

Freedom of Expression and Restrictions in the Interest of Defense, Public Safety, Public Order, Public Morality, or Public Health: Article 22(2)(a)- It's Application from a Prosecutorial Perspective Today, Public Perception, and Permissible Exceptions in a Democratic Society

A paper delivered by Public Prosecutor Naomi Evenor during the Symposium held on the theme “The Freedom of Expression”, at the Palais des Justice on the 17th of June 2024 on the occasion of the Day of the Constitution.

Think of: Charlie Hebdo's publication of Prophet Muhammad cartoons, the release of the Pentagon Papers, and responses to COVID-19 misinformation— in all of these example questions arose about the limits of free speech versus potential harms or societal benefits. Including whether expressions crossed into hate speech or endangered national security, and whether restrictions on expression were justified to protect public safety or unduly restricted civil liberties.

Restrictions serve vital roles across various sectors to ensure the smooth functioning and safety of society. In defense, these restrictions safeguard national security by censoring sensitive information that could undermine military strategies or national defense plans. For public safety, they prevent the dissemination of information that could incite violence or endanger individuals. To maintain public order, these measures curb actions that might trigger civil disorder or unrest. Public morality is upheld by restricting content that violates societal standards of decency. Finally, public health is protected by preventing the spread of

harmful or misleading information, ensuring the well-being of the population. These multifaceted restrictions collectively contribute to a secure and orderly society.

Recently Cabinet has approved for amendments to the Penal Code to include hate crime as an offence. The existent Cybercrimes Act addresses digital crimes such as cyberbullying, harassment, or spreading harmful misinformation, with specific provisions even for single messages intended to cause harassment.

In *Sullivan v. Attorney General and the Government of Seychelles*- In its decision dated July 31, 2013, the Constitutional Court of Seychelles stated that although Article 22 of the Charter of Fundamental Rights and Freedoms of the Constitution guarantees the right to freedom of expression, that right is not absolute and is subject to restrictions as prescribed by law and necessary in a democratic society for protecting the reputation, rights, and freedoms of persons.

The Court emphasized key tests:

- Test for a prescribed law: The law should be certain, clear, precise, and framed so its legal implications are foreseeable.
- Test of ‘necessary in a democratic society’: The concept of democracy is dynamic, guided by national and international norms, and requires careful consideration of international instruments and opinions.

In Mauritian Case Law *Ahnee v DPP*, it was established that for a criminal law to pass the test of constitutionality, it must allow the ordinary citizen to determine what constitutes an offence and what acts will render them liable to prosecution. This is evaluated against the requirements of the prosecutors' code, assessing whether prosecuting is in the public interest and whether sufficient evidence exists to prove the offence

Prosecutorial Perspective From a prosecutorial standpoint, the task is immense. Prosecutors must apply the law in ways that protect society without unjustly infringing on individual rights. They must prove that any restriction is not only legal but also necessary and proportionate to the threat posed. For instance, during the COVID-19 pandemic, prosecutors had to enforce public health orders to prevent the spread of the virus, a clear case of public health taking precedence to save lives. The challenge lies in ensuring these actions do not set dangerous precedents. The principles of legality, necessity, and proportionality must be adhered to, ensuring that freedom of expression is curtailed only to the extent absolutely necessary.

- Other Commonwealth Countries such as The Indian Supreme Court emphasizes a direct and imminent connection between speech and the threat to public order. Nigerian courts uphold restrictions to maintain public safety, balancing individual rights and public security. The constitutions of Zambia allow for restrictions on freedom of expression to maintain public safety, order, and morality, provided these restrictions are reasonably justifiable in a democratic society.

- Our Article 22 is backed up by the European Convention on Human Rights (ECHR): specifically Article 10 which stipulates that freedom of expression can be limited for national security, public safety, prevention of disorder or crime, protection of health or morals, and protection of the reputation or rights of others. The European Court of Human Rights employs a proportionality test to ensure restrictions are necessary and appropriate.

During crises like national security threats or pandemics, there is often greater public support for limitations on freedom of expression. However, this support can erode if restrictions are perceived as overreach or used to silence dissent. Trust in the system is paramount, with transparent, consistent application of the law fostering public confidence.

Freedom of expression is essential for a functioning democracy, enabling citizens to participate in the political process, express their opinions, and hold the government accountable. It fosters the exchange of diverse ideas, leading to societal progress. It promotes innovation and creativity by allowing individuals to share new ideas and perspectives. It also contributes to social stability by providing a legal outlet for grievances and dissent, reducing the likelihood of unrest.

Balancing freedom of expression with public safety, order, morality, and health is a complex and ongoing challenge, especially during crises such as public health emergencies or national security threats. Legal systems worldwide have to ensure that any restrictions are justified, necessary, and proportionate, maintaining public trust and engagement to uphold the legitimacy of these measures.

Protecting freedom of expression is also healthy for upholding other rights, such as freedom of thought and assembly, as demonstrated in *Seychelles National Party Ors v. Government of Seychelles Anor, Dhanjee v. Michel Anor* (CS 3 of 2014) 2015 SCCC 2 (6 July 2015), where sections of the Public Order Act were found inconsistent with Article 22 of the Constitution and subsequently repealed.

Throughout history, freedom of expression has been essential to democracy, from ancient Athens' to Enlightenment thinkers like Milton and Locke. The U.S. and French revolutions enshrined free speech, and post-WWII instruments like the UDHR Universal Declaration of Human Rights and ICCPR International Covenant on Civil and Political Rights codified it globally. Balancing this right with public safety and order is complex, as seen in Snowden's leaks and Singapore's Protection from Online Falsehoods and Manipulation Act (POFMA). Legal frameworks must ensure restrictions are justified and proportionate, maintaining public trust and transparency.

Abuse of this right, especially now online, must be regulated to protect societal standards, as highlighted in *Seegum J v. The State of Mauritius*.

The balance between freedom of expression and its restrictions in the interest of public safety, order, morality, and health is a complex and dynamic area of law. Prosecutors, courts, and legislators must work together to ensure that restrictions are justified, necessary, and proportionate, while public perception and engagement play a crucial role in maintaining the legitimacy and acceptance of these measures in democratic societies.

As we conclude, let us acknowledge that the true strength of our democracy lies not merely in the rights we proclaim but in the rights we diligently protect. Freedom of expression stands as a cornerstone of our democratic values, yet its responsible exercise necessitates an acceptance of certain limitations in pursuit of the greater good. We must steadfastly commit to upholding this delicate balance, advocating for transparency, accountability, and justice. In doing so, we can ensure that our society remains both free and secure, a testament to the enduring power and resilience of our democratic principles.