

THE RIGHT OF PEACEFUL PROTEST IN INTERNATIONAL LAW
AND AUSTRALIAN OBLIGATIONS UNDER THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS

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Rights

A right of peaceful protest is not specifically recognised in international instruments or indeed in the domestic legislation of those countries where protest marches and demonstrations have become a familiar means, of drawing attention to the views of the person or group involved. The World Federation of UN Associations expressed the right of protest in terms more recognisable to a lawyer in a recent communication to the U.N. Secretary-General when it noted that "the Charter of the United Nations and the International Covenant on Civil and Political Rights declare the right to adhere to one's own views, to express them freely, to take part in any meeting and mass demonstration".¹

There are two essential elements in the right to peaceful protest as it is commonly understood - the rights to freedom of expression and freedom of assembly. An assembly may in itself be a form of expression. Peaceful protest may also be seen as an exercise of the right of every citizen to take part in the conduct of public affairs - although this would require a broader interpretation of "public affairs" than has hitherto prevailed in consideration of this right.² The focus of this paper will be on the essential elements, the right to freedom of expression and the right of peaceful assembly, as they are set forth in the International Covenant on Civil and Political Rights.

Freedom of expression

Article 19(1) of the ICCPR states:-

"19(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 right 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."

This provision falls into two parts. The first part - paragraphs (1) and (2) - set forth the essential right to freedom of opinion and expression which each State Party to the Covenant undertakes to-respect, ensure and give effect to (under Article 2_of the Covenant). This part echoes Article 19 of the 1948'Universat Declaration of Human Rights:-

"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."

The second part sets forth Limitations on the exercise of freedom of expression, in what has been aptly named the "clawback" cLause.

The history of the principle of freedom of expression is well known. It is part and parcel of the struggle of European peoples in the 16th, 17th and 18th centuries to curb the autocratic powers of their monarchs and is enshrined in the manifestos of the two great revolutions at the end of the 18th century - the French Revolution and the American Revolution.

Article 11 of the French Declaration of the Rights of Man and the Citizen reads:-

The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the cause of this liberty, in the cases determined by Law.

Article 1 of the US Bill of Rights (First Amendment) reads:-

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While many constitutions drafted in the 19th century showed the inspiration of these great manifestos, and of the schools of thought which lay behind them, it cannot be said that freedom of expression was regarded as a fundamental human right. To the extent that the constitutions of Sweden (1809), Denmark (1849), Switzerland (1876) and Norway (1814), for example, contained reference to specific rights, there was more concern to emphasise freedom of belief, equality before the law, freedom of movement and freedom from arbitrary arrest, than freedom of expression (and assembly). The acceptance of freedom of expression as a fundamental human right, as reflected in the U.S. Bill of Rights, appears to

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have been less urgent from the citizens' point of view than other liberties. Thus while Lauterpacht may say that in the nineteenth and twentieth centuries the recognition of the fundamental rights of man in the constitutions of states became in a paraphrase of Article 38 of the Statute of the World Court, 'a general principle of the law of civilised states'³ the process was slower with some rights than with others.

As one of its first tasks in taking up its responsibility for "promoting and encouraging respect for human rights and fundamental freedoms for all",⁴ the United Nations in 1945 assigned to the new Commission on Human Rights the formulation of an International Bill of Rights. 'After consideration of the form the Bill of Rights should take, it was decided to proceed with the preparation of a Draft Declaration on Human Rights, Draft Covenant on Human Rights and Measures for Implementation. It was envisaged that the Declaration would set forth general principles, would be wider in context and more general in expression than the Covenant, while the Covenant would address matters which would lend themselves to formulation as binding obligation'.⁵

This approach was followed in the documents which emerged from the second session of the Commission on Human Rights in December 1947.⁶ The nature of the Declaration as a statement of principles was reflected in the Article on freedom of expression. This stated the principle with the same forthrightness as is to be found in the U.S. Bill of Rights, subject only to generally worded qualifications in the last two Articles of the Declaration, underlining, inter alia, that in the exercise of his rights every one is limited only by the rights of others and by the just requirements of morality, public order and the general welfare in a democratic society.⁷

The language of the draft international Covenant on human rights in December 1947 retained the reservations attached to the right to freedom of expression in earlier

formulations before the distinction between the Declaration and the Covenant had been established. These reservations had been concerned principally with publications rather than oral expression of opinion. The United States clung nevertheless to its proposal that the provision in the Covenant as well as in the Declaration should be in unqualified terms along the Lines of the First Amendment with an overall limitation clause placed elsewhere in the Covenant .⁸

The drafting of the declaration moved forward rapidly in 1948, despite a large number of new proposals by the USSR aimed generally at qualifying the exercise of many rights and in the case of freedom of expression at subordinating this right to "the principles of democracy and in the interest of strengthening international co-operation and world peace"- The text submitted by the U.N. Conference on Freedom of Information, which followed the language tentatively agreed by governments in . stating the right to freedom of thought and expression in broad terms, was adopted with only minor amendments as Article 19 of the Universal Declaration.

