

# LAWFUL RESTRICTIONS ON CIVIL AND POLITICAL RIGHTS<sup>1</sup>

## EXECUTIVE SUMMARY

In view of a history of human rights abuses by authoritarian regimes, many constitution-makers in the Arab world are seeking to enshrine ironclad human right guarantees into the new constitutions. When considering the protection of human rights, it is important to also discuss their limitations. This may seem counter-intuitive in a context of widespread human rights abuses by the recent authoritarian regimes, but only few rights have no limits. Therefore a precise, rights-friendly system of limitations is preferable to an absence of constitutional text on such limitations, which would create a legal grey zone where rights protection could erode once more.

International human-rights law includes a number of key elements that ensure that limitations of rights do not undermine these rights altogether.

These key elements are:

- Reasons for limitations shall be clearly defined;
- Limitations generally must have a legal basis;
- Limitations must be proportional to the objective they pursue and they shall not affect the essence of a right;
- There should be an effective legal remedy against potential human-rights violations.

A constitution should adhere to these international standards in order to create an effective human rights regime.

## 1. INTRODUCTION

New constitutions for Arab countries present an opportunity to anchor human-rights protections in a legal framework, the first step toward securing fundamental freedoms. New constitutions in Egypt, Libya and Tunisia must overcome the legacy of their authoritarian predecessors, which allowed the

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government to undermine human-rights protections at will. In many instances the exception became the rule, for example by maintaining ‘states of emergency’ over many decades.

Constitutions are an effective way to protect human rights. They outline a set of rights, the essence of which cannot be violated by non-constitutional law or executive decree. Not protecting rights in constitutions, or leaving rights protection up to non-constitutional law, can open the door to the violations of personal liberty, free speech, and other political rights committed by past dictatorships.

The constitutions of past authoritarian regimes in the region included human-rights protections, but they suffered from two flaws: they were either not respected, or they included far-reaching limitation clauses that rendered them meaningless.

Against this background of abuse, many policymakers feel that a constitutional bill of rights should not contain any limitations. After all, human rights are meant to be absolute, and no public authority should be able to violate them. There is a sentiment that any qualifications, like “as determined by law,” should be eliminated.

But it might be a mistake to not define the circumstances under which certain rights can be curtailed. International treaties on democracy and human rights recognize the need to limit certain rights protections. The concern is practical. Virtually all political and civil rights must be limited in some way to ensure social order and justice. In the words of U.S. Supreme Court justice Oliver Wendell Holmes, “The right to swing my fist ends where the other man's nose begins.”<sup>2</sup>

Not stating where and how the limits must be drawn can leave the entire rights bill vulnerable to abuse by executive authority. This paper explores international standards and comparative examples of legal limits on political rights protections, including recommendations for constitution-makers.

## 2. RIGHTS LIMITATIONS IN INTERNATIONAL LAW

Virtually all political rights have their limits. The freedom of assembly usually does not extend to citizens demonstrating on a public highway or an airfield; the freedom of expression does not generally protect speech meant to incite violence; a criminal gang does not enjoy the freedom of association. The question therefore is not *whether* human rights can be limited but rather *how* and *to what degree*.

International human-rights law clearly accepts limits on political rights. Article 29 II of the Universal Declaration of Human Rights (UDHR) states<sup>3</sup>:

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.

Article 29 II works in tandem with Article 30, which states:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

These articles together recognize the need for laws to enact and specify the rights obligations laid out in the Declaration.

Article 5 of the International Covenant on Civil and Political Rights (ICCPR) includes a similar provision stating that the covenant may not be interpreted as implying for any state, group, or person to “perform any act aimed at the destruction” of any of the protected rights.

International human-rights law limits rights in two ways. Some documents include a *general limitation clause* — such as the above-mentioned Article 29 II of the UDHR — that applies to all rights protections in the document. These clauses make it easier for those who apply the norms — a legislature, the executive and judges — and to the public to grasp the limitation concept being used. On the other hand, they do not allow differentiation between rights.

