

Script: Limitations to freedom of religion or belief

You'll know from watching the news and perhaps from your own life experience that many governments impose limits on freedom of religion or belief. They argue that they need to limit religious expressions for one reason or another. So how do we know when limitations are justifiable and permissible and when they're not?

International human rights law says that the right to have, choose, change or leave a religion or belief is absolute – it may never be limited. The right to manifest a religion or belief may on the other hand be restricted but only when four rules are followed.

Any limitation needs to be provided for in law.

The point of this is to stop the state, police and the courts from acting unpredictably or inconsistently.

The limitation has to be necessary to protect public safety, public order, health or morals, or the rights and freedoms of others.

This is important. Imposing a limitation because it's necessary to protect other people is very different from choosing limitations based on what will win votes.

Limitations may not be discriminatory,

And any limitation must be proportionate to the problem caused by the manifestation.

These rules are really important. Without them, governments could limit any and every group or practice that they don't happen to like. Limitations are meant to be a last resort, not a tool for state control.

Let's use a made up example to illustrate what the rules mean.

Imagine a town where there are five different religious groups. All of them have places of worship and they all make a certain amount of noise, which isn't appreciated by the neighbours! But the police only receive complaints about one small, unpopular group...

High levels of noise are bad for health and public health is a legitimate ground for limitations. So what should the local authority do? What kinds of regulations are necessary, non-discriminatory and proportionate to protect public health?

In this case, a general law regulating the volume permitted for all public meetings would be appropriate. A law that applies equally to all religious groups and to others. If any group exceeds the volume, it would be proportionate to require them to turn it down or face a fine. It would not be proportionate to demand complete silence or to ban them from meeting all together!

And the police would have to enforce the law equally, even if they only receive complaints about unpopular groups.

That's a fairly minor, simple example.



When we look at major violations of freedom of religion or belief, it's usually easy to see that these rules are being ignored, because the restrictions are so obviously unnecessary, discriminatory or disproportionate.

Some countries ban all religious activities that take place outside buildings registered for the purpose. This makes it illegal to say a prayer of thanks with guests before you eat dinner in your home! This limitation is obviously not legitimate!

But there are lots of controversial cases. Is it ok for a town mayor in France to ban burkinis – swimming costumes that cover everything but the face and feet? Or for authorities in parts of India to limit the right to tell others about your beliefs?

In this presentation we're going to look at the seven questions courts should ask to determine if limitations are legitimate. Hopefully this'll help you assess limitations that you encounter.

When a state places restrictions, the first question to ask is if the limitation interferes with the absolute right to have or adopt a religion or belief, or with the right to manifest it.

If the absolute right is being limited, then the state's actions are not legitimate. But if a manifestation is being limited, we move on to our next question.

Is the behaviour being limited a manifestation of religion or belief, or just a behaviour?

The things we do are often guided by our beliefs. But not everything we do is a protected manifestation of religion or belief. When someone complains that their right to manifest has been limited, courts start by deciding if the behaviour concerned is a manifestation of religious or belief. They do this by looking at the connection between the behaviour and the belief to see if they are intimately linked.

Sometimes this is easy. Going to church is intimately linked to Christianity, and fasting is intimately linked to Islam.

But it's not always simple. For one Christian wearing a cross isn't important; for another, it's a deep expression of religious identity. And Muslim women have different beliefs about head coverings.

It's not the role of the courts to decide which beliefs are correct. In deciding what counts as a religious manifestation, courts face the risk of making judgements on doctrine that give preference to some theological interpretations over others. Human rights are held by individuals, so courts increasingly look at the beliefs of the person concerned instead of institutional doctrines, and reason that if that person considers an action to be a religious manifestation, then for them it is!

Once we've established that a protected manifestation is being limited, we need to check whether the limitation is provided for in law.

Is there written law, case law, or customary law that regulates the limitation? Or is it being imposed by officials without any legal basis? If there's no legal basis, the limitation is not legitimate.