The passage of the parallel provision in the Covenant was less smooth. The Drafting Committee to the Commission on Human Rights was unable to decide at its 2nd session in May 1948 between a French text (in similar terms to the present Article 19 of the Covenant), a Soviet text identical to that proposed and rejected for inclusion in the Universal Declaration, and a text submitted by the U.N. Conference on Freedom of Information which sought to enumerate exhaustively the restrictions on the right to freedom of expression. Additional limitations suggested by governments brought the number of proposed restrictions to 33.⁹

This Problem was resolved, however, at the 6th Session of the Commission on -Human Rights, when the Commission decided to support a separate convention on freedom of information. The Commission then adopted a draft provision on freedom of expression in substantially the same terms as Article 19 of the Covenant.

Freedom of assembly

The International Covenant on Civil and Political Rights provides in Article 21 that

21. 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.

Like freedom of expression, freedom of peaceful assembly has come to be seen, albeit relatively recently, as one of the foundations of a democratic society. Its association with freedom of expression is reflected in the first Article of the U.S. Bill of Rights (see above). In common with the freedom of expression; freedom of peaceful assembly was included from the beginning in the International Bill of Human Rights, the first Secretariat draft of which provided simply that "There shall be freedom of peaceful assembly"¹⁰ -- The original U.K. proposal for a Bill of Human Rights, conceived as an instrument with binding obligations rather than as a declaration, 'stated the right of peaceful assembly in more qualified terms', reflecting the English Common law positionI-

Article 15

All persons shall have the right to assembly peaceably for any lawful purpose including the discussion of any matter, on which under Article 14 any person has the right to express and publish his ideas. No restrictions shall be placed on the exercise of this right other than those necessary for the protection of life and property and to prevent disorders, the obstruction of traffic and of the free movement of others. h1

Consistently with its general approach the United States favoured a statement in simple terms, "There shall be freedom of assembly"¹², and the French proposal, for a declaration, added reference to the purposes of an assembly and the protection of public order.¹³

On the basis of these proposals the drafting Committee produced suggestions for a Declaration and a Convention, with Article 10 of the draft convention being in the same terms as Article 15 of the U.K. proposal.

The Commission on Human Rights in December 1947 accepted the U.K. text as Article 18 of the draft Convention,^{1.4} and with the addition of a national security Limitation, this provision was left Largely untouched in subsequent negotiations of the Covenant.

The reason I have delved into the negotiating history of these provisions is to underline the difference between the Declaration and the Covenant, the differences between States' approaches to these provisions in the Covenant, and the insistence of governments on attaching Limitations to the exercise of these rights as a condition of entering into legally binding- obligations to respect, ensure, and give effect to them.

While the Declaration was not intended to be legally binding Article 29 is a reminder that even when framed as general propositions the rights it sets forth are not absolute, and their exercise must be Limited (only) "by respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

In the Covenant this limitation, in broadly similar terms, omitting the general welfare in a democratic society and adding national security as a consideration, is attached to discrete Articles, not covered *by* a broadly worded catch-all clause. The effect

of this so called clawback clause¹⁵ is thereby strengthened. An almost identical "clawback clause" is attached to Article 12 (freedom of movement), 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (rights of peaceful assembly) and 22 (freedom of association). In addition, in a time of public emergency as defined in Article 4 of the Covenant, a State Party may take measures derogating from its obligations under all these Articles except Article 18. Article 4 is unlikely, one hopes, to be relevant in Australia's case but it illustrates that while ready to endorse these freedoms as fundamental rights, most governments, the most conspicuous exception in 1947-8 being the United States, were not prepared to allow the exercise of these rights without retaining a discretion to curtail them and even abrogate them in certain circumstances.

In what circumstances is a State Party entitled to impose restrictions on the exercise of these rights?

It must first be pointed out that under Article 5(2) of the Covenant

"no restrictions upon or derogation from any of the fundamental human rights recognised or-existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such Rights or that it recognises them to a lesser extent''.

In other words-a government may not reduce the Liberties already available to citizens simply because the Covenant is more restrictive than its Own existing Laws. It is relevant in this regard that the proposed Australian Bill of Rights provides in draft Article 3

"1. The rights and Freedoms- set out in this Bill of Rights are subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.

2. A right or freedom set out in this Bill of Rights shall not be limited by any law to any greater extent than is permitted by the International Covenant on Civil and Political Rights."

Here there is a clawback clause in para 1, potentially less restrictive of citizens'.. rights than the clawback clause in the Covenant, plus confirmation that Limitations on rights and freedoms in the Bill of Rights will certainly not be greater than in the Covenant. It can be argued that the. draft Bill of Rights will thus constitute a stronger guarantee of these rights than would be achieved if Legislative action had been _confined to incorporating the Covenant into Australian law.

