

Law, State, & Citizen Class 7 - Lecture

Fundamental Freedoms and Fundamental Justice

Mid-Term Reminder:

- Coverage: up to and including last week's lecture on the charter (lecture 6).
 - Nothing from this weeks lectures and readings will be on it.
- The mid term should only take 2 or 3 hours if you are prepared.
- Look at bright space for more information and the rubric for the midterm.
- Word count is enforced, don't go over, they will not read past limit.
- There will be two parts:
 - Part A - Short answer.
 - 30 out of 70. Each question worth 10.
 - 4 questions, you answer 3.
 - No more than 300 words for each question. 900 Total.
 - Write word count at end of question.
 - Part B - Essay Questions.
 - 40 out of 70. Each question worth 20.
 - 3 questions, you answer 2.
 - No more than 600 words for each question.
- Skim readings again, you have 36 hours for this open book exam.
- You'll have notes, PowerPoints, lectures...etc.

Fundamental Freedoms:

- This builds on what we covered last week. This is about drilling down into the core elements of the Charter and the case law that is generated.
- Recall that section 2 of the Charter provides that "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; and
 - (d) Freedom of association.
- They appear under the subheading fundamental freedoms. This is what the Charter describes as fundamental freedoms.

Fundamental Justice:

- Recall that section 7 of the Charter provides that:
 - "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
 - Definition of fundamental justice in the Charter.
 - Principles of fundamental justice MIGHT enable you to be deprived of the above.
 - There is a balancing act here, there is one for fundamental freedoms. There is a balancing act for the whole charter because of section 1.
 - Fundamental justice is ill defined and given that fundamental freedoms like the rest of charter is subject to reasonable limits therefore courts have wrestled over how to interpret these two sections.

Fundamental Freedom:

- Freedom of speech, conscience, religion, and association can seem common and taken for granted.
 - For the most part, we can become caviller about such freedoms, freedoms that are arguably are embed in a modern liberal democracy. Its easy to think they are fundamental and take them for granted.

- But history shows they (fundamental freedoms) are often at risk.
 - E.g. Textbook points to Nazi Germany but many other examples: slavery, colonialism, indigenous genocides (eg. Caribbean and Tasmanian).
 - The horrors of the past are entirely singular, they are not unique, in the sense that there has been no other violations of fundamental freedoms and fundamental justices.
 - Nazi Germany is far from the only example of seeing tragic large scale violations of fundamental justices and de human rights.
- But threat to fundamental freedoms is not just historical.
- Repression and brutality continue to occur in many contemporary societies and countries.
 - See: <https://www.amnesty.org/en/countries/>
 - Its clear repression and brutality of violating fundamental rights and justices continues to occur.
- Suresh v. Canada (2002) 1 SCR 3
 - Canadian fundamental justice includes some norms of international law.
 - This comparative international/historical perspective, these international situations and norms of international law that they generate are applicable in Canada. Not all. But worth remembering that this is an area of canadiana law where we have explicit recognition that the norms of international law are relevant here.
 - Canada can't just go its own way. It can't just proceed in a matter that is contrary to international law norms.

UN Declaration on Human Rights:

Intentional law - UN Declaration of Human Rights.

UN Declaration on Human Rights:

- Article 1:
 - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should at towards one another in a sprit of brotherhood.
- Article 3:
 - Everyone has the right to life, liberty, and security of the person.
- Note:
 - No qualifying language as found in s.7 of Charter!
 - Canadian charter of rights and freedoms section 7 Is limited from the UN declaration on human rights. BUT on the charter you have this qualifying language.
 - If its in accordance with fundamental justice.

UN Declaration on Human Rights:

- Article 18:
 - Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
- Article 19:
 - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

UN Declaration on Human Rights:

- Article 20:
 - (1) Everyone has the right to freedom of peaceful assembly and association.
 - (2) No one may be compiled to belong to an association.
- Article 17:
 - (1) Everyone has the right to own property alone as well as in association with others.

- Note: Difference between Canadian Charter and UNDHR (and American constitution).

Fundamental Freedoms - National Security and Terrorism:

- Circumstances in which fundamental freedoms are particularly threatened.
 - The war on terror occurred after 9/11, we are just at the end of it leading into the current pandemic. Even established democratic countries, Canada, the USA, UK, no country is immune to an erosion of fundamental freedoms when faced with a perceived crisis.
 - Even established democratic countries are not immune to erosion of fundamental freedoms when faced with perceived crisis.
 - E.g. when crime and terrorism are seen to threaten safety, governments are under pressure to respond with control measures that can threaten personal liberty.
 - There is a requirement to respond to a threat with control measures, and those control measures can threaten personal liberty. It's another balancing act, it's times of crisis that's when we see fundamental freedoms being eroded, even in long established democratic countries.
- “Never let a good crisis go to waste”.