The next step is to assess whether the limitation is necessary to protect a legitimate ground.

To answer this, we first need to check if there is a direct link between the practices being limited



and one of the legitimate grounds and secondly check if the limitation is necessary? Let's look at each of these questions in turn.

Under international law, the only legitimate grounds to limit freedom of religion or belief are the protection of public safety, public order, health or morals or the rights and freedoms of others.

So how does the behaviour being limited threaten these grounds? And is there evidence of this?

The state has to demonstrate a **direct link** between the practices being limited and one of these legitimate grounds.

The Hindu caste system divides people into higher and lower castes and casteless groups. Casteless groups face massive discrimination and social and economic disadvantage. Some temples used to bar casteless Hindus from entering. India abolished the caste system in 1949, and temples are no longer allowed to refuse entry to casteless Hindus. This limitation passes the test - there is a clear, direct link between preventing caste discrimination and protecting the rights and freedoms of others.

But not all limitations have such a clear link and sometimes governments misrepresent or misuse the legitimate grounds.

Limitations to freedom of religion or belief often relate to **public order**. Public order laws regulate lots of things including threats, assault, incitement to violence and sometimes blasphemy.

The freedom to manifest religion or belief necessarily involves the right to say what you believe to be true. Obviously beliefs can be expressed peacefully or in ways that incite violence. Sadly some people are so offended by the peaceful expression of beliefs other than their own that they respond with violence.

Some states ban the peaceful expression of certain beliefs, arguing that they have legitimate public order grounds to do so because of the risk of mob violence. Indonesia bans the public expression of Ahmadi or atheist beliefs on this basis. As a result, victims of violence are sometimes charged with blasphemy or incitement, instead of perpetrators being charged with assault.

Laws like this don't reduce violence. Instead, they reinforce the idea that people who have the 'wrong' beliefs should be punished.

Another tricky ground to apply is **public morals**. Does everyone have the same morals and whose morals are 'public'? UN human rights experts say that the definition of public morals must come from "many social, philosophical and religious traditions". In other words, you can't base limitations on the morals of majority alone.

It might surprise you that **national security** is not a legitimate ground for limiting freedom of religion or belief.

Some governments demonize groups, especially groups that share the religion of an enemy country, calling them a threat to national security. The convention writers agreed that that public health, safety and order give enough scope for limitation and that adding national security would risk making freedom of religion or belief inapplicable when it's most needed.



So we've established that the state has to demonstrate a **direct link**, showing how the practices limited threaten a legitimate ground. We've also seen that it's important to check that the legitimate grounds are being interpreted and applied correctly.

Let's move on to the second part of our question - is the limitation necessary? Not desirable from a political or majority perspective but necessary.

Let's say that the government has shown that there's a direct link between the limitation they propose and the protection of the rights and freedoms of others.

Is the threat serious enough to motivate a limitation?

Will the limitation proposed be effective in protecting other people's rights?

And are there other ways of solving the problem without limiting rights?

If the problem isn't serious enough, if the limitation proposed won't contribute to solving it or if there are other ways to solve it without limiting rights, then the limitation is not necessary.

The government of China claims to have health and safety concerns about overcrowded Buddhist training centers. Health and safety are legitimate grounds. One solution would be to enable centers to renovate and expand. This solution would not limit rights. Instead, the government demolished whole areas and forcibly removed 1000 nuns. This was not necessary.

Of course, some limitations are necessary. The United Nations has clearly stated that harmful traditional practices should be forbidden, such as some initiation rituals and female genital mutilation.

Of course, many cases aren't so clear. But the burden of proving the limitation is necessary is meant to lie on the state.

Once we've established that the state has legitimate grounds and the limitation is necessary, we need to check if the limitation is discriminatory.

You might think that it's easy to see if laws, policies or practices are discriminatory. And if they explicitly apply to some people and not others, it is. This is called direct discrimination and is forbidden.

