

RESTRICTIONS ON FREEDOM OF EXPRESSION *“Evaluation and Justification”*

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Abstract

Freedom of expression has a special importance among human rights, as it is considered one of the foundations for building a civilized society and a standard for democratic systems. In view of that importance, which has a direct impact on human life, it was necessary to surround it with actual guarantees that would prevent wasting its value and ensure its exercise. With the existence of these guarantees, there must be some restrictions as well that guarantee the exercise of freedom of expression in a logical manner and not harmful to the rights of others. Research on the legitimacy of these restrictions constitutes a challenge for judicial systems, some of which have resorted to following the so-called proportionality test, especially in Europe and Canada, in which I see a successful method that can be generalized to judicial systems around the world.

Keywords: freedom of expression, restrictions, Justifications, proportionality test

1. Introduction

Public freedoms have particular importance because of their legal, political and social dimensions that directly affect the lives and rights of individuals. In this regard, it is easy to notice the clear disparity between countries in protecting public freedoms and ensuring their exercise, based on many factors, including the rulings of specialized international and regional human rights courts such as the European Court of Human Rights, as well as the reports of official and unofficial international organizations on human rights. In this context, it seems that political freedoms, especially freedom of expression, play an important role as effective factors in evaluating and proving this inequality. This makes the search for guarantees of exercising those freedoms a matter of complexity, given that the matter is not only related to the legal aspect, which may seem ideal in some dictatorial regimes, but is also related to the practical aspects directly related to the practice, and this requires a deep understanding of the philosophical and historical aspects of the nature of those freedoms.

At a time when it seems important to talk about guarantees of the exercise of freedom of expression, talking about restrictions on the exercise of that freedom in its various forms is no less important. these restrictions constitute an exception to the right to freedom, which is built on

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centuries of bitter struggle. This exception uses as a weapon by many governments in the face of their people under loose titles and without any obligation to justify.

2. Freedom of expression

The importance of freedom of expression is reflected primarily in the fact that it is one of the human tools in affirming his existence. This philosophical basis is explained as a starting point for many thinkers and philosophers in their defense of freedom of expression. Perhaps the most notable of these is John Stuart Mill, who made one of the liberal first, and perhaps most famous, defenses of freedom of expression.¹

and it is the basis for the democratic system of any country in the world. Freedom of opinion and expression has been linked to the objectives of the United Nations, including maintaining international peace and security, and this confirms the universality and necessity of this freedom.

2.1. Legal bases of Freedom of expression

Freedom of expression is based on many sources that form a legal and normative basis for its existence. These sources can be classified according to their level, as follows:

International conventions and declaration:

- Freedom of expression has always been a concern of many international conventions and treaties on human rights in general. Therefore, it can be said that the articles relating to the protection of freedom of expression are almost the same in terms of wording in most of those conventions and treaties.
- According to the article 19 of the *Universal Declaration on Human Rights*:
- *(Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.)*
- The International Covenant on Civil and Political Rights (1966) has also stressed the importance of freedom of expression and the need to protect it.²

Regional conventions:

- Regional conventions and treaties also constitute one of the sources of protection for human rights and freedoms, including freedom of expression, although there is a discrepancy in the strength and binding of these treaties and the extent to which they are respected by the parties. The European Convention on Human Rights (1950) is considered the most important regional agreement that affirms freedom of expression and guarantees its exercise. The importance of this agreement is due to its association with the European Court of Human Rights with its effective mechanism, and also due to the identification of

¹ VAN MILL, David, "Freedom of Speech", Edward N. Zalta (ed.): The Stanford Encyclopedia of Philosophy (Spring 2021 Edition), , URL = <<https://plato.stanford.edu/archives/spr2021/entries/freedom-speech/>>.

² According to article 19: Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

the national legislations of the state's parties with the objectives and policies of the Convention.

- The American Convention on Human Rights included an explicit provision on guaranteeing freedom of expression.³
- The African Charter on Human and Peoples' Rights included a timid reference (in our opinion) to freedom of expression, according to the text of Article 9: (Every individual shall have the right to receive information and the right to express and disseminate his opinions within the law.)