Fundamental Freedoms:

- Elliot asks Why preserve them?
- First, if human beings are inherent values as individuals, and not just as social building blocks, then it is important to let them make their own decisions, as free as possible from external constraints.
 - Elliot is talking about the principle of autonomy - this notion that fundamental freedoms inherently is towards individual autonomy.
 - Fundamental freedoms speak to autonomy and human individuality.
 - BUT fundamental freedoms has this communitarian component — human beings as autonomous individuals may freely elect to band together to form groups.
- In many cases, the result of this freedom may be a decision to band together to achieve in groups what individuals might be unable or unlikely to accomplish separately – e.g. collective bargaining process.

Fundamental Freedoms:

- Why preserve them?
- Second, as JS Mill noted, sound opinions and proposals are likelier to emerge in contexts where ideas are freely debated than where they are restricted or controlled.
 - The mill reading, the fundamental take away is that, the right of pursuing our of good in our own way.
 - This is how he builds the thought of liberty.
 - Restrictions and control are fundamentally incompatible with in a society where liberty reigns.
 - There is a social value here in prioritising citizen control rather than government control of citizens.
 - Ex. Free access to information, the ability to criticise with others, express opinions.
 - This open public sphere is vital to citizens ability to maintain effective control of government.
- Third, free access to (accurate?) information, and the ability to associate freely with others, exchange ideas, criticize, and express opinions is vital to citizens' ability to maintain effective control of government (and the economic means of production?).
- Recall social value prioritising citizen control.

Fundamental Freedoms:

- The entrenchment of many of these fundamental freedoms in the Charter raises their profile, and encourages us to explore their rationales.
 - Fundamental does not mean straight forward.
- E.g. Dickson in Big M Drug Mart linked the freedoms of conscience and religion to our democratic traditions.

- But this case also showed that even if these freedoms are fundamental, they are no more precisely defined than any other basic rights.

Fundamental Freedoms:

- Like other basic rights, the fundamental freedoms of s. 2 of Charter are still limited, despite their importance
- Why?
- We do live in social units, and civilized life would not be possible without them
- Constraints are seen to be needed to achieve common goals, ensure public safety, prevent exploitation, allocate common resources, and assist vulnerable.

A recognition that we do live in social units, we live in society, and civilised society would not be possible without it.

- There is no Canadian charter of duties of the citizen but arguably the function of the limit set out in section 1, means there's no need for a Canadian charter of duties because all of these rights and freedoms are limited. They are subjected to the requirements of reasonable limits in a free and democratic society.
- Its in a sense a version of rights and duties being opposite sides of the same coin.
- Civilised life would not be possible if we only had freedoms and rights but no duties.
 - If we didn't have a duty to pay tax, than the state cannot finance any of the structure that we have come to expect.
 - Individuals still rely on each other for common goals to be achieved.

Fundamental Freedoms:

- Recall that Charter addresses rights and justifications (s.1) separately.
- Thus, a finding that a fundamental freedom was violated will be followed by analysis of whether it was validly restricted under Oakes test.
- Again, s.1 is thus a crucial provision.

Fundamental Justice — s.7:

- Section 7:
 - of the Charter: •“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
 - When Charter was drafted, “fundamental justice” in s. 7 was even less defined than fundamental freedoms.
 - Fundamental justice was relatively untested term in 1982, and appeared only rarely in common law (judge made law).

Fundamental Justice — s.7:

- If fundamental justice has a core, this is likely natural justice or procedural fairness.
- But what about non-procedural justice?
 - i.e. questioning substance and aims of state action, and not just process by which aims are pursued
 - Motor Vehicles Reference case: yes, s. 7 can include considerations of non-procedural justice
 - Suresh case: fundamental justice can include some norms of international law (e.g. against torture).

Fundamental Justice — s.7 & Bedford 2013:

- Do Criminal Code provisions prohibiting activities connected to prostitution (bawdy house, communicating) breach s. 7 rights of sex workers to life, liberty and security of person?
 - Its a fundamental justice case.
- SCC emphasized basic values against arbitrariness, over breadth and gross disproportionality part of fundamental justice raised by the case.

Bedford (2013) Continued:

- Three sex workers challenged the Charter compliance of various sections of the Criminal Code – argued a s. 7 Charter violation to their right to safety and a violation of the s. 2 Charter right to freedom of expression.
- SCC held that the Criminal Code's prohibition on bawdy-houses imposed dangerous work conditions, forced prostitutes to choose between safety or freedom, thereby engaging s. 7 of the Charter. It also upheld that by preventing prostitutes from hiring security guards, drivers or receptionists, the Criminal Code was detrimental to s. 7 Charter rights.
- Aim of the impugned Criminal Code section was to limit community harm in the form of nuisance; it was disproportionate to the objective by violating sex workers rights
- The Criminal Code aimed to take sex solicitation or selling out of public view, not to eradicate street prostitution, but this law's effect is grossly disproportionate to its intent.

This is a case where you have to balance competing objectives and rights.