CHAPTER
3

Justifiable Limitations to the Right to Freedom of Expression

The Limitations Analysis

Despite its importance, freedom of expression is not an absolute right, and there are a number of situations in which the right can be justifiably limited. However, the process of limiting freedom of expression (or any other human right) cannot be done without proper justification.

There is authority from around the world that stipulates that rights cannot be limited in such a way that would make the right itself nugatory. For example, in *Chimakure v Attorney-General of Zimbabwe*[80] the Zimbabwe Constitutional Court remarked that "[t]o control the manner of exercising a right should not signify its denial or invalidation."[81] The Human Rights Committee also noted that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."[82]

In addition, in most jurisdictions there is a *three-part test* to determine whether the right to freedom of expression may be justifiably limited.

Step 1: Any restriction on a right must be prescribed by law.

Step 2: The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.

Step 3: The restriction must be necessary to achieve the prescribed purpose.

Step 1: Prescribed by law

This is simply a statement of the *principle of legality*, which underlies the concept of the rule of law and requires that laws should be clear and non-retrospective. In order for a law limiting freedom of expression to pass this test it must be unambiguously established by pre-existing law that the right may be limited.

[80] Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe*, Constitutional Application No SC 247/09 (2014).

[81] *Id*, 17.

[82] Human Rights Committee: General Comment 34 at para 21.

What is a law?

A law restricting the right to freedom of expression will usually be a written statute, although common law restrictions are also allowed. The Human Rights Committee says that laws may include laws of parliamentary privilege or laws of contempt of court. Given the serious implications of limiting free expression, it is not compatible with the ICCPR for a restriction "to be enshrined in traditional, religious or other such customary law."[83]

It is not enough for the limitation to exist in domestic law alone; it must also reach a qualitative threshold for it to fulfil the principle of legality. The ECtHR has held that "prescribed by law" requires that the law have a basis in domestic law, be adequately accessible, and be formulated with sufficient precision.[84]

In Zimbabwe, the Constitutional Court in *Chimakure* held that for a limitation to satisfy the principle of legality it must "specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression."[85] This is to "enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience."[86]

Courts have also required laws to create a sense of "foreseeability" – that is, enable citizens and law enforcement officials to know how to regulate their conduct. The Human Rights Committee said that "[a] law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[87]

Example

In *Chavunduka and Choto v Minister of Home Affairs & Attorney General*,[88] the Zimbabwean Supreme Court held that the offence of publishing "false news" in the Zimbabwean criminal code was vague and over-inclusive. The offence included statements that "might be likely" to cause "fear, alarm or despondency," without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out: "[A]lmost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions."[89]

[83] Human Rights Committee: General Comment 34 at para 24.

[84] ECtHR: *Sunday Times v the United Kingdom*, No 6538/74 (1979).

[85] Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe supra* note 80, 24.

[86] *Id*, 26.

[87] Human Rights Committee: General Comment 34 at para 25.

[88] Zimbabwe Supreme Court: *Mark Giva Chavunduka and Another v The Minister of Home Affairs supra* note 40.

[89] *Id*, 14.

Step 2: Serving a legitimate purpose

Most national constitutions and international and regional instruments include a list of legitimate purposes for limiting the right to freedom of expression within the text of the right. As long as the law limiting the right was enacted to serve one of the interests listed in the instrument, it will pass this stage of the limitations analysis.

Article 19(3) of the ICCPR provides for two possible types of restriction:

> "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."

The African Court and the African Commission have stated that the only legitimate reasons that can be relied on to limit the right to freedom of expression under Article 9 of the African Charter are those set out in Article 27(2) of the African Charter, namely that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest."[90]

Many national constitutions include similar lists, but some go further and include more possible purposes for which the right can be limited. The right in section 20 of the Zambian Constitution is one example, and is similar to many other constitutions in the southern Africa region. The right is protected in the first subsection, and then limited in the third:

> 3. "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --
> a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
> b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
> c) that imposes restrictions on public officers;
> and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society."

[90] African Court: *Konaté v Burkina Faso supra* note 29, 35. African Commission: *Media Rights Agenda v Nigeria* Communication Nos 105/93, 128/94, 130/94 and 152/9 (1998). at para 68.

Note

It is interesting that courts have recognised that sometimes protecting rather than limiting free speech is more beneficial to the safety of a state. In *Free Press of Namibia v The Cabinet for the Interim Government of South Africa*[91] the Namibia High Court held:

> "Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the state or to the maintenance of public order. In fact to stifle just criticism could as likely lead to those undesirable situations."[92]

The United Kingdom House of Lords has also recognised this:

> "The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."[93]

Step 3: Necessary in a democratic society

Most limitations to the right to freedom of expression require that the limitation be "necessary", "reasonably justifiable in a democratic society", or another similar formulation.

To determine whether a limitation meets this standard courts have adopted a proportionality test. The Human Rights Committee, in *Marques de Morais v Angola*,[94] said that the "requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."[95]

Various forms of the proportionality test have been adopted by courts, but they all are designed to ensure that a limitation does not unduly restrict a fundamental right. The most oft-quoted test is from a Canadian case, *R v Oakes*:[96]

> "Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objective or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second,

[91] Namibia High Court: *Free Press of Namibia v The Cabinet for the Interim Government of South Africa* 1987 (1).