National Constitutions and Laws: Which often derive its provisions from international conventions and declarations. There is a special importance for laws dealing with freedom of expression at the national level, as most issues arising from freedom of expression begin in a particular country due to a breach of the law or an abuse of power.

2.2. What does freedom of expression include?

It can be said roughly that all conventions and declarations of rights have referred to freedom of expression in the same terms. According to the Article 10 of the European Convention on Human Rights (ECHR): *“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.”*

Based on the various texts on freedom of expression, there are some important points that fall under freedom of expression, which are:

- The right of opponents of the government to express their opinions in the state-owned mass media, including television, on an equal basis with others (any party or other organization) especially during times of general and local elections.
- The right to access and secure information from government sources
- Protection of academic, scientific and educational freedoms and artistic and literary expression.
- Obtaining government support for the right of expression on a non-political basis and aimed at promoting the continuation of pluralism.
- Protection of the right of distribution and publication.
- The right to establish independent radio and television stations

3. Freedom of Expression Restrictions

Recognizing the importance of ensuring and protecting freedom of expression is matched by an emphasis on the importance of placing controls and restrictions on freedom of expression. When a person expresses his opinion, he exercises a right established for him, but at the same time, that right is offset by duties that may be imposed by many considerations that may relate to the protection of the state, society or persons. Therefore, we see that wherever legal articles confirming

³ American Convention on Human Rights, Article 13.

the guarantee of freedom of expression are found, they are often accompanied by restrictions that constitute a kind of control over the exercise of that freedom.

There are international standards on which these restrictions are based, which have been elaborated during the past century based on the texts of human rights conventions and treaties. These considerations can be classified on the basis of their purpose, as provided by the European Convention on Human Rights in Article 10:

- protection the interests of national security, territorial integrity or public safety
- prevention of disorder or crime
- protection of health or morals
- protection of the reputation or rights of others
- prevention the disclosure of information received in confidence
- maintaining the authority and impartiality of the judiciary

Here, the question is who has the authority to impose restrictions on freedom of expression? On what is that authority based?

3.1. The power to impose restrictions on freedom of expression

International and regional human rights treaties contain provisions that may constitute standards for restrictions on freedom of expression, and local authorities often rely on these standards to impose restrictions. However, it is not enough for these restrictions to be based on specific criteria, but they must also be issued by a legitimate authority and not just from a party that enjoys the power, this requires a thorough understanding of the concept of “authority”.

In the context of the conceptual research on the nature of Authority, it is not difficult to discover the confusion caused by the mix between the concepts of authority, power and legitimacy. Especially in English. The term power in English is loose and has many meanings, and authority is one of those meanings. In fact, this form is not only linguistic, but extends to the essence, due to the long-term intellectual and theoretical link between both concepts, which has reached the point of integration, especially when talking about political authority and the tools for exercising it.

Some see authority in its broad sense as a form of power. It is a means by which one person can influence the behavior of another. However, power and authority are usually distinguished from one another as contrasting means by which compliance or obedience is achieved. While power can be defined as the ability to influence the behavior of another person, authority can be understood as the right to do so.⁴

As for *Max Weber*, the difference between both concepts that power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, while authority is the probability that certain specific commands (or all commands) from a given

⁴ Andrew HEYWOOD: *Political theory (An Introduction)*, Third Edition, Palgrave Macmillan, New York, 2004. 129-130.

source will be obeyed by a given group of persons.⁵ Weber has considered authority as a special kind of power.⁶

Walter Buckley defined power as Control or influence over the actions of others to promote one's goals without their consent, against their will or without their knowledge or understanding. And he defined authority as the direction or control of the behavior of others for the promotion of collective goals based on some ascertainable form of their knowledgeable consent.⁷ In the same context, *Joseph Raz* argues that coercive power is not equivalent to authority. Your neighbor can exercise power over you with threats but that is not authority. These coercive threats do not amount to authority even in the case that the neighbor may have legitimate cause for threatening you. Consequently, Raz concludes that it 'seems plain that the justified use of coercive power is one thing and authority another'.⁸

