

How to determine whether a FORB limitation is legitimate



ANALYSE

A TOOL FOR ANALYSIS

The right to have, adopt or change a religion or belief may never be limited.

This is known as 'forum internum' or the internal dimension of freedom of religion or belief and concerns our thoughts, beliefs and identities. Any limitations to these rights are violations of the right.

When can manifestations of the right to freedom of religion or belief (FORB) be limited?

- When they are prescribed by law.
- Only when necessary to protect the one of the following protected grounds: public safety, public order, public health or public morals or the rights or freedoms of others.
- Limitations must be proportionate and non-discriminatory.
- National security is not a legitimate ground for limiting freedom of religion or belief.
- FORB is a non-derogable right. This means that the right cannot be 'suspended' in a state of emergency. In a state of emergency, the above criteria must be applied as usual. However, the limitations deemed necessary may be different during an emergency – for example, limitations related to public health may be different during a public health emergency such as a pandemic.

Are limitations legitimate?

In thinking about whether a limitation is legitimate we can use the following process:

1. **Does the limitation target the absolute right to have or change your religion or beliefs?** Or does it target a manifestation/practice of the right? Limitations of the right to have or change religion or beliefs are not permitted.
2. **If the limitation targets a behaviour – is it in fact a behaviour that is intimately linked to a religion or a belief?** In deciding what counts as a protected religious manifestation, courts increasingly look at the beliefs of the person concerned instead of institutional doctrines, and reason that if that person considers a practice to be a religious manifestation, then for them it is.
3. **Does the limitation have a legal basis?** This could be in written law, case law or customary law. If not, it is not legitimate.
4. **Is the limitation directly linked to the protection of a legitimate ground (public safety, order, health or morals and the rights and freedom of others)?**

5. **Is the limitation necessary?** Is the threat posed by the manifestation to the legitimate ground protected (e.g., public health) serious enough to motivate the limitation? Is the limitation necessary, as opposed to desirable from a political or majority perspective.
6. **Does the limitation cause direct or indirect discrimination?** If a law explicitly applies to some people and not others, this is 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 indirect discrimination and should be avoided as far as possible by finding reasonable ways to accommodate the needs of individuals and groups.
7. **Is the limitation proportionate?** Does the seriousness/extent of the limitation stand in balance with the threat posed by the manifestation being limited? Will the limitation be effective in protecting that legitimate ground? Is the limitation the least intrusive option available to achieve the desired result of protecting the legitimate ground concerned?

Advanced level: Balancing rights or maximising rights?

Although human rights are mutually reinforcing, there are situations where rights come into conflict with one another. For example, our right to national security and our right to privacy are often in tension in relation to the surveillance activities of the state.

Sometimes, when discussing 'clashes' of rights the terminology of 'balancing' rights is used. This implies determining which right is more important in a given situation and giving greater weight to that right in any judgement. This approach can, however, become problematic if it results in the other right being ignored or restricted to a greater extent than necessary.

It may be more helpful to adopt a 'rights maximisation' approach that seeks to ensure that the importance of all rights involved is recognised and that all these rights are respected to the maximum extent possible. This approach places a focus on the 'necessity' and 'proportionality' criteria.