

Limitations

In principle, the right to freedom of expression protects any activity involving the exchange of information or ideas between individuals against interference by the state.

The great majority of such activities are completely harmless but it is clear that the notion of 'seeking, receiving and imparting information or ideas' also encompasses activities which few societies could tolerate, such as incitement to murder, unauthorised graffiti on public walls or the sale of pornography to children.

While the right to freedom of expression is universally recognised as one of fundamental importance, it is therefore also accepted that the right is not absolute. Certain important public and private interests may justify action by the authorities which interferes with or limits the exercise of the right.

A key question, then, is exactly when and under which circumstances international law permits states to impose such restrictions.

The three-part test

Because interference with freedom of expression is an extremely serious matter, it is permissible only under certain very narrowly drawn conditions. Freedom of expression should be the rule, and limitations the exception; limitations should always leave the essence of the right intact. Article 19(3) of the International Covenant on Civil and Political Rights sets out the test for assessing the legitimacy of restrictions on freedom of expression:

The exercise of the rights 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 test, which is found in a similar form in all the major human rights instruments, includes three parts: first, the interference must be in accordance with a law; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate in international law;

and third, the restriction must be necessary for the protection or promotion of the legitimate aim. These three conditions are discussed in detail in the following sections.

FIRST PART OF THE TEST: 'PROVIDED BY LAW'

The first condition means, first and foremost, that an interference with the right to freedom of expression cannot be merely the result of the whim of a public official. There must be an enacted law or regulation which the official is applying. In other words, only restrictions which have been officially and formally recognised by those entrusted with law-making capacity can be legitimate.

The condition of 'provided by law' requires more, however, than the mere existence of a written piece of legislation. The legislation must also meet certain standards of clarity and precision, enabling citizens to foresee the consequences of their conduct on the basis of the law. Vaguely worded edicts, whose scope of application is unclear, will not meet this standard and are thus illegitimate restrictions on freedom of expression. For instance, a prohibition on "sowing discord in society" or "painting a false image of the State" would fail the test on account of vagueness.

There are several rationales for this part of the test. In the first place, it is a matter of fairness that citizens are given a reasonable opportunity to know what is prohibited, so that they can act accordingly. Furthermore, a situation in which officials could make up the rules as they go would be undemocratic: restrictions on freedom of expression ought to be decided on by bodies which broadly represent the will of the people. And there will always be a temptation to abuse vague laws, for example for political reasons. Vague laws also can have what is often called a 'chilling effect': because they create uncertainty about what is permitted and what is not, they encourage citizens to steer far clear of any controversial topic, for fear that what they wish to say is illegal, even if in fact it is not. In this way, vague laws can inhibit discussion about important matters of public concern.

Vagueness is most often a problem in legislation which imposes restrictions on the content of what may be broadcast or published. But it can also be an issue in laws which give the authorities discretionary powers in the area of freedom of expression. For example, many countries have laws requiring broadcasters of radio and TV stations to obtain a licence from a public body. Such laws must clearly specify exactly how, and on the basis of which considerations, the public body will take its decision whether to issue a licence; else, the law leaves too much room for arbitrary decision-making.

SECOND PART OF THE TEST: LEGITIMATE AIM

The second requirement for restrictions on freedom of expression is that they must serve a

legitimate aim. This requirement is not open-ended; the list of legitimate aims provided in Article 19(3) of the International Covenant on Civil and Political Rights is exclusive and governments may not add to these. It includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (ordre public), public health or morals.

The rationale of this part of the test is to make it clear that not all of the motives underlying governments' decisions to restrict freedom of expression are compatible with a democratic form of government. For example, a desire to shield a government from criticism can never justify limitations on free speech. In order to satisfy this second part of the test, a legal provision which limits freedom of expression must serve a legitimate aim both in purpose and in effect. It is not sufficient if the provision has an incidental effect on one of the legitimate aims; if the purpose of enacting it was to serve another aim, it will not pass this part of the test.

THIRD PART OF THE TEST: NECESSITY

The final part of the test holds that even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will still breach the right to freedom of expression unless it is truly necessary for the protection of that legitimate aim. This part of the test may seem self-evident: if a restriction on a right is not needed, why impose it? Nevertheless, in the great majority of cases where international human rights courts have ruled domestic laws to be impermissible restrictions the right to freedom of expression, it was because the legislation in question was not deemed to be necessary. An important reason for this is that international courts read the word 'necessary' as imposing several quality requirements on any law and/or practice which abridges freedom of expression.

In the first place, to justify a measure which interferes with free speech, a government must be acting in response to a pressing social need, not merely out of convenience. On the continuum between 'useful' and 'indispensable', the meaning of 'necessary' should not be placed in the middle, but close to the 'indispensable' end.

