

Freedom of Expression

- * *In those wretched countries where a man cannot call his tongue his own, he can scarce call anything his own. Who ever would overthrow the liberty of a nation must begin by subduing the freeness of speech.*

Benjamin Franklin

- * *Let noble thoughts come to us from all sides.*

Vedic saying

Freedom of Expression

- * International and national bodies and courts worldwide have demonstrated that the right to freedom of expression is central to the international human rights regime and human dignity.

Why freedom of expression matters?

- * **Totalitarian regimes: full control over expressions, opinions and at time conscience**
- * The slave trade and slavery, the inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag, prisoners of conscience in Burma, China, Iran...

Curtailement of Freedom of Expression

- * Free expression is often being targeted on the grounds that it is **offensive or insulting**.
- * **Should people in a diverse, multicultural society be protected from offence and insult in the name of religion or culture, curtailing free speech where necessary?**

Where do we draw a line?

- * What are this right's boundaries?
- * What should be the breaking point?
- * Where is the threshold whose crossing means the space occupied is no longer that of **individual freedoms** but that of **criminal behaviour**?

Conceptual Contours of the Right to the Freedom of Expression

- * 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states:
- * *“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”*

Article 19, UDHR and ICCPR

Freedom of expression is guaranteed under:

- * Article 19 of the Universal Declaration on Human Rights (UDHR)
- * Article 19 of the International Covenant on Civil and Political Rights (ICCPR): *Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*

Other Human Rights Treaties

- * Article 10 of the *European Convention on Human Rights* (ECHR)
- * Article 13 of the *American Convention on Human Rights*
- * Article 9 of the *African Charter on Human and Peoples' Rights*.

Article 10 (1), ECHR

- * (1) 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 public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

European Court for Human Rights

- * *“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”*
- * It forms a central pillar of the democratic framework through which all rights are promoted and protected, and the exercise of full citizenship is guaranteed.



*** Yet, freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted.**

International Covenant on Civil and Political Rights

- * Limitations must remain within **strictly defined parameters.**
- * Article 19(3) of the ICCPR lays down the conditions: *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.***

Three part test

- * For a **restriction to be legitimate**, all three parts of the test must be met:
- * (1) the interference must be provided for **by law**. This requirement will be fulfilled only where the law is **accessible** and “**formulated with sufficient precision to enable the citizen to regulate his conduct.**”
- * (2) the interference must **pursue a legitimate aim**. The list of aims in the various international treaties is **exclusive** in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.

Three part test

- * (3) the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “**pressing social need**” for the restriction.
- * The reasons given by the State to justify the restriction must be “**relevant and sufficient**” and the restriction must be **proportionate to the aim pursued**.

Three part test

- * A similar formulation can be found in the ACHR and ECHR. **It is vague enough to leave much discretion at the hands of states** as to how they should restrict freedom of expression.
- * stringent restrictions requirements of speeches that have been deemed or characterised as “**political**”
- * greater **margin of appreciation** to states for restrictions targeting other forms of speeches, particularly those deemed **offending public morals or religion**.

Article 10 (2), ECHR

What are the permissible limits of restrictions on freedom of expression?

- * (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

What are the permissible limits of restrictions on freedom of expression?

- * **Judiciary**: performing the task of **reconciling** freedom of expression with certain **imperatives of public interest** such as national security, public order, public health or morals, **and individual rights** such as the right to reputation and the right of privacy.

What are the permissible limits of restrictions on freedom of expression?

- * What to do about advocacy of national, racial, religious or other **hatred**?
- * One of the most vexed questions in the jurisprudence of freedom of expression.

Freedom of Expression and Limits on Hate Speech: A Difficult Symbiosis

- * **Situations in which states CAN impose limitations under certain conditions (as illustrated above)**

VERSUS

- * **Situations in which states has no discretion, but instead have a DUTY to prohibit by law (as follows)**

International Law and its Standards

- * **The American Convention** expressly requires states parties to declare such advocacy a criminal offence.
- * **The ICCPR** expressly requires that hate speech be prohibited by law.
- * **The ECHR and the African Charter** permit, although they do not expressly require, a proscription in law.
- * The strongest prohibition is found in **International Convention on the Elimination of All Forms of Racial Discrimination** (ICERD, Art. 4).

Hate speech

- * Article 20 of the ICCPR – the **prohibition on war propaganda and on hate speech**: *"Any propaganda for war shall be prohibited by law" "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*
- * This is the only duty that States must abide by, as far as restricting freedom of expression is concerned.

Article 4(a) of CERD

Far-reaching protection against hate speech

- Article 4(a) of CERD places a specific obligation on States Parties **to declare as offences punishable by law** six categories of activity:
 - 1. dissemination of ideas based on racial superiority;
 - 2. dissemination of ideas based on racial hatred;
 - 3. incitement to racial discrimination;
 - 4. acts of racially motivated violence;
 - 5. incitement to acts of racially motivated violence; and
 - 6. the provision of assistance, including of a financial nature, to racist activities.

