

Implementing international human rights into domestic law & policy : The Canadian experience

Fundamental freedoms

Training for Taiwanese officials
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Presentation Outline

- Fundamental freedoms at international law

- How Canada implements fundamental freedoms – Case studies:
 - Freedom of expression
 - Freedom of peaceful assembly

Fundamental Freedoms at International Law

Fundamental freedoms - Purposes

- Freedom from interference with what is profoundly personal – one's thoughts, ideas, beliefs and opinions
- Necessary for the full development of the human person
- Foundational to a free and democratic society; necessary for the exercise of democratic rights and political participation
- Recognize that human flourishing and the achievement of individual goals may be impossible without the aid and cooperation of others

Religion

Peaceful Assembly

Expression

Association

Fundamental freedoms at international law - interpretation

- Fundamental freedoms are set out in a number of treaties. We will focus today on the ICCPR.
- Treaty provisions often use language that is broad and sometimes ambiguous; they require interpretation in good faith and in accordance with their “ordinary meaning”, in their context and in light of the treaty’s object and purpose.
- Where can we look for more guidance about what a treaty provision means?
 - Periodic reports by States Parties on how they are implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision or a similar provision; expert academic commentary; *travaux préparatoires*;
 - General Comments of the UN treaty bodies (e.g., Human Rights Committee General Comment No. 34 on ICCPR, Article 19) (non-binding);
 - Views of the UN treaty bodies in individual communications (non-binding);
 - International declarations, resolutions, and other instruments, and commentary of other UN expert mechanisms (e.g., UN Special Rapporteurs) (non-binding).

Fundamental freedoms in the ICCPR

International Covenant on Civil and Political Rights (ICCPR)

- **Article 18:** Freedom of thought, conscience and religion. Includes the freedom to have a belief or a religion and to manifest it through worship, observance, practice and teaching.
- **Article 19:** Freedom of opinion and expression. Includes the freedom to seek, receive and impart information and ideas of all kinds.
- **Article 20:** Requires states to prohibit by law war propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- **Article 21:** Freedom of peaceful assembly.
- **Article 22:** Freedom of association, including the right to form and join trade unions.
- **Justifiable Limits:** Articles 18-22 permit the state to limit some aspects of the fundamental freedoms, according to the specific criteria set out in each article.

Fundamental freedoms at international law

Other sources

Covenant on Economic, Social and Cultural Rights (ICESCR)

- Right to form and join a trade union, including protection of certain trade union activities (Article 8)

Convention on the Rights of the Child (CRC)

- Freedom of expression (Article 13); freedom of religion (Article 14); freedom of association and peaceful assembly (Article 15); role of the mass media and access to information from diverse sources (Article 17)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- State obligations in respect of hate propaganda (Article 4); right to exercise fundamental freedoms without discrimination on the basis of race, colour, national or ethnic origin (Article 5)

Convention on the Rights of Persons with Disabilities (CRPD)

- Freedom of opinion and expression, including access to information on an equal basis with others (Article 21)

Freedom of expression in the ICCPR

What does freedom of opinion and expression in ICCPR, Article 19 mean?

Scope of the right:

- Protects the communication of ideas and opinions of all kinds, including ideas that may be deeply offensive, subject to limits set out in Article 19(3)
- Extends to many different forms of expression, including speech, writing, images, art, sign language, dress, internet-based communication, commercial advertising, etc.
- Includes freedom of the press and media of all kinds, and the right to receive media output
- Protects against compelled expression of an opinion
- Includes the right of access to information held by government

- See Human Rights Committee General Comment No. 34 (non-binding)

Freedom of expression in the ICCPR

What does freedom of opinion and expression in ICCPR, Article 19 mean?

Justifiable limits on freedom of expression:

- Must be provided by law; the law must be sufficiently precise and publicly accessible
- Must serve a purpose listed in Article 19(3) (respect of the rights or reputations of others, protection of national security or public order, protection of public health or morals)
- Must be necessary for achieving this purpose; this includes the principle of proportionality (limits must not be overbroad)
- Limits on political discourse may be more difficult to justify
- No limits on freedom of opinion are allowed (Article 19(1))
- Articles 19 and 20 are compatible with and complement each other

- See Human Rights Committee General Comment No. 34 (non-binding)

Freedom of peaceful assembly in the ICCPR

What does freedom of peaceful assembly in ICCPR, Article 21 mean?

Scope of the right:

- Includes the right of persons to gather together with other persons intentionally and temporarily for a specific purpose
- Protects only peaceful assemblies (e.g., non-violent assemblies)
- Closely linked to freedom of opinion and expression

Justifiable limits:

- Must be imposed in conformity with the law
- Must serve a purpose listed in Article 21 (national security, public safety, public order, protection of public health or morals, protection of the rights and freedoms of others)
- Must be necessary in a democratic society for achieving this purpose

How Canada Implements Fundamental Freedoms – Case Studies

Implementation in Canada - General

Constitutional protections:

- **Charter, section 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; and (d) freedom of association.”
- **Charter, section 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.”



Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 2(b), Freedom of expression

- Canadian courts have interpreted freedom of expression very broadly to protect any activity or communication that conveys or attempts to convey meaning.
- All content is protected, no matter how offensive or unpopular (e.g., hate speech, pornography, defamatory speech), subject to limits that can be justified under section 1.
- Expression that takes the form of violence is not protected.
- Expression in certain public locations may not be protected (i.e., public property or government-owned property whose function is not compatible with freedom of expression).
- Protects individuals from laws or government actions that interfere with freedom of expression, either in purpose or effect.
- Save for exceptional circumstances, it does not guarantee access to government-held information, or require the state to take positive action to help individuals exercise their freedom of expression.



Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 2(c), Freedom of peaceful assembly

- There are not many Canadian court cases interpreting freedom of peaceful assembly; given the strong connection with freedom of expression, these cases are often examined instead under section 2(b) freedom of expression.
- Protects the physical gathering together of people, including the right to participate in peaceful demonstrations, protests, parades and meetings.
- Protects the right to peaceful assembly; Canadian courts have held that it does not protect riots and gatherings that seriously disturb the peace.



Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 1, Justifiable limits

- Canadian courts have held that governments may justify a limit on *Charter* rights, including the fundamental freedoms, if they can show that the limit:
 1. Is prescribed by law;
 2. Pursues a sufficiently important objective; and
 3. Is proportional to that objective, meaning that it is rationally connected to the objective, impairs the right no more than reasonably necessary to achieve the objective, and has benefits that outweigh the negative effects on the right.
- Canadian courts have found that limits on political expression are generally the most difficult for governments to justify, because of the importance of free expression to democracy.



Implementation in Canada – Expression & peaceful assembly

Legislative protections:

- **Access to information legislation** at the federal, provincial and territorial levels, which promote the exercise of freedom of expression and transparency in government by providing individuals with a right of access to records under the control of a government institution.
- The right of access is subject to certain specific, limited exceptions where access is not permitted because of an overriding public interest in keeping the record confidential – for example, records containing personal information; records containing legal advice that is subject to solicitor-client privilege; records containing trade secrets of a third party.
- Such legislation also generally provides for the review and oversight of government decisions on whether to disclose records by an independent body (e.g., the Information Commissioner of Canada).



Implementation in Canada - Case study

FACTS:

- In mid-October 2011, Mr. B. and a group of protesters began camping overnight in a public park in downtown Toronto (Canada's largest city), as part of the global "Occupy Movement". The movement advocates for a more participatory form of democracy, greater social equality, and reform of the global financial system. The camp included some 300 tents and other structures, 25 portable toilets, and took up most of the park grounds. The protesters' activities were peaceful.
- One month later, the City of Toronto served the protesters with a Trespass Notice under applicable legislation. The Trespass Notice required the protesters to remove their tents and structures. It also stated that the protesters were prohibited from putting up tents or other structures in any city park, and from gathering in any city park between the hours of midnight and 5:30 a.m. The City said it was acting to protect the ability of other people to use the park, to protect nearby residents and businesses from disturbance, and to protect the park from damage.
- The protesters went to court, challenging the Trespass Notice as violating all of their section 2 *Charter* rights.

Implementation in Canada - Case study

QUESTIONS:

- Which fundamental freedoms do you think are most implicated in this case, and how are they implicated?
- What are the relevant international human rights treaty provisions?
- Does the Trespass Notice limit the protesters' freedom of expression and peaceful assembly?
- If so, do you think the limit is justifiable?
 - Are the objectives the government is pursuing sufficiently important to override the fundamental freedoms at stake?
 - Is the limit provided by law?
 - Is the limit necessary to achieve the government's objectives and proportional to those objectives?
 - Does the nature of the expression and the assembly in this case make the limit easier or more difficult to justify?

Implementation in Canada - Case study

OUTCOME:

- This case is about balancing the right to use public spaces for political protest and the rights of the broader society to use and enjoy public spaces for other purposes.
- The Ontario Superior Court found that the protesters were engaged in expressing political messages protected by the *Charter* right to freedom of expression, and that the tents and other structures they had erected formed part of that political message. The court concluded that the Trespass Notice interfered with the protesters' expressive freedom.
- The court accepted that the city's objectives were sufficiently important to limit the protesters' freedom of expression.
- The court also found that the Trespass Notice was proportional to the objectives. The protesters remained free to express their political message in other ways, including signs, postings on the internet, demonstrations and marches through city streets. They also remained free to gather in the park throughout most of the day. In addition, the Trespass Notice did not seek to limit the size of the protest.
- The court concluded that the Trespass Notice was a reasonable balancing of the rights of all who wish to use the park.

Implementation in Canada - Case study

OUTCOME (continued):

Other measures in place to ensure that peaceful protest can occur safely in Canada include:

- Police services receive training on human rights;
- When significant protests are expected, police services engage in community outreach and dialogue with potential demonstrators and other stakeholders before the event;
- In addition to judicial remedies under the *Charter*, there are other mechanisms in place to ensure accountability of government and police services in regulating protests. These include non-judicial mechanisms, such as Parliamentary oversight committees, statutory bodies created to administer particular legislation, police complaints commissions, ombudspersons, civil liberties organizations, inquiries and a free press.

Resources

- UN Human Rights Committee General Comments:
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>
- M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2d ed.), 2005 – available in Chinese (2009 translated edition)
- Canada's human rights reports to the United Nations:
<http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>
- Federal *Access to Information Act*: <http://laws-lois.justice.gc.ca/eng/acts/A-1/index.html>
- *Batty v. City of Toronto*, 2011 ONSC 6862:
<http://www.canlii.ca/eliisa/highlight.do?text=batty&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2011/2011onsc6862/2011onsc6862.html>