Second, if there exists an alternative measure which would accomplish the same goal in a way is less intrusive to the right to free expression, the chosen measure is not in fact 'necessary'. For example, shutting down a newspaper for defamation is excessive; a retraction, or perhaps a combination of a retraction and a warning or a modest fine, would adequately protect the defamed person's reputation.

Third, the measure must impair the right as little as possible and, in particular, not restrict speech in a broad or untargeted way, or go beyond the zone of harmful speech to rule out legitimate speech. In protecting national security, for example, it is not acceptable to ban all discussion about a country's military forces. Courts have recognised that there are practical

limits to how precise a legal measure can be without becoming ineffective. But subject only to such practical limits, restrictions must not be overbroad.

Fourth, the impact of restrictions must be proportionate, meaning that the harm to freedom of expression caused by a restriction must not outweigh its benefits to the interest it is directed at. A restriction which provides limited protection to a person's reputation but which seriously undermines freedom of expression does not meet this standard. A democratic society depends on the free flow of information and ideas; it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. In other words, the benefits of any restriction must outweigh its costs.

Finally, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied. A restriction in favour of national security which is justifiable in time of war, for example, may not be legitimate in peacetime.

The European Convention on Human Rights contains a slightly different, and arguably preferable, formulation of the necessity test. Under Article 10(2), restrictions on freedom of expression must be "*necessary in a democratic society*". This wording makes it plain that the purpose of a restriction may never be to shield the incumbent government from criticism and peaceful opposition to its policies. Although Article 19(3) of the ICCPR does not expressly require restrictions to be compatible with a democratic form of government, the Human Rights Committee routinely refers the role of freedom of expression in free and democratic societies when applying the necessity test under the ICCPR.

Meaning of 'restriction'

An important question which remains to be answered is what exactly is meant by 'restriction on freedom of expression'. In other words, what kinds of measures are subject to the three-part test described in the previous sections?

International courts have taken a very flexible approach to this question, and generally held that any action by any public body which has a tangible effect on the exercise of the right constitutes a restriction. Three observations are relevant here.

First, the nature of the action is immaterial; a restriction on freedom of expression can consist in anything ranging from a law to a court order to an internal disciplinary measure by a public body, whether or not it is legal under domestic law.

Second, the nature of the public body concerned is also irrelevant. Restrictions on freedom of expression can be made by any legislative, executive or judicial body, including publicly

owned or controlled enterprises.³⁹

Lastly, any action by a public body which has a discernable effect on the ability of one or more persons to express themselves is a restriction on freedom of expression. It does not matter whether the action merely causes inconvenience or makes the exercise of the right completely impossible; in either case, there is a restriction which must conform to the three-part test. It is clear, however, that a minor inconvenience is more likely to meet the necessity test (see section 4.4) than a wholesale denial of the right.

The European Convention on Human Rights is more specific than the ICCPR in its description of the kind of state action that is subject to the three-part test. Under Article 10(2) of the Convention, the test applies to any “formalities, conditions, restrictions or penalties” imposed on the exercise of the right. In practice, the ICCPR is interpreted in the same way.

The case of *Ross v. Canada*, decided by the UN Human Rights Committee, provides a good illustration of how international human rights bodies interpret the meaning of ‘restriction’, as well as how they apply the three-part test. Ross was a Canadian school teacher. Between 1976 and 1991, he also authored several publications and made public statements, including on TV, in which he presented controversial opinions on conflicts between Judaism and Christianity and related topics. A Jewish parent whose children attended another school within the same school district filed a complaint with the authorities, alleging that the School Board, by failing to take action against Ross, had not met its obligation to combat discrimination against Jews and that this had contributed to the growth of an atmosphere of intimidation of Jewish students in the district. Ross was subsequently transferred to a non-classroom teaching position in the school district, and submitted a complaint against Canada to the UN Human Rights Committee (HRC), alleging a violation of the right to freedom of expression, as protected under Article 19 of the ICCPR.

The HRC rejected Canada’s claim that because Ross remained free to express his controversial opinions and retained his job, there was no restriction on his right:

The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

The HRC then went on to evaluate the restriction under the three-part test. It found that there was an acceptably clear legal basis for the restriction. It also served an aim recognised as legitimate under the Covenant, namely the protection of the rights of others, in this case the right of Jewish students “*to have an education in the public school system free from bias,*

prejudice and intolerance.” Finally, the restriction had met the necessity test:

[T]he Committee takes note of the fact that ... it was reasonable to anticipate that there was a causal link between the expressions of the author and the “poisoned school environment” experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions.

In conclusion, the HRC found that Canada had not violated Ross’ right to freedom of expression.