



CENTRE FOR LAW
AND DEMOCRACY

BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Restrictions on Freedom of Expression

Centre for Law and Democracy
International Media Support (IMS)

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Restrictions on Freedom of Expression

Although freedom of expression is a fundamental human right, it is recognised under international law that it is not an absolute right and that it may, in appropriate cases, be restricted. The test for whether or not a restriction on freedom of expression is justified is found in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR):

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 is strict, with narrowly drawn conditions. In its September 2011 General Comment No. 34 on Article 19 of the ICCPR, the UN Human Rights Committee (UNHRC) stated:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. [references omitted]

Article 19(3) of the ICCPR establishes a three-part test for the validity of restrictions on freedom of expression. First, a restriction must be in accordance with a law. This includes primary legislation, as well as regulations and other legally binding documents adopted pursuant to primary legislation. This would include, for example, a

binding code of conduct for the media adopted by a broadcast regulator pursuant to broadcasting legislation. Under this part of the test, the power to authorise restrictions on freedom of expression is essentially vested in the legislative branch of government.

It is not enough simply to have a law; the law must also meet certain standards of clarity and accessibility. If restrictions are unduly vague, or otherwise grant excessively discretionary powers of application to the authorities, they fail to meet the main purpose of this part of the test, namely to limit the power to restrict freedom of expression to the legislature. Unduly vague rules may also be interpreted in a manner which gives them a wide range of different meanings. It would be inconsistent with democracy to give officials the power to make up the rules as they go and this would also not be fair to individuals, who should be given reasonable notice of exactly what is prohibited.

Not only do vague laws bypass democratic legislative control, they can also result in a ‘chilling effect’, whereby individuals steer far clear of controversial topics because there is uncertainty about what is permitted and what is not. The chilling effect can be exacerbated where penalties for breach of the law are unduly harsh. As the UNHRC stated in General Comment No. 34:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable

them to ascertain what sorts of expression are properly restricted and what sorts are not.

Second, the restriction must serve a legitimate aim. Article 19(3) of the ICCPR sets out a list of legitimate aims: respect for the rights and reputations of others, protection of national security, public order, public health or morals. The UNHRC has made clear that this list is exclusive, so that restrictions which do not serve one of the listed aims are not valid:

Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (UNHRC, General Comment No. 34).

Furthermore, the restriction must be primarily directed at one of the legitimate aims and serve it in both purpose and effect. For example, a restriction that has a purpose directed at one of the legitimate aims listed but has a merely incidental effect on that aim cannot be justified.

Third, the restriction must be necessary for the protection or promotion of the legitimate aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court of Human Rights (ECHR):

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

To determine if a restriction is necessary, courts have identified four aspects of this part of the test. First, there must be a pressing or substantial need for the restriction; minor threats to legitimate aims do not pass a threshold test for restricting freedom

of expression. Second, the approach taken must be the least intrusive manner of protecting the legitimate aim. If there is an alternative measure which would accomplish the same goal in a way which is less intrusive, the measure chosen is clearly not necessary. For example, licensing newspapers would be an effective way to prevent undue concentration of ownership, but this objective can be achieved in ways that are far less harmful to freedom of expression and so licensing cannot be justified on this basis.

Third, the restriction must impair the right as little as possible in the sense that it is not ‘overbroad’. For example, while it is legitimate to prohibit defamatory statements, these rules should be limited to speech which illegitimately undermines reputations. Banning all speech which was critical would be overbroad since much critical speech is true or otherwise reasonable.

Fourth, a restriction must be proportionate. This part of the test involves weighing the likely effect on freedom of expression against the benefits of the restriction in terms of the legitimate aim which is sought to be protected. Where the harm to freedom of expression outweighs the benefits, a restriction cannot be justified, keeping in mind that the right to freedom of expression is a fundamental human right.

In General Comment No. 34, the UNHRC summarised these conditions as follows:

Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The

principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. [references omitted]

It is important to note that, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied. For example, in the case of *Zana v. Turkey*, the ECHR noted, in evaluating a statement made in support of the PKK, a militant separatist group:

The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised... the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

An identical statement carried out in peacetime may not have met the threshold of necessity, but the specific conditions at that time, and in that area justified the imposition of the restriction in that case.

FURTHER READING

- Toby Mendel, *Restricting Freedom of Expression: Standards and Principles*, March 2010: <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>
- UN Human Rights Committee, *General Comment No. 34*, 12 September 2011, CCPR/C/GC/34: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en