On the other hand, the concept of legitimacy has often been used to express the concept of authority or as one of its synonyms, but it can be said simply that legitimacy takes a place between the concepts of power and authority. In other words, legitimacy is the quality that transforms a naked power into a legitimate authority.⁹

That overlap between concepts and the difference in the concept of authority according to different opinions and social and political schools made it difficult to develop a clear definition of authority that shows its nature and characteristics. All that has been presented in this field to date are opinions and theories that have been supported by and criticized. But when it comes to imposing a restriction or obligation related to a right or freedom, the distinction between those concepts (especially between power and authority) seems of great importance, since the legitimacy of that restriction is closely related to the party that imposed it. In other words, is there any criterion by which one can determine whether these restrictions are a response to the principle of the rule of law, or are they merely an expression of the interests and desires of the authority? This question necessarily calls for a search for reasonable and legitimate justifications for imposing these restrictions.

3.2. Justifications for Freedom of Expression Restrictions

Since freedom of expression is one of the basic and important human rights, the restrictions imposed on its exercise must be based on logical and convincing justifications commensurate with the seriousness of depriving a person or entity of freedom of expression.

In summary, it can be said that freedom of expression is the rule and restrictions are the exceptions¹⁰. This entails a great burden in justification on the party that imposes these restrictions.

⁵ A. J. GRIMES: Authority, Power, Influence and Social Control: A Theoretical Synthesis, *The Academy of Management Review* Vol. 3, No. 4 (Oct., 1978), 724-735.

⁶ Norman UPHOFF: Distinguishing Power, Authority & Legitimacy: Taking Max Weber at His Word by Using Resources-Exchange Analysis, *Polity*, Vol. 22, No. 2. (Winter, 1989), 295-322.

⁷ Walter BUCKLEY: *Sociology and modern theory*, Englewood Cliffs, N.J.: Prentice-Hall, 1967. 186.

⁸ Joseph RAZ: *The morality of Freedom*, Clarendon Oxford, 1986. 24-25.

⁹ Andrew HEYWOOD: *Political theory (An Introduction)*. 141.

¹⁰ Gehan GUNATILLEKE: Justifying Limitations on the Freedom of Expression, *Human Rights Review* 2021/22. 91–108. 93.

John Stuart Mill defend the freedom of expression and confirmed that there is no inherent justification for suppressing the beliefs and opinions of others through coercive means, even if one believes that those beliefs and opinions are untrue, as they may in fact be true, and the alternative beliefs and opinions untrue.¹¹ As for *Hohfeld* a liberty can only be constrained by a competing duty that correlates to another's claim right¹².

The most important question remains about the mechanism by which the legality of restrictions imposed on freedom of expression can be assessed and the extent to which they are based on the criteria established by the relevant conventions and treaties. In principle, no matter how different these mechanisms are, the balance between exercising freedom and the interests of the state and the interests of others remains the goal on which these restrictions must be based.

3.3. Proportionality Test

One of the most fears associated with the restrictions on freedom of expression is the misuse of these restrictions by the authority and their use to serve its interests. Such a thing often happens under dictatorial regimes, but at the same time, it is not excluded from happening under democratic regimes. Therefore, it was necessary to have a criterion or set of criteria on which to base the assessment of the legitimacy of restrictions on freedom of expression and to ensure the rule of law. It seems that these criteria in one way or another revolve around one idea, which is balance which is based on comparing the benefits or interests that will be protected with the harm that may result from the restriction on freedom.

The proportionality test is the main model and method that is based on evaluating the legality of restrictions imposed on the exercise of rights and freedoms, including freedom of expression. The origin of this test goes back to the Canadian judiciary, specifically the Supreme Court, and the German judiciary has started applying the proportionality test since the late fifties, whenever the Constitutional Court has to review laws that limit basic rights, or administrative and judicial decisions that apply these laws. From Germany, the principle of proportionality has spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is used in the European Court of Human Rights and in the European Court of Justice.¹³

Most jurisdictions in Europe, and treaty bodies such as the United Nations Human Rights Committee, apply the proportionality test when assessing the permissibility of restrictions on freedom of expression.