Other international human rights instruments do not include a general clause, but rather have *specific limitation clauses* attached to specific articles. This is the solution of the ICCPR, which contains no general limitation clause that would apply to all rights equally.<sup>4</sup>

Some articles of the ICCPR do not include specific text on limitations. Article 25, for example, on political participation only states that there should be ‘no unreasonable’ restrictions. In these situations the UN Human Rights Committee has developed case law to explore the meaning of ‘unreasonable restrictions’.

<sup>2</sup> The Holmes’ quote could suggest that persons enjoy human rights in relation to other persons. Such an assumption is known as the horizontal effect of human rights. This paper only addressed the classical assumption of human rights, i.e. that they represent rights of individuals vis-à-vis the state.

<sup>3</sup> Many international lawyers consider that the Declaration, or some part of it, represents customary international law.

<sup>4</sup> Nevertheless, in practice the various formulations of limitations in the ICCPR have become less relevant. The UN’s Human Rights Committee tends to use these formulations interchangeably.

### 3. OBJECTIVES OF LIMITATION CLAUSES

Limits on the extent of political rights in constitutions and international law have several objectives. Fundamentally, they establish rights-based principles that bind decision-makers. Such clear principles show executives and legislatures the limits of their authority, the courts the bounds of their jurisdiction to rule on rights abuses, and the public what they can expect from the bill of rights. They signal a reality of democracy: that freedom does not mean that anyone can do anything.

Limitations to political rights in constitutional texts have three potential features. Limit clauses define:

- The *reasons* for which a human right can be limited (“the rights of others”, “public order”, etc.)
- “*Limit-limits*,” including absolute limitations (the essence of a human right should not be affected) and relative limitations (a measure should be proportionate to the aims pursued by it)
- *Procedural requirements*, namely the need for a legal basis for an administrative act that restricts a human right. Furthermore, there should be an effective remedy against a potential human rights violation, such as an appeal to an independent court.

The next three sections review these layers.

### 4. REASONS FOR LIMITATIONS

Human rights can be limited for a number of reasons. Before discussing these, it is important to highlight that the **content** of a human right must be clarified. An issue that may appear to be a limitation may not be covered by a right in the first place. For example, usually only citizens of a state have a right to vote in national elections (see Article 25); the fact that foreigners cannot vote is not a matter of a human-rights limitation. On the other hand, some countries do not allow military conscripts to vote. This is a matter of a limitation, because citizens have the principle right to vote.

As mentioned above, limitations for human rights also result from the need for a **systematic interpretation** of a human rights catalogue. Rights cannot be seen in isolation. For example, female genital mutilation is not protected by freedom of religion (of parents), because the human right to physical integrity and the rights of the child clearly outweigh religious freedom on this point.<sup>5</sup>

<sup>5</sup> See for example the article 5 b.) African Union Protocol to the Charter on Human and People’s Rights on the Rights of Women. Article 24(3) of the Convention of the Rights of the Child stipulates: States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. See also CEDAW Committee recommendation no.19 (1992).

Constitutions usually list reasons for limiting rights, as do international human-rights treaties. Some of these reasons include:

- **The rights of others.** These may include fundamental rights of other persons, it may also include rights which are not protected in fundamental rights catalogues. For example, private property is not always protected in fundamental rights, but it is generally accepted that private property restricts freedom of movement.
- **Public order.** Public order is an accepted reason to limit human rights in numerous ICCPR articles and it is found in many constitutions. On the one hand, public order seems to be an obvious limitation, referring to state’s role of preventing disorder and to safeguard the rule of law. This limitation justifies, for example, that not anybody is allowed at any time to hold a demonstration at an important intersection; in other words, public order considerations can limit the freedom of assembly. On the other hand, this ground for limitation is often abused and serves many authoritarian regimes with a justification to undermine human rights protections. It is important therefore that legislation and courts develop a detailed notion of legitimate public order restrictions and that this limitation is itself limited by the use of the proportionality principle (see below).
- **National security.** In international human-rights instruments, national security is an accepted reason to limit some human rights, for example freedom of movement (Article 12 ICCPR) and freedom of expression (Article 19 ICCPR).
- **Public health.** This reason for limitation is widespread. It can apply for example to situations where a state prohibits access to a water conservation area (freedom of movement).
- **Public morals.** The protection of public morals is a limitation that is recognised in relation to many human rights. It can apply for example to prohibit a demonstration in a mosque, a church or a cemetery. The extent of this limitation is often controversial in relation to freedom of expression, for example regarding blasphemy.

