Limitations and Restrictions of Rights

I. Introduction

[1] The scope and quality of human rights protection does not only depend on the nature, terminology and reach of rights, but perhaps even more on the extent to which these rights are subject to limitations and restrictions. Limitations and restrictions allow interfering with guaranteed human rights. Clauses permitting the limitation or restriction of human rights are present in numerous international and regional human rights → treaties as well as national constitutions. Thus, only when assessing the scope of protection and the limitations as a whole, is it possible to ascertain the extent to which freedom is guaranteed. Any pertinent discussion of limitations and restrictions of rights has at least two dimensions: a politico-philosophical one and a doctrinal one.

[2] The politico-philosophical dimension essentially encompasses the permissibility of limitations and restrictions. The establishment and manifestation of limitations and restrictions of rights primarily is a matter of legal policy. In this regard, it is possible to classify rights as → absolute and relative rights as well as → negative and positive rights. While relative rights are subject to limitations and restrictions, absolute rights, at least in principle, are not. Limitations and restrictions largely apply to negative rights, which require the government to respect individual freedoms and to refrain from interfering therewith. Positive rights, which necessitate governmental action to either protect or to fulfil, are rather subject to balancing with governmental capacities and conflicting obligations but not normally to limitations and restrictions.

[3] In addition, limiting and restricting rights poses doctrinal and constructional issues. Doctrine addresses the ways and means to limit and restrict such rights, and construction refers to whether the focus is on the right as such or on the limitations and restrictions. As to the latter, a broadly framed scope of a right may easily be faced with far-reaching limitations and restrictions, whereas a narrow scope leaves less room to limit and restrict. While guaranteeing rights, the state must justify why those are interfered with. National human rights law embraces the interests of the individual and the public interest at the same level of law-making as the national legislator both safeguards and limits these rights. International human rights law typically focusses on the individual interest

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(the right guaranteed) and allows the national (not the international) legislator to specify the public interest that serves to justify limitations and restrictions. Consequently, social rights are more easily organized on a domestic level with their progressive realization being dependent upon national resources, national legislation and pertinent administrative law.

[4] Special problems arise in respect of so-called 'claw-back clauses', which are particularly prominent in the African human rights system. Such clauses condition the enjoyment of rights on the fulfilment of certain criteria. We believe that 'claw-back clauses' must be distinguished from limitations and restrictions. They tend to mix private and public interests and blur the important distinction between the scope of protection of a human right and the permissibility of limitations and restrictions.

[5] The consideration of and the contrast between individual and → collective rights is of special importance. Group rights operate on a different conceptual level than individual rights. Their relationship to public interests and the rights of other groups, similar to the case of social rights, is a matter of general balancing and less of constructing limitations and restrictions.

II. Limitation clauses

[6] International and regional human rights treaties as well as national constitutions choose different approaches to regulate limitations and restrictions on human rights. Limitation clauses can be attached to each and every human rights guarantee separately (rights-specific limitation clauses), or they can take the form of a single clause applying to all the rights included in the treaty comprehensively (general limitation clause).

[7] General limitation clauses are the exception rather than the rule. One of the very few examples at the international level, not even included in a treaty but enshrined in a General Assembly Resolution, is Article 29 of the → Universal Declaration on Human Rights. Paragraph 2 of Article 29 UDHR reads as follows:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[8] A parallel example can be found in Article 52 of the → Charter of Fundamental Rights of the European Union, which is not a treaty in itself but nevertheless binding. Its paragraph 1 provides:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

[9] General limitation clauses are much more common at the level of national law than in international treaty law.

[10] If general clauses related to limitations are included in international human rights treaties, these provisions ensure that limitations, even if arising from rights-specific limitation clauses, do not touch the essence of a right as such. Apart from the above-mentioned examples, Article 4 of the → International Covenant on Economic Social and Cultural Rights (ICESCR) is illustrative of this approach:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

[11] At the regional level, Article 18 of the → European Convention on Human Rights and Fundamental Freedoms (ECHR) protects the essence of rights by stating that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'. Similarly, Article 30 of the → American Convention on Human Rights (ACHR) provides that '[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established'. These provisions prevent the national legislator and governments from adding restrictions and limitations beyond what the respective treaties allow for. They bar governments from making human rights guarantees dead letter by depriving them from their core.

