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Help

## THE LEGITIMACY OF LIMITATIONS TO RIGHTS - EXERCISE 1 (1/1 point)

If you think you've understood the general rationale behind this first condition, please test your intuitions against the following hypotheticals. Provide your own answer before turning to the comment:

1. A State justifies a policy excluding gays and lesbians from the armed forces, by invoking the the strong homophobia in the army. It argues that, due to this homophobia, the morale of the troops and the ability of the recruits to work harmoniously together would be jeopardized by the inclusion of gays and lesbians. Is this argument valid?

- ☐ No. The State could not formally limit entry into the armed forces on the basis of the 'sexual orientation' of candidates, although it could discharge homosexual members of the armed forces if it could prove that morale of the military was indeed affected by their presence.
- ☐ Yes. Given the overriding importance of national security and public order, States should have broader discretion in recruiting soldiers, as compared to other classes of public workers, such as teachers and fire-fighters.
- ☒ No. Strong feelings about the sexual orientation of soldiers regardless of whether they are held by general public, government officials, or the military themselves do not provide a legitimate ground for denying equality of opportunity to persons. ✓
- ☐ Yes. As the employer of the armed forces, the State should retain full freedom to select candidates according to its own understanding of its operational and security needs, and of the respective qualities and limitations of different social groups.

### EXPLANATION

Inquiring into the sexual orientation of individuals applying to join the army is a strong intrusion in their right to privacy and, of course, "homophobia" does not constitute a legitimate ground. It should not matter whether the prejudice against gays and lesbians (or indeed, against LGBTI persons generally) is that of parliamentarians having voted a law excluding them from the army or of members of the Cabinet, or whether the homophobic prejudice is present within the armed forces themselves: the homophobia that the Government cannot act on directly, it should not be able to act on indirectly, by "merely" "registering" the feelings within the armed forces and giving them effect.

Note however that human rights courts are sometimes reluctant to question the motives invoked by the State to justify certain restrictions imposed on human rights, particularly on such sensitive issues. It is remarkable, for instance, that when it was confronted by a policy in the UK armed forces excluding homosexuals from the army's

ranks, the European Court of Human Rights contented itself with observing that 'the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces ... The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to have pursued the legitimate aims of "the interests of national security" and "the prevention of disorder" ' (Eur. Ct. H.R. (3d sect.), *Smith and Grady v. United Kingdom* (Applications Nos. 33985/96 and 33986/96), judgment of 27 September 1999, para. 74). The reality was that, as implicitly acknowledged by the Court itself, the alleged 'threat to the fighting power and operational effectiveness of the armed forces' -- which would result from the acceptance of homosexuals in the armed forces -- 'were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation', and that such attitudes should not constitute an adequate justification for restrictions to the right to respect for private life of the individuals concerned. Indeed, as the Court emphasized when examining the necessity of the impugned measures: 'these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour' (para. 97).

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