### 5. LEGAL BASIS AND EFFECTIVE REMEDY

When allowing for limitations, constitutions and international law often require that these restrictions **be based in law**. For example, Article 19 of the ICCPR states that the freedom of expression and information might be open to certain restrictions “provided by law”<sup>6</sup>; the Libyan constitution of 1951, as mentioned, contains similar provisions for virtually all of its rights protections.

<sup>6</sup> It was always understood that law in the sense of the ICCPR also includes “judge-made law” (precedent) in the case of common law countries.

Clauses like these are often seen as weakening the force of the rights protection: that non-constitutional law can abrogate or shape a constitutional right, rendering the constitution impotent against rights violations. These clauses, however, protect against arbitrary acts of the executive. Their meaning is that only the legislature – or judge-made law in common-law systems – can provide the basis for a human rights limitation.<sup>7</sup>

Thus the “prescribed by law” clause of Article 19 of the ICCPR prohibits “interference based solely on an administrative provision or a vague statutory authorization.”<sup>8</sup> It is important to stress, however, that the “prescribed by law” clause alone is no sufficient guarantee. A constitution should confine the lawmaker’s scope, as outlined in the next section

A further procedural guarantee is that an **effective remedy** should be available for anybody who alleges that his rights have been violated. Article 2 of the ICCPR notes:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Guaranteeing judicial recourse gives legal force to rights protections and can defend against state violations against the essence of a particular right.

## 6. PROPORTIONALITY, PROTECTING THE ESSENCE OF A RIGHT, AND NECESSITY IN A DEMOCRATIC SOCIETY

Limitations of human rights cannot be without limits themselves. Otherwise nothing may be left of a given human

right. Hence international human rights law has established the notion that the ‘**essence of a human right**’ may not be affected by limitations. This constitutes an absolute limitation. For example, if a government told opposition parties that they could not hold demonstrations in the city centre but that they could instead stage demonstrations in a stadium. Such a limitation affects the essence of the right to freedom of assembly because the purpose of demonstrations is to reach and engage the public in the streets, which is not possible in a stadium.

The legal principle of **proportionality** is also important in narrowing limitations. The principle of proportionality states that the government should not impose obligations on a citizen beyond the extent to which the obligations are necessary to attain the social objective embodied in the measure. The Organization for Security and Cooperation in Europe, in describing limits on restrictions on the freedom of assembly, writes:

“Any restrictions should closely relate to the particular concerns raised, and should be narrowly tailored to meet the specific aim(s) pursued by the authorities. The state must show that any restrictions promote a substantial interest that would not be served absent the restriction. The principle of proportionality thus requires that authorities not routinely impose restrictions that would fundamentally alter the character of an event, such as routing marches through outlying areas of a city.”<sup>9</sup>

Proportionality is expressed in different ways in international law. For example, Article 19 of ICCPR indicates that restrictions shall only be permissible if they are ‘necessary’ to achieve the objective of the limitation. Judges have often broken down the proportionality test into two components: whether it is *necessary* at all to achieve a legitimate objective (or if it could be achieved otherwise) and whether the restriction is *proportional* to the objective. The latter criteria tries to prevent that a ‘nut is cracked with a sledgehammer’.<sup>10</sup>

Another important principle is the **democratic necessity** of ICCPR protections on the right of assembly and association. These two rights have an essential democratic function in the process of forming and expressing political opinions, and limits to these rights must remain true to that function. ICCPR requires that restrictions against these rights must be necessary to maintaining a “democratic standard oriented along the basic democratic values of pluralism, tolerance, broadmindedness, and peoples’ sovereignty,” according to Manfred Nowak’s authoritative commentary on the ICCPR.<sup>11</sup> In other words, in order to restrict assembly or association, the

<sup>7</sup> This guarantee goes as far back as the English Magna Carta of 1215, which states in Article 39: „No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or **by the law of the land.**” (Emphasis added)

<sup>8</sup> Nowak, page 460, note 46.