A typical proportionality test assesses whether the restriction of a right can be justified by reference to the gain of another benefit or value.

The test is based on four principles:

- a) The state must pursue an object that serves a binding "*legitimate*" interest when restricting this right. Here specifically, the question arises about what exactly the legitimate goals and objectives are. Especially since from a political perspective, these goals are often combined

¹¹ John Stuart MILL: *On Liberty* (1859), Batoche Books, Kitchener, 2001. 19-20.

¹² HOHFELD: *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *The Yale Law Journal*, Jun., 1917, Vol. 26, No. 8 (Jun., 1917), 710-770.

¹³ Dieter GRIMM: *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *University of Toronto Law Journal* 383 (2007).

with the goals of the decision-makers, or in other words, those who represent the side of the authority and its desires.¹⁴ Among the applications of the legality test is the decision of the European Court of Human Rights in the case of *Bayev and others v. Russia*, as stated in the conclusion of the decision:

“In the light of the above considerations the Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others.”

- b) There must be a rational relationship between the specific procedure used to restrict the right and the legitimate interest. This is called a *“suitability test”*. The suitability test, the first limb of proportionality, is similar to the requirement, developed to assess restrictions on the rights under Articles 8–11 ECHR, that an interfering measure must pursue a legitimate aim.¹⁵
- c) This action must be necessary to advance or prevent setbacks to that legitimate interest. This is called the *“necessity test”*. The European Court of Human Rights has developed in its case-law the autonomous concept of whether an interference is “proportionate to the legitimate aim pursued”, which is determined having regard to all the circumstances of the case using criteria established in the Court’s case-law and with the assistance of various principles and interpretation tools. The Court’s reasoning to assess the necessity of a given interference with freedom of expression is based on several considerations.
 - Existence of a “pressing social need
 - Assessment of the nature and severity of the sanctions
 - Requirement of relevant and sufficient reasons¹⁶.
- d) *The action must be proportionate*. That is, there should be a noticeable benefit in exchange for restricting the right. In other words, the act must represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realisation of the aim¹⁷.

These proportionality tests are applied in a variety of ways that vary in different countries and jurisdictions systems¹⁸. Balance is an essential element in these tests, regardless of the stage in which it comes. In addition, the priority in evaluating considerations of legitimacy, necessity and appropriateness differs from one judicial system to another.

Although the proportionality test is the most widely followed criterion for assessing the legitimacy of restrictions on freedom of expression, it has been subjected to many criticisms on the grounds that it may represent the values and interests of majorities politically and socially, and that it relies on broad concepts of public order that may provoke violent reactions.

¹⁴ MOLLER, K.: Proportionality: Challenging the critics. *International Journal of Constitutional Law*, 2012/3, 709-731. doi:10.1093/icon/mos024.

¹⁵ ARAI-TAKAHASHI, Y.: *‘Scrupulous but Dynamic’—the Freedom of Expression and the Principle of Proportionality under European Community Law*. *Yearbook of European Law* 200/1. 27-79.

¹⁶ For more information see: (Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression 2021). 22-24.

¹⁷ RIVERS, J: *Proportionality and Variable Intensity of Review*. *Cambridge Law Journal* 2006. 174-207.

¹⁸ FRANCISCO J. URBINA: *Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’*, *The Canadian Journal of Law and Jurisprudence* 2014/1. 167-192.

4. Conclusion

It is true that international conventions and treaties have defined the basis for imposing restrictions on freedom of expression, but some terms such as preserving national security and public morals remain broad terms that may form a basis for wasting freedom of expression. Therefore, it is necessary to find clear international legal standards that include mechanisms for imposing restrictions on freedom of expression and the basis for assessing its legitimacy so that it can be monitored at the national level.

Imposing restrictions on freedom of expression is a process that requires a lot of caution and must take into account political and social considerations and the requirements of international law. But the challenge lies in assessing the legitimacy of these restrictions. This may not be a problem in advanced countries under a unified judicial system such as the European Union, but it may be a disaster in countries that are based on the interests of the authority. Where restrictions are the rule and freedom is the exception.