But sometimes laws that apply to everyone have a major impact on some people and no impact on others. This is called indirect discrimination.

Let's return to our imaginary town and the noisy places of worship. The council has introduced a law limiting the volume of public events and religious communities have adjusted their loud speakers accordingly. But the church bells are too loud and you can't reduce their volume. The church has to give up a traditional practice, while other communities had no problems.

This is indirect discrimination.



There are lots of examples of general laws resulting in indirect discrimination:

Many countries ban the carrying of knives in public places. This has no effect on religious and belief groups, with the exception of Sikhs. Sikh men are required to wear a Kirpan, a ceremonial knife, under their shirt. So the law limits the ability of Sikh men to fulfil their religious obligations.

In some countries planning regulations require new buildings to be approved by the owners of neighbouring properties. But neighbours can be prejudiced, so traditional groups find it easier to get planning permission than smaller, non-traditional groups.

Policies and practices can also create problems. If a university always holds entrance exams on Saturdays, then Adventists and observant Jews are disadvantaged. Often workers from minority religious groups are required to take holiday in connection with majority religious festivals instead of being allowed to take their leave in connection with their own festivals.

Direct discrimination is always banned. But the courts should treat indirect discrimination as a practical problem to be solved wherever reasonably possible. And often simple solutions can be found. In our imaginary town, the council could grant an exception allowing the church bells to ring on Sundays and religious festivals.

In Sweden, university entrance exams used to be held only on Saturdays. They're now held on a Friday too. And uniforms in work places can often be adapted to include variations like turbans.

But courts recognize that it's not always possible. Indirect discrimination can be lawful if it can be proved that there's a good enough reason – an objective justification for it.

For example, hospital infection control policies that ban staff from wearing jewelry disadvantage some groups. This is justified on the basis of public health.

Public health is of course a legitimate ground for limitations to freedom of religion or belief. But in relation to indirect discrimination, courts accept other grounds too. For example, a company might argue that it would undermine company interests to change its policies. A clothes shop that requires salespeople to wear clothes from its product range would probably not be required to employ a salesperson who refused to wear the company's products on religious grounds.

So while direct discrimination is banned, indirect discrimination is meant to be avoided as far as possible by finding reasonable ways to accommodate the needs of individuals and groups.

Once we've established that the limitation is not discriminatory, we need to decide if it's proportionate.

To what extent should the manifestation be limited? What should be banned, for whom, when and where?



There's a huge difference between banning particular kinds of religious clothing for particular professions in particular kinds of workplace and banning everyone from wearing religious clothing on the street!

So international courts look at proportionality. Courts in the United States apply an even stricter test – limitations have to be applied in the least restrictive way possible.

One final aspect that some courts take into consideration is the margin of appreciation. The world is diverse and human rights principles can be put into practice in many different ways, grounded in the national context.

Because of this some international courts apply a 'margin of appreciation' which basically means that national authorities understand the national context best and are best placed to formulate national law, so international courts grant them a degree of discretion.

The question of how wide the margin for state's discretion should be, and whether the courts give too wide a margin is an important subject for debate!

To sum up:

In thinking about whether a limitation is permissible, we use the following process

- i. Decide if a law limits the absolute right to have or change your religion or beliefs, or a manifestation.
- ii. Determine if the behaviour limited counts as a protected manifestation.
- iii. Check if the limitation has a legal basis
- iv. Determine to what extent the manifestation poses a threat to a legitimate ground for limitation, such as the rights and freedoms of others.
- v. Check if the limitation is directly or indirectly discriminatory.
- vi. And consider if the limitation is proportionate to the threat posed and will be effective in meeting it.

When we understand the arguments courts should use in order to comply with human rights, we can claim our rights more effectively. We can also contribute more fully to the public debate about whether the courts and the government are getting it right or whether they are in fact violating freedom of religion or belief.

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