<sup>9</sup> <http://www.osce.org/odihr/24523>

<sup>10</sup> The UN Human Rights Committee has explained its understanding of the protection of the essence of a right and the principle of proportionality in various General Comments. See for example General Comment No.29 (1999) on article 12 (freedom of movement), paragraphs 11-18: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)

<sup>11</sup> Nowak, 491, 505.

state must show that such a restriction is required to address a pressing social need. For example, the state can outlaw a supremacist group that seeks to systematically intimidate racial minorities as they prepare to vote. A restriction on the supremacist group is justified not only because it limits the rights of others, but also because it threatens the basic values of a pluralistic society.

## 7. LIMIT CLAUSES IN CONSTITUTIONS

Many legal systems around the world place lawful limits on political rights that are consistent with international obligations. These limits come in varieties.

South Africa's constitution provides a highly sophisticated human rights architecture and lays out human rights limitations in detail: Article 3 notes: "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." Thus the constitution contains both a general limitation and specific limitations.

Article 36 reads:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
  - a) the nature of the right;
  - b) the importance of the purpose of the limitation;
  - c) the nature and extent of the limitation;
  - d) the relation between the limitation and its purpose; and
  - e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The South African text thus includes explicitly all the guarantees against excessive limitations that have been highlighted in this paper.

The Swiss constitution also provides a general provision relating to human rights limitations (Article 36):

1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
3. Any restrictions on fundamental rights must be proportionate.

4. The essence of fundamental rights is sacrosanct."

The Swiss constitution requires a legal basis for restricting rights, but also grants the executive some authority to suspend rights in emergency situations. Most constitutions address this aspect in specific provisions on the state of emergency.

The German constitution takes a similar approach in Article 19:

1. Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
2. In no case may the essence of a basic right be affected.
3. The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.
4. Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.

The German constitution also protects the essence of a basic right through limit-limits and guarantees recourse for alleged rights violations in the courts.

The former Libyan constitution of 1951 opens the door to legislative restrictions on human rights but does not provide a limit to the extent to which the rights can be abrogated. The constitution appears to allow for laws to supersede virtually every protected right by a reference to the law, for example Article 19 (emphasis added): "Dwelling houses are inviolable; they shall not be entered or searched *except in cases and according to the manner prescribed by law.*" As outlined above, a reference to law can provide a guarantee against executive fiat, but, if there is no further language on restrictions, it can easily be misinterpreted as a blank-checke for legislators to void human rights of their content. In other words, the 'prescribed by law' clauses can turn into dangerous "claw-back clauses" that can result in the erosion of rights through non-constitutional law, if they are not complemented by additional guarantees as outlined in this Briefing Paper.

The method of human rights limitations in common-law countries is different as they rely on judicial precedent to determine the limits of fundamental freedoms. The Bill of Rights in the constitution of the United States, for example, contains no provisions for the limitation of political rights. The first article in the Bill of Rights states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitutionally, freedom of expression is absolute. The U.S. Supreme Court, however, has ruled that certain acts are not covered under this first article. The Supreme Court ruled in 1919, for example, that speech that creates a “clear and present danger” — such as yelling “fire!” in a crowded theatre — is not protected. Reliance on the courts to delimit rights protections requires an independent and robust judicial system and a government with the capacity to enforce the court’s decisions.

## 8. CONCLUSION AND RECOMMENDATIONS

Political and civil rights are limited. In the interest of the enjoyment of the same rights by others or to allow the state to pursue objectives that are legitimate in a democratic society, states can impose limitations on political rights. Constitution-makers must tackle the question of limitations.

There are many techniques of establishing the legal framework for limitations. Some international instruments, such as the ICCPR, explain in relation to every right its possible limitations. Others include a general limitation clause.

Constitution-makers should give due consideration to the question of legitimate and clear language on human rights restrictions in line with international human rights obligations. In order to provide the public and the courts with a clear yardstick, they also should consider including one article in a bill of rights that outlines essential guarantees including the need for limitations to be based on law, to be proportionate to the objective pursued and not to undermine the essence of a human right.

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