The ECtHR case-law

- * The ECtHR has **refused to protect attempts to deny the Holocaust**, largely on the basis that these fuel anti-Semitism and states, particularly those in states with a history of anti-Semitism, have the competence to decide whether they would like to **legislate specifically against such denials**.
- * At the same time, the ECtHR also made clear that **if the statements in question do not disclose an aim to destroy the rights and freedoms of others, or deny established facts** relating to the Holocaust, they are protected by the guarantee of **freedom of expression**.

Common Definition in International Law Missing

- * **No agreed definition of propaganda or hate speech in international law.**
- * Instead, there are marked different regional or national approaches in restricting it.

What Constitutes Hate Speech?

- * Hate Speech:
- * (1) incites its audience to discrimination or hatred?
- * (2) incites to violence?

US Approach

- * One hand of the spectrum: the US approach which ***protects* hate speech unless:**

US Approach

- (1) the speech actually incites to violence *and*
- (2) the speech will likely give rise to imminent violence.
- Very stringent standard: even speech **advocating violence** and filled with racial insults, will be protected absent a showing that violence is likely to occur **virtually immediately**.

European Union Approach

- * **Substantial differences in the European Union:**
- * The French or German position of **high restriction on FoE.**
- * The UK or Hungary where **greater protection** has been afforded to a variety of speeches.
- * The development of **specific hate speech regulations** for denying the **Holocaust** or other **genocides.**

Hate Speech Law Limitations

- * no one should be penalized for statements which are true;
- * no one should be penalized for the dissemination of “hate speech” **unless** it has been shown that they did so with the **intention of inciting discrimination, hostility or violence**;
- * the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are **reporting on racism and intolerance**;
- * one should not be subject to **prior censorship**; and
- * any imposition of sanctions by courts should be in strict conformity with the **principle of proportionality**.

Hate Speech Law Limitations

- * In some countries hate speech laws have been introduced to **outlaw** extreme expression.
- * The success of such laws has often **been questionable** and one of the consequences has been to drive hate speech underground.

Examples of misuse of hate speech laws

- * In many countries, overbroad rules in this area are **abused by the powerful to limit nontraditional, dissenting, critical, or minority voices, or discussion about challenging social issues.**
- * Free speech is a requirement for, and not an impediment to, tolerance.

Role of Media

- * The exercise of freedom of expression and a **free and diverse media** play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences.
- * Compare the statement with the following case

Azerbaijan and the Role of Media

- * One reporter and one editor were sentenced for **incitement of religious hatred**.
- * The journalists published an article in the small Azeri newspaper *Sanat* entitled “Europe and Us”, in which they compared **European and Islamic traditions**. In it, they stated that **Islam was an obstacle to Azerbaijan’s economic and political development**.

Azerbaijan and the Role of Media

- * The article led to protests and death threats from **religious extremists**, who called for the execution of journalists.
- * Journalists were charged under Article 283 of the **Azerbaijani Criminal Code**, on incitement of national, racial and religious hatred.

Azerbaijan and the Role of Media

- * Is the right to freedom of religion about **respecting religion** or about **respecting people's right to *practice the religion of their choice***?
- * Do **offensive statements** threaten the ability of adherents to religions to exercise and express their own beliefs?

Azerbaijan and the Role of Media

- * The right to freedom of religion **does not impose a duty on States to enact laws that protect believers from insult or offence** (*Choudhury v UK In Dubowska & Skup v Poland*).

Azerbaijan and the Role of Media

- * Was the article causing an offence or **inciting to religious hatred**?
- * Distinction between speech that truly **incites to discrimination, hostility or violence**, and speech that does not.
- * **Mere offence/critique versus incitement.**

Azerbaijan and the Role of Media

- * No incitement to violence, but **simply criticism**, which is **protected under Article 10** of the ECHR, to which Azerbaijan is a signatory.
- * In a democracy one should be free to express opinions about all subjects, including religion.

Azerbaijan and the Role of Media

- * Azerbaijan is in breach of its **obligations under international law to protect and promote freedom of expression.**
- * This creates a climate of fear, which is incompatible with a free and independent media.

Examples of misuse of hate speech laws

- * In Central Asia, hate speech laws are used to repress all forms of Islamist movements, including those that have publicly stated that they are committed to non-violence, such as Hizb-ut-Tahrir.

Examples of misuse of hate speech laws

- * **Turkey** frequently uses Article 312 of the Penal Code – which provides for up to three years' imprisonment for anybody who **'incites hatred based on class, race religion, or religious sect, or incites hatred between different regions'**– against those who espouse Kurdish nationalism or even express pride in Kurdish culture.

Examples of misuse of hate speech laws

- * The practical test is important, indeed crucial, to ensure that whatever regulations and restrictions are put in place (both negative and positive ones) fulfill the social functions they are meant to play.