[12] Much more common than general limitation clauses are rights-specific clauses. They are

normally attached to the provisions guaranteeing the respective human right. In the → International Covenant for Civil and Political Rights (ICCPR) limitations and restrictions are incorporated in Articles 12, 18, 19, 21 and 22. Article 12(3) ICCPR, for example, reads:

> The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

[13] The essential elements of these limitation clauses (requirement of a legitimate objective, principle of legality, principle of proportionality) are further specified by the authoritative interpretation of the Human Rights Committee in its General Comments No 10 (1983), No 22 (1993) and No 27 (1999) (*GC No 10: Opinion and Expression* [1983]; *GC No 22: Thought, Conscience or Religion* [1993]; *GC No 27: Freedom of Movement* [1999]). Prominent examples can be taken from the ICCPR, such as Articles 18, 19, 21 and 22. Similar limitation clauses are included in Articles 8, 9, 10 and 11 ECHR. Article 8(2) ECHR on interference in the right to respect for private life and family, for example, reads:

> There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.

[14] The → African Charter on Human and Peoples' Rights (AfCHPR) does not include a general limitation clause, instead the Charter encompasses specific limitation clauses for certain rights, for example Article 11 of the AfCHPR on the → freedom of assembly ('The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others'). As has been discussed in paragraph 4, these clauses are often labelled 'claw-back' clauses, in particular, if they condition the enjoyment of rights. The example of Article 11 AfCHPR, however, rather than conditioning freedom of assembly, provides a basis for limitations upon this right; hence, it is best considered as a limitations clause, not a 'claw-back clause'. The same applies to the → Arab Charter on Human Rights with certain specific limitation clauses.

[15] A different approach can be observed between limitations and restrictions of civil and political as well as those of economic, social and cultural rights, which is especially prevalent in the two separate international covenants (→ Generations of Human Rights). This distinction may generally be seen in Article 2 of the ICESCR, which obliges states parties only to undertake steps to guarantee the specified rights to the maximum of its available resources by all appropriate means (→ Core Obligations and Progressive Realization). In these instances, ascertaining an interference (or the specific obligations of the state) is significantly more difficult, and in cases where states have not failed to comply with their duty of progressive realization, the case does not raise questions of (permissible) limitations. This illustrates the relativity of positive rights, in particular, when the duty to fulfil is at issue. Most rights are relative, while only few human rights include an absolute guarantee.

[16] An advantage of a general limitation clause applicable to all (or most) rights is that a coherent, equal approach for restricting human rights can be developed with the same conditions being necessary for restricting rights. However, this can also be seen as too rigid and hardly adjustable. The benefit of specific limitation clauses forming part of the various provisions on human rights is that it can specifically be adapted and applied for the respective right. The drawback consists of a possible lack of a coherent interpretation of preconditions for limitations due to their variety and uncertainty if restrictions are possible for rights without a specific limitation clause.

III. The substance of limitation clauses

[17] The substance of limitation clauses is decisive when it comes to precisely assessing the scope of freedoms guaranteed. A proper assessment of the substance of limitations clauses is essential when human rights law moves from law on the books to law in action. Only if the conditions of limitations are precisely phrased, if the bodies entitled to interfere with human rights guarantees can be clearly identified, and if their decisions can be independently reviewed (→ Effective Remedy, Right to), the respective human rights treaty can be considered to effectively protect the rights included therein. The entities competent to limit or restrict rights in the respective provision are normally stipulated as 'public authority' or 'the state'. This basically means that the state plays a dual role with

regard to human rights: it protects human rights and it limits human rights. This mirrors the Janus-faced nature of the state in respect of human rights. While limitation clauses differ in substance, some common feature can be identified. They all start from the question whether an interference is permissible at all. Limitation clauses typically approach this question by the requirement of a legitimate objective (Section III.2.). While sometimes the existence of a generally termed public interest is considered to be legitimate, other clauses lay down a list of specific objectives, thereby reducing the scope of interference and at the same time being rather tailor-made. In addition, nearly all limitation clauses today lay down the conditions of legality (Section III.1.) and proportionality (Section III.3.). The exercise of limitation or restriction of rights by states is frequently reviewed by courts or quasi-judicial bodies, however, typically on the basis of individual or collective complaints, in order to determine whether a violation of human rights guarantees has occurred. By doing so, human rights bodies and courts interpret and substantiate limitation and restriction clauses and provisions.