[92] *Id*, 624.

[93] United Kingdom House of Lords: *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126.

[94] Human Rights Committee: *Marques de Morais v Angola* Communication No 1128/2002 (2005).

[95] *Id* at para 6.8.

[96] Canada Supreme Court: *R v Oakes* [1986] 1 SCR 103.

> the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be."[97]

The Human Rights Committee has also emphasised the importance of the proportionality of restrictions:

> "[R]estrictive 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."[98]

In General Comment 34, the Human Rights Committee additionally noted the factors that should be taken into account:

> "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."[99]

The African Commission said that "the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained."[100]

The East African Court of Justice has also emphasised the proportionality argument:

> "[A] government should not determine what ideas or information should be placed in the market place [of] information and we dare add, if it restricts that right, the restriction must be proportionate and reasonable."[101]

In Europe the ECtHR has said that they will look at whether the reasons adduced by the state are "relevant and sufficient" to justify interference with the right.[102]

This test often involves a balancing exercise between the rights of an individual and the rights of a community. The Zimbabwe Constitutional Court in *Chimakure* stated that "[t]he purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression."[103]

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[97] Canada Supreme Court: *R v Oakes supra* note 96, 105-106.

[98] Human Rights Committee: General Comment 27.

[99] Human Rights Committee: General Comment 34 at para 35.

[100] African Commission: *Constitutional Rights Project v Nigeria supra* note 35 at para 69.

[101] East African Court of Justice: *Burundi Journalists Union v Attorney General of Burundi supra* note 53.

[102] ECtHR: *VgT Verein gegen Tierfabriken v Switzerland* Application No 24699/94 (2001), 75.

[103] Zimbabwe Constitutional Court: *Chimakure v Attorney General of Zimbabwe supra* note 80, 21.

The ECtHR explained that the purpose of the right, and the relationship the right has to a functioning democracy is also relevant in assessing the permissibility of the limitation:

> "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.."[104]

Courts have also looked at whether there are less restrictive means in which the purpose of the limitation can be achieved.

- The Inter-American Court has stated that "it must be shown that a [legitimate aim] cannot reasonably be achieved through a means less restrictive of a right protected by the Convention."[105]
- The United States Supreme Court has stated that "[e]ven though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[106]

The fact that the exercise of the right may cause some form of harm is not sufficient, on its own, to justify the limitation. In *Chimakure* there is an acknowledgement that the free expression of ideas may cause harm – but that only serious harm can lead to a limitation of the right. Malaba DCJ stated that "[t]he exercise of the right to freedom of expression is not protected because it is harmless … It is protected despite the harm it may cause."[107] It is therefore not an adequate response when explaining that a limitation is justified that it may cause some form of harm. The Constitutional Court emphasised that "[t]he Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in section 20(2)(a) of the Constitution."[108]

Expression should also be allowed to offend, shock, and disturb. Although referring specifically to criticism of judges, English Judge Mumby of the Family Division of the High Court said that language used should not overrule the content of a statement:

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[104] ECtHR: *Handyside v United Kingdom supra* note 45, 18.

[105] Inter-American Court of Human Rights: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism supra* note 48 at para 30.

[106] United States Supreme Court: *Shelton v Tucker*, 364 US 479, 488 (1960).

[107] Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe supra* note 80, 57.

[108] *Id*, 56.

> "[T]hat which is lawful if expressed in the temperate or scholarly language of a legal periodical or the broadsheet press does not become unlawful simply because expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar."[109]

And a South African judge memorably explained it as such:

> "Although conscious of the fact that I am venturing on what may be new ground I think that the courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the Ladies Agricultural Union on the subject of pruning roses!"[110]

Examples

In *Konaté v Burkina Faso*[111] the African Court said that custodial sentences for criminal defamation were a disproportionate punishment:

> "Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions."[112]

In *Law Offices of Ghazi Suleiman v Sudan*,[113] the African Commission said that security officials preventing a lawyer from making a public speech was a disproportionate approach:

> "The disproportionate actions of the government of Sudan against Mr Ghazi Suleiman is evidenced by the fact that the government has not offered Mr Ghazi Suleiman an alternative means of expressing his support for human rights in each instance. Instead the Respondent State has either prohibited Mr Ghazi Suleiman from exercising his human rights by issuing threats, or punished him after summary trial, without considering the value of his actions for the protection and promotion of human rights."[114]

[109] United Kingdom Family Division: *Harris v Harris: Attorney-General v Harris* [2001] 2 FLR 395.

[110] South Africa High Court: *Pienaar v Argus Printing and Publishing Company Ltd* 1956 (4) SA 310 (W), 318

[111] African Court: *Konaté v Burkina Faso supra* note 29.

[112] *Id* at para 165.

[113] African Commission: *Law Offices of Ghazi Suleiman v Sudan supra* note 37.

[114] *Id* at para 63.