluctance of the judiciary to hinder the exercise of freedoms which is clearly in contradiction to its goals. The problem here may be that any steps taken in such enterprise would be exposed to criticisms that the state is becoming more intrusive and is departing from the notions of democracy and liberty into that of the police-state. What we may observe however, if one is to allow the prevalence of abuse because he may otherwise be seen as autocratic, then we can say that our version of democratic governance is no longer adhering to the rule of law but that to the rule of the loudest and the many. As John Stuart Mill notes *'The will of the people, moreover, practically means, the will of the most numerous or the most active part of the people...the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard*¹⁷. It is a misconception that an individual have a right to exercise unlimited freedom, let alone exercising it as a tool of coercion.

CONCLUSION

In conclusion, the freedom of expression has been melted and moulded into what was a shield into a sword. It has moved from what was traditionally a negative role of ensuring the liberties of the people from the exercise of arbitrary power, into that a positive role where the people are able to use their right of freedoms against their own. In answering our question as to how freedom of expression has become a coercive political tool, we may infer from our examples that the exercise of the freedom when given a political role acts as the perfect vehicle for extremist and hate views. Such usage of the freedom gives life to a fallacy that one can practice absolute freedom and is even allowed to force their opinions regardless of its nature. What one can confer from this shift is that the political realm has become a matter of who screams loudest in that the majority will have the last say. In light of such developments, it is become increasingly proper for the legal community in particular that of the judiciary, to take a more active position in order to ensure the free and non-coercive exercise of the freedom of expression.

¹⁵ Amsterdam District Court, 23 June 2011, NJFS 2011, 270 (Geert Wilders) (also available at:

http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BQ9001&u_ljn=BQ9001 (Rechtspraak, 17 December 2011))

¹⁶ Vries, B. *Anger and Courage: On Parliamentary politics, the academic discourse and the legal forum*. Utrecht University 2009

¹⁷ Mill, J. Liberty to be found at http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645o/chapter1.html (John Stuart Mill on Liberty, University of Adelaide, 17 December 2011)

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