1. Principle of legality

[18] Limitation clauses generally include the condition of legality. The language typically used is 'prescribed by law' or 'in accordance with the law'. This requirement is primarily rooted in the principle of the → rule of law. However, it serves a dual purpose: on the one hand, it aims at foreseeability and clarity for individuals who should be in a position to assess whether or not the human rights they rely upon can be limited or restricted; on the other hand, however, it ensures that any limitation or restriction of human rights requires the legislature to be involved (not leaving this exclusively to the executive branch of government). Reference to the law, it may be argued, thus only preserves the rule of law but also a degree of democratic legitimacy whenever governments interfere with human rights guarantees. Sometimes, the link to democratic government can also be taken from the principle of proportionality (if this is phrased along the lines 'necessary in a democratic society'). As to foreseeability and clarity, one might add transparency: human rights limitations are not permissible in a secretive way. Individuals and the general public are a necessary audience of any limitation. Legal certainty, however, goes beyond accessibility by including transparency: legislation limiting and restricting human rights must be sufficiently detailed and cannot simply be based upon abstract and general terms. As to the form of legislation, and given different legal systems and traditions across the globe, most human rights bodies agree that the principle of legality does necessarily require parliamentary legislation. The → European Court of Human Rights has, in respect of common law countries, accepted unwritten law as meeting the legality requirement:

> The Court observes that the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation.
>
> (*Sunday Times v UK* [1979] para 47)

[19] Legality requirements are not interpreted uniformly by all human rights bodies. Some have developed stricter requirements for fulfilling the condition of legality. This applies not only to the question of written or unwritten law but also to the question of parliamentary or executive law-making.

2. The requirement of a legitimate objective

[20] Limitation clauses, by requiring a legitimate objective whenever human rights are restricted, open up space for a legitimacy debate at the national level: what is a permissible objective for the government to pursue when this involves the limitation of individual human rights? In the absence of such an objective, the limitation is inadmissible. Generally speaking, most of these objectives must be related to common goods, but they also include the protection of the rights of others. While some limitation clauses are fairly general, most include a list of specific objectives. Among the general objectives, public welfare is a typical one. Article 1 of the First Protocol to the ECHR only refers to the notion of 'public interest':

> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[21] When it comes to more specific objectives, public order, public health or morals are listed, as well as the rights and freedoms of others. Article 13(2) of the ACHR adds 'national security' and 'the rights of others' to this list when indicating which purposes may be pursued when limiting freedom of expression: 'a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals'.

[22] There are, however, also very detailed lists. An example to this end is Article 10(2) ECHR:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[23] Only in exceptional cases, limitation clauses do not specify certain objectives but rather exclude some objectives or particular ways of pursuing them. However, such provisions sometimes specifically point out that the choice of objectives pursued may not be arbitrary. Thus, Article 6 AfCHPR states: 'No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

3. Principle of proportionality

[24] Most limitation clauses ensure that limiting and restricting rights has to take place in accordance with the principle of proportionality. Even where this principle has not been mentioned expressly, it has been developed and applied by courts and human rights bodies. The principle of proportionality has, occasionally, been narrowed down to the notion of necessity, requiring limitations and restrictions to effectively reach the objective and not go beyond that level. The term 'arbitrary' also is referred to in this context, and may – beyond reducing the scope of legitimate objectives (Section III.2.) – also be read as referring to a test of proportionality. Among the most common examples are the limitation clauses included in Articles 8 to 11 ECHR, all of them referring to limitations 'necessary in a democratic society'. It is noteworthy that some human rights bodies have developed a rather detailed approach to the principle of proportionality. Others take a more general approach. The methodology applied for deciding on proportionality varies between human rights systems. All of them can be considered to be procedures weighing all relevant interests and making contextual assessments. It is, however, important to note that a differentiated approach does not necessarily lead to a higher level of protection of human rights. The European Court of Human Rights has included in the proportionality test three sub-tests: the test of suitability or effectiveness, the least-intrusive-means-test and the means-ends test, which can also be labelled the necessity test. Similar elements can be identified in the case-law of the Human Rights Committee. In the case of *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia* (2003), the Committee applied the proportionality test as follows:

> [T]he State Party has not, in the Committee's view, demonstrated that their [the applicant family's] detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State Party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State Party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for the length of time described above, without appropriate justification, was arbitrary and contrary to Article 9, paragraph 1, of the Covenant.
> (*Bakhtiyari v Australia* [2003] para 9.3)

IV. Alternative approaches

1. Balancing

[25] An alternative approach to limits and restrictions is the balancing of competing rights. Balancing of rights in the sense of a formal approach without substantive and differentiated considerations is especially prevalent in the jurisprudence by the US Supreme Court regarding constitutional rights. The approach in the US is one of a formal hierarchy between the different constitutional rights. Balancing is also often used in other common law countries. In civil law countries, for example in Germany, there is no specific formal and hierarchical process of balancing, but most rights are thoroughly balanced and harmonized according to each individual case in the context of ascertaining whether limitations are proportional.

2. Emergency clauses and derogations

[26] Limitation clauses need to be differentiated from emergency clauses. As opposed to limitations to human rights, emergency clauses can only be applied in certain exceptional circumstances to achieve certain essential collective aims (→ Emergency, State of). They allow for a temporary encroachment of rights in extraordinary situations, on a larger scale as regular limitations and

restrictions of rights. Thus, they pose the danger for an abuse of power if they are applied extensively. Derogations are prevalent in most international and regional human rights treaties. For example, Article 4(1) ICCPR provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

[27] Emergency clauses often encompass protection of non-derogable rights varying in range, see for example Article 4(2) ICCPR ('No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision'). Non-derogable rights must be respected fully even in emergency situations, for example the → prohibition of torture. For the application of an emergency clause most often a declaration of a state of emergency or derogation of certain derogable rights is necessary, as also required by Article 4(3) ICCPR ('Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant [. . .] of the provisions from which it has derogated and of the reasons by which it was actuated. [. . .]'). The classification of non-derogable rights is also important in the process of limiting and restricting norms as the significance of certain rights becomes apparent. Other examples for emergency provisions and derogations are included in Article 15 ECHR on derogation in time of emergency and in Article 27 ACHR on the suspension of guarantees.

[28] Unlike the ICCPR, the ICESCR and the AfCHPR do not contain a derogation clause. Nevertheless, there is a certain tendency within states parties to interpret some social rights as derogable, among others, the right to strike, rights related to → trade unions and the right to work in exceptional situations. This slightly contrasts with the notion of progressive realization of the rights included in the ICESCR, with the general limitations clause included in Article 4 ICESCR, and raises the question whether other economic, social and cultural rights should be considered to be non-degorable, which effectively may only be plausible in respect of minimum core obligations, including the right to be free from hunger.

V. Conclusion

[29] The approach to limitations and restrictions of rights is essential as it stipulates a need for justification in the case of interference with human rights by the state within the scope of a human rights instrument. Limitations of rights are and should only be permissible if they are based on rational arguments. However, limitations seem to be necessary to allow for a peaceful coexistence within a society, and when it comes to conflicting individual and collective interests and a concurrent exercise of the same and different human rights. It is important that limitations and restrictions ensure a rational discourse about human rights and therefore enable appropriate solutions in different circumstances. Judicial mechanisms for review in order to guarantee compliance with limits on restrictions on human rights guarantees are necessary and of utmost importance. Otherwise, human rights guarantees might be eroded and be rendered especially vulnerable in cases of abuse of power and arbitrariness.

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