

LAW ANALYSIS

REASONABLE RESTRICTIONS

Article 39 of the Bangladesh Constitution and Global Standards

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The issue of imposing limitations on freedom of expression has garnered the interest of scholars across the globe. The present discourse echoes back to the Constituent Assembly of Bangladesh (1972), wherein eminent personalities like Dr Kamal Hossain spoke at debates about the matter in question. Dr Hossain, citing examples from socialist and democratic states and the UN Charter, provided that no country can guarantee fundamental rights without incorporating reasonable restrictions defined by law. The issue of implementing limitations on the freedom of expression has been a topic of continuous discussion over time.

While the Constitution lacks a definitive textbook definition or clear delineation of the expression "reasonable restriction," it does establish in article 39(2) that restrictions can be legally imposed under various circumstances. These include safeguarding national security, fostering friendly relations with foreign states, maintaining public order, upholding standards of decency and morality, and addressing contempt of court, defamation, or incitement to commit an offence. In this context, it is worth emphasising that the freedoms of speech, expression and press provided in this provision are paramount not only for intellectual self-expression and social interaction among the citizens but also for preserving the spirit of unity by promoting democratic and secular values to boost national productivity.

The ICCPR, a well-known international human rights treaty, provides useful perspectives when comparing article 39 with global standards. The ICCPR also allows for restrictions to protect national security, public order, or the rights and reputation of others. Concerning a limitation on the right to freedom of expression under article 19(3) of the ICCPR, a three-part test is used to assess whether such a limitation is justified: (i) the limitation must be provided for in law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose.

Although there is a parallel between



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article 39 and the ICCPR in recognising the need for reasonable restrictions, the scope and interpretation of these restrictions differ. The Human Rights Committee of the UN, which monitors the implementation of the ICCPR, employs a three-step test to prevent the occurrence of arbitrariness in General Comment No. 34. According to the Comment, the general approach to impose reasonable restriction must be based on clear and accessible law, must pursue legitimate purpose, and the restriction must be necessary to achieve the intended purpose and be proportionate to the specific goal pursued. It is noteworthy that this test is not explicitly incorporated within our Constitution.

Other than that, article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), articles 12 and 13 of the Convention on the Rights of

the Child (CRC), and article 21 of the Convention on the Rights of Persons with Disabilities (CRPD) also protect the right to freedom of expression. While international instruments do reference the freedom of expression, there is no explicit mention of a specific test regarding reasonable restrictions akin to the ICCPR.

The American Constitution is known for its robust protection of freedom of expression, including hate speech while imposing strict limitations on government interference. However, as established in *Brandenburg v Ohio* (1969), it permits speech restrictions that incite imminent lawless action. Some scholars argue that Bangladesh, a democratic country like the US, should avoid imposing any limitations to safeguard freedom of expression. However, reports from the US sources highlight that unregulated freedom of expression has been associated with

increased hate crimes. Specifically, the spread of hate speech resulted in an alarming 11.6% increase in hate crimes, with a bias against individuals based on race, ethnicity, sexual orientation, and religion.

Europe offers another global standard for freedom of expression. The European Convention on Human Rights (ECHR) takes a holistic approach to freedom of expression, unlike the US. The ECHR's article 10(2) restricts this right under the three-step test. The test also evaluates whether the restriction is necessary and proportionate to achieve the legitimate goal. In cases such as *Sunday Times v The United Kingdom* (1979) and *Groppera Radio AG and Others v Switzerland* (1990), the court has successfully struck a balance between safeguarding freedom of expression and maintaining other crucial societal interests. In addition, it is noteworthy that European courts

have established a framework on the margin of appreciation for member states, which holds significance in safeguarding the freedom of expression.

In case *30/1992 (V 26) AB of the Constitutional Court of Hungary*, it was stated that freedom of expression is a mother of several freedoms. Hence, the protection of freedom of expression is necessary. To conclude, the commitment to safeguarding freedom of expression is reflected in article 39 of the Bangladesh Constitution. However, scope exists to improve the formulation and implementation of restrictions. From international legal instruments such as the ICCPR and the European context, Bangladesh can borrow the three-step test to enhance clarity and precision, mitigating the risk of abuse and arbitrary enforcement.

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RIGHTS WATCH

The state of press freedom: A comparison between regional and international best practices

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The fundamental right of journalists and media organisations to operate independently without interference, censorship, or undue influence from the government, political entities, or other external forces is referred to as press freedom. It includes the freedom of expression as well as the right to access, gather, and disseminate information without hindrance or fear of retaliation.

Press freedom is necessary for a democracy to function and flourish because it acts as a check on power, promotes transparency and accountability, and allows citizens to make informed decisions. It enables journalists to investigate and report on public-interest issues, expose corruption, hold governments and public officials accountable, and provide a platform for a diverse range of voices and opinions.

Organisations such as UNESCO, Reporters without Borders (RSF), the Committee to Protect Journalists (CPJ) and others advocate for and monitor press freedom around the world. These organisations develop frameworks and policies to promote and protect press freedom. The Universal Declaration of Human Rights (UDHR) of 1948 includes freedoms of expression and the press as fundamental rights.

