

Material for the Law Interview

University College, Oxford, 2024

Please read and consider the following material carefully before the interview, and bring it with you to the interview. You are not expected to memorise it, and you will be able to refer to it as often as you wish.

You will be asked a number of questions about the material and your understanding and opinion of it. You may be asked to summarise one or more of the judgments on the following pages in your own words, and to consider how the arguments given by the judges may apply in different factual situations. You may also be asked what you think of each of the judgments, whether you agree with any of the judges or not.

In answering these questions, feel free to criticise the judges and/or to say why you think one or more of them are right. The interviewers may give you counterarguments or may seem to disagree with you in the interview – this will simply be to advance the discussion and is not a comment on your own performance. Differences in opinion or value judgment will not affect the assessment of your response to the questions in any way.

None will assume or rely upon the notion that you have any knowledge of the law or the matters arising in the material, apart from what can be gleaned from a careful reading of the following passages.

A note on freedom of expression

The scenario given on the following pages refers to a constitutional right of freedom of expression (also known as ‘freedom of speech’) in a fictional country. This means, among other things, that the government and other organs of the state cannot pass laws or take other measures to stop people from expressing their ideas without a very good reason. If a law restricts freedom of expression without good reason, it is said to be ‘unconstitutional’. Speech and other modes of communication are thus said to be ‘protected’ by the constitution.

Voss v Government of Albionia

The Digital Platform Fairness Act imposes certain obligations on large social media platforms to prevent the censorship of user-generated content. The statute includes provisions stating that a platform must:

- (1) not make decisions (including automated decisions) about user-generated content in order to promote or disadvantage a particular political party or candidate at an election.
- (2) ensure that platform users receive a diverse range of political viewpoints.
- (3) show due impartiality when devising community standards and making content moderation decisions.

Max Voss is the owner of BuzzHub, the most widely used social media platform in the country of Albionia. The Progressive Party is the leading opposition party in Albionia. On the day before the general election, BuzzHub placed a message from the leader of the Progressive Party at the top of each user's feed. The BuzzHub algorithm de-prioritised those posts that were critical of the Progressive Party. After the election, BuzzHub was fined £5 million for breach of the Digital Platform Fairness Act.

The Constitution of Albionia provides that

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority.”

but also qualifies the right by providing that:

“freedom of expression may be restricted where it is necessary to protect the rights of others”.

Any laws that violate a provision of the Constitution are invalid.

Max Voss (as owner and controller of BuzzHub) makes an appeal to the Supreme Court, arguing that the fine violates his right to freedom of expression. Justice Sterling gives the leading judgment for the majority of the Court. Justice Carter gives an opposing judgment for the minority (known as a dissenting opinion).

Justice Sterling

The first question is whether the law restricts Max Voss's expression rights. Voss did not write or utter any of the words that were seen by the users of the platform. All the words came from the users of the platform. However, it is clear to me that Voss is a speaker. Platforms like BuzzHub, in at least some functions, engage in expression. In constructing certain feeds, social media platforms make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression. When the government interferes with such editorial choices—say, by ordering the excluded to be included— it alters the content of the compilation. In many ways, the role of the platform in compiling the speech of others is comparable to that of any other media company. Traditional publishers and editors also select and shape other parties' expression into their own curated speech products.

The Government of Albionia argues that the Act does not curb expression rights, but protects the rights of the platform users by ensuring that they receive a wide range of views. The Government fails to see that diversity is already served by the vast array of content available on the digital media as a whole. From the vast number of voices online, it is for the citizens to decide what to hear. More fundamentally, government has no business in enacting legislation to secure diversity or impartiality in political content. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources and receive a wide range of views. That is the reason why freedom of expression is protected. However, the worst thing for freedom of expression is the government deciding when speech is imbalanced, and then coercing speakers to provide more of some views or less of others. The government may not interfere with private actors' speech to advance its own vision of ideological balance. That amounts to a form of state censorship.

The goal of the Act is also dubious. There is no such thing as an unbiased or impartial system for managing content on a social media platform. A company has to decide which content to recommend or remove. In making these decisions, a platform will develop algorithms and community standards rules that prohibit or discourage certain types of content, such as pornography, hate speech, or misinformation on select topics. A company inevitably has to make these decisions based on its own view of the content. Those choices rest on a set of beliefs about which messages are appropriate on the platform and which are not.

Voss owns the platform, so it is his choice how to use it. If he wants to make a space that promotes the Progressive Party, then he is just as free to do so as a person putting a political poster in the window of their home. Government cannot force a person to give space on their own property to views that they disagree with or find abhorrent. While some people say it is unfair for the Progressive Party to get publicity that is not offered to other political parties, that does not matter. The choice is for Maxwell Voss and not for government. As a result, the Digital Platform Fairness Act violates the right to freedom of expression and is unconstitutional.

Justice Carter

The case is not about the rights of Maxwell Voss. It is about the rights of the platform users that create the content and see the content made by others. They have a right to be treated fairly. When the platform recommends or removes content, it does not speak or express an idea. Instead, the algorithms make decisions about the speech of others. If Voss wants to speak himself, then he can post his own messages on the platform like anyone else. Moreover, nobody confuses the content hosted on the platform with Voss's own personal views. A user will not conclude that Voss supports a political party simply because its messages appear on the platform. The Act therefore does not stop Maxwell Voss from speaking or impose the views of others on him.

Even if the right to freedom of expression were to be engaged in this case, it is clear that the restriction would be justified to protect the rights of others. If every person is entitled to participate in a modern democratic state, it is essential that everyone has access to the differing viewpoints that enable them to come to an informed view on individual topics. Where users access political content on platforms that are not the subject of a requirement of "due impartiality" or fairness, they may receive only one viewpoint to the exclusion of other

viewpoints. In such circumstances, the platform may function as “an echo chamber” or “information silo” for a single viewpoint. Given the multiplicity of sources, and the corresponding increased likelihood of a viewer accessing only content reflecting their own viewpoint, the importance of a platform acting fairly and with impartiality becomes of greater, and not lesser, importance. This is because it may provide the only way to ensure the viewer is exposed to differing viewpoints.

The social media platforms now play a particularly important role not just in providing access to content that it hosts, but in deciding what will be seen and heard. The platform can act as a promoter and as a censor of a user’s speech. Having regard to the powerful impact of the digital media, the fundamental role of freedom of expression in a democratic society is undermined if a wealthy company or individual is permitted to obtain a position of dominance over the social media. To protect the rights of the platform users to receive diverse content, the government is under an obligation to pass appropriate laws to regulate private companies and guarantee that different views get a hearing. It is government’s job to evaluate the effect of the platforms on political debate, and decide if corrective action is necessary. If the government did not pass a law such as the Digital Platform Fairness Act to constrain the power of the platforms, it would be failing in its duty to protect freedom of expression.

Everybody expects a platform to take action to stop users being harmed by content. That is why platforms can be required to stop the direct harm caused by hate speech and violent content on its servers, for example. The duties on the platform are not limited to the direct harms caused by such content, but extend to the indirect harms inflicted on society as a whole. A democratic society would suffer such significant harm if a powerful platform like BuzzHub became a vehicle for its owner’s political preferences. For these reasons, I conclude that the Act is constitutional in so far as it serves the rights of others.