In regard to the application of Article 4 of the Covenant there have been a number of derogations from obligations under the Covenant following the proclamation of an emergency as required in Article 4(1). Currently Chile, Ecuador, El Salvador, Nicaragua, Peru (not Article 19), Uruguay and United Kingdom have given notice of derogations under Article 4. The most encouraging points which can be made about these are firstly, that these governments are sufficiently conscious of their obligations under the Covenant to follow the procedures laid down therein for derogation and secondly that to date the derogations have been in response as far as one can see to genuine states of emergency. This body of precedent in itself makes it more difficult for governments to abuse their rights of derogation under Article 4 although it :does not of -course prevent a government from itself provoking a sit.uation.-of public emergency as a justification for the suspension of basic rights. So far measures taken under Article 4 have not been questioned by other governments party to the Covenant.

where the extent of governments' obligations under the Covenant has been most usefully explored is in

the application in practice of the clawback clause. The decisions of the European Commission of Human Rights and the European Court of Human Rights, applying the almost identical provisions of the European Convention on Human Rights and Fundamental Freedoms give valuable guidance. In regard to freedom of expression the focus of concern in Europe has been principally written matter rather than speech, and decisions here are not so relevant to protests and demonstrations. In regard to freedom of assembly the European Commission has said that a requirement for prior authorisation of public meetings is not inconsistent with the relevant Article 11(1) of the European Convention but that a complete ban on all demonstrations must be shown to be "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (the substance of the clawback clause in Article 11 of the European Convention on the right to freedom of peaceful assembly).¹⁶

The European Commission has also held that a complete prohibition on public meetings for political purposes, and a requirement for police authorisation of a political meeting to be held in private are inconsistent with the right to freedom of peaceful assembly under the European Convention)⁶

Enforcement

If the Australian Government breaches provisions of the Covenant what action can be taken by the individual whose right has been violated?

It must be emphasised that although Australia is a party to the Covenant the Covenant has not been incorporated into Australian law. Australia's international obligations under the Covenant are to be met by taking the necessary steps to adopt such legislative or

other measures as may be necessary to give effect to the rights recognised in the Covenant (Article 2(1)). The reporting procedures set up under Article 40 of the Covenant provide a mechanism for monitoring the progress made by States in giving domestic effect to the Covenant. These are backed up by an optional procedure in Article 41 whereby a State party may expressly allow other parties to the Covenant to submit a claim that it is not fulfilling its obligations under the Covenant. This procedure has never been used, however, and must unfortunately be considered a dead letter.

The Optional Protocol to the Covenant extends the enforcement machinery, by allowing individuals to bring complaints to the Human Rights Committee. Only individuals from States which are party to the Protocol may avail themselves of this procedure and they must first have exhausted all local remedies. Australia is in the process of becoming a party to the Protocol. A number of European States are already parties but for their citizens resort to the Protocol is unlikely to supersede use of the already established and effective machinery set up for policing observance of the European Human Rights Convention.

The battle for a world human rights court, empowered to judge violations of the rights set forth in the Covenant, accessible to individuals and able to make decisions binding on governments, was one which Australia fought and lost in 1948, when the possibility that such a court might be accepted by States was already remote, but considerably less remote than now.

For the individual Australian who wishes to seek redress for the violation of a right set forth in the Covenant it is to domestic courts that he must apply. In most cases his right will already be protected under domestic law. Where this is not the case, measures may

have already been initiated to give legal effect to the right under the Covenant he claims to have been violated. There has, for example, been a proposal for a Public Assemblies Ordinance in the A.C.T. which would explicitly recognise the right of peaceful assembly, although this has not yet been adopted.

Conclusion

The right of peaceful assembly is one which is known to the common law as only a residual freedom not a fundamental freedom as recognised in the United States, nor even a primary right subject to certain limitations as in the Covenant. Although there has been some judicial recognition of the right of Australian citizens to use peaceful assembly as a legitimate means of protest, no substantial progress will be made in recognition of the right until it is enshrined in legislation. The proposed A.C.T. Public Assembly Ordinance will be an important move in this direction, but it is the Bill of Rights which will provide the most effective momentum towards fulfilment of the obligations which Australia assumed towards its citizens when it became a party to the International Covenant on Civil and Political Rights.

Footnotes

1. Document E/CN.4/1986/NG0/13
2. Sieghart, The International Law of Human Rights, p. 365-6
3. H. Lauterpacht, International Law and Human Rights, p. 89
4. U.N. Charter Articles 1(3), 13(1)(b), 55(c), 62(2), 68, 76(c).
5. Document E/CN.4/21, Chapter II (1 July 1947)
6. When nature of the Bill of Rights had been under discussion Australia had been among those in favour of a single instrument binding on States, and had also argued strongly for an international court of human rights. It was in this context that the Australian delegation observed that the language of the Declaration was confused, and that the Declaration should be couched in declaratory language, just as the Covenant should be in mandatory language.
7. Report of the Commission on Human Rights E/600, Annex A, 17 December 1947.
8. Report of the Commission on Human Rights E/600, Annex B, 17 December 1947.
9. E/CN.4.195, 21 May 1948.
10. E/CN.4/AC.103, Art. 19.
11. E/CN.4/21, Annex B.
12. E/CN.4/AC.1/11.
13. E/CN.4/21/Annex D.
14. E/600, 17 December 1947, Annex B.
15. Higgins, Derogations under Human Rights Treaties, p. 281-320, vol. XLVIII, British Yearbook of International Law (1976-77).
16. Sieghart, op.cit. p. 342.