While best practices for press freedom vary by region, international standards, legal frameworks, and the work of advocacy organisations all play an important role in shaping and promoting press freedom around the world. Governments, civil society, and media organisations must collaborate to protect and strengthen press freedom in their respective regions and beyond.

While the concept of press freedom is universally valued, the specific practices and regulations surrounding it can vary across regions and countries. Here, we have compared regional and international best practices on press freedom.

To begin with, Europe has a strong tradition of press freedom. European countries consistently rank high in global press freedom indexes. The region's laws



ILLUSTRATION: BIPLOB CHAKROBORTY

and institutions protect journalists' rights and independence. Freedom of expression and press are guaranteed by the European Convention on Human Rights, which is enforced by the European Court of Human Rights. Transparency, access to information, and journalist source protection are also laws in many European countries.

In North America, particularly in the United States and Canada, press freedom is protected by constitutional provisions and legislation. The United States Constitution's First Amendment guarantees press freedom by prohibiting the government from interfering with information distribution. The Canadian Charter of Rights and Freedoms guarantees freedom of expression and the press. However, concerns about the region's press freedom have been raised by issues such as declining media trust, corporate ownership, and government surveillance.

Although press freedom in Latin America has improved significantly in recent years, challenges remain. Some countries have enacted legislation to protect journalists' rights and ensure access to information. However, in some countries, violence against journalists, impunity for crimes against the press,

and government control or influence over media outlets are still issues. When compared to other countries in the region, Costa Rica and Uruguay have stronger press freedom environments.

Press freedom in Africa is a mixed picture. Some countries, such as Namibia, Ghana, and South Africa, have relatively robust press freedom environments, with legal protections and independent media. However, other countries face challenges like government control, censorship, and violence against journalists. Lack of access to information and legal harassment are also prevalent in some regions, limiting journalists' ability to operate freely.

Asia's press freedom landscape is diverse, with notable variations across different countries. Countries like Japan and South Korea have strong traditions of press freedom, with independent media and legal protections. However, in countries like China and North Korea, press freedom is heavily restricted, and media outlets are often controlled by the State. Journalists face censorship, surveillance, and legal consequences for reporting on sensitive topics in India, Pakistan and Bangladesh. Other Asian countries fall somewhere in between, with varying degrees of press freedom protection.

When comparing Bangladesh's press freedom with other countries, it is important to note that press freedom rankings can vary depending on the source and methodology used. One widely recognised index that measures press freedom is the World Press Freedom Index published by Reporters Without Borders (RSF).

In terms of press freedom, Bangladesh has faced challenges. Journalists and media outlets in the country have endured assault, physical attacks, and legal constraints. Bangladesh was ranked 163rd out of 180 countries in RSF's 2023 World Press Freedom Index, a rise from its 2022 ranking of 162nd. The report expressed concern about the use of repressive laws to limit media freedom, such as the Digital Security Act, which has been criticised for suppressing free speech.

A number of incidents have been taking

place in Bangladesh, which are frequently used as comparison examples:

Norway consistently ranks highly in press freedom indexes. It is known for its robust legal protections and strong support for journalistic freedom.

Sweden also ranks among the countries with the highest press freedom. The country's legal framework, coupled with a tradition of open and transparent governance, contributes to a favorable environment for journalists.

United States has a strong tradition of press freedom, protected by the First Amendment of its Constitution. However, challenges such as attacks on journalists, polarisation, and declining trust in media have raised concerns in recent years.

Germany is recognised for its press freedom. The country has a diverse and vibrant media landscape, and legal protections safeguard journalists' independence.

China often ranks low in press freedom indexes due to strict government control over media and extensive censorship. The government tightly regulates and monitors media organisations, resulting in limited freedom of expression and information.

One of the most important steps towards freedom of press is to pass legislation that protects journalists and press freedom. Many states have "shield laws," which give journalists an absolute or qualified right to refuse to reveal their sources. A shield law protects both the journalist and their sources. Because there is no federal shield law in the United States, many activists are working toward this goal. In Bangladesh also, we should work for this kind of "shield laws" to protect press freedom. Individual citizens can help protect press freedom by staying informed about threats to press freedom and efforts to support free media. Supporting local newspapers is another way to stay informed and ensure that the issues that are most important to citizens are covered. For the sake of democracy, press freedom is a right that every entity in society must care about and commit to protecting.

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place in last few years in Bangladesh. According to International Press Institute (IPI)'s monitoring data from October 2022 to March 2023, journalists in Bangladesh continue to work in a hostile and dangerous environment, frequently facing physical attacks and threats, as well as judicial and legal harassment. During this six-month duration, IPI recorded at least 42 press freedom threats or violations, half of which were reported cases of physical, verbal, or online attacks on journalists.

If comparing Bangladesh to other countries, it is critical to consider a diverse range of nations from various regions and political contexts. The following countries