



# Limitation Clauses

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## About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organizations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

## About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

## Overview

### What?

- A limitation clause enables constitutional rights to be partially limited, to a specified extent and for certain limited and democratically justifiable purposes, while prohibiting restrictions that are harmful to democracy by reason on their purpose, nature or extent.

### Why?

- Many of the rights guaranteed to the citizens of democratic countries must be limited or qualified - or the scope of rights narrowed - in order to prevent conflicts with other rights or with certain general interests. A well-drafted limitation clause prevents these limits, qualifications or restrictions from being taken too far or from being misapplied.

### Why not?

- Constitution-makers may decide to make some rights absolute since violating them to any extent under any circumstances would be inhumane and might invite broader violations.
- In some cases, limitations and qualifications are well established by judicial precedents.

### Where?

- The European Convention on Human Rights (ECHR), the Canadian Charter of Rights and Freedoms and the Constitution of South Africa are just some of the most influential examples of rights instruments that explicitly address their own limitation.

## What Is the Issue?

The exercise of certain rights (such as the right to a fair trial, freedom from arbitrary imprisonment, freedom of movement, freedom of expression, freedom of religion or the right to participate in public decision-making) is integral to citizenship in a democratic society. The protection of fundamental rights against arbitrary or excessive infringements is an essential feature of constitutional government, which is recognized both in international human rights law and in many national constitutions.

Nevertheless, relatively few rights can be enjoyed in absolute terms. Most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common goods such as social justice, public order and effective government or for the protection of the rights of others. For example, freedom of expression may be limited to prevent people from shouting ‘Fire!’ in a crowded public place or by a prohibition against inciting violence against a specific individual or group. Likewise, freedom of movement is quite properly limited by traffic rules, by rules relating to lawful detention and imprisonment and by immigration rules. These rules may permit the state to infringe on individual freedom, but they may be justified if they do so only for legitimate purposes and to an acceptable (i.e. necessary, reasonable, proportional) extent.

The challenge, then, is to design a constitutional provision that enables rights to be prudently limited to the extent necessary to protect the public good and the rights of others without undermining essential human rights or the civil liberties that provide the foundation for a free society. This can be achieved through a so-called **limitation clause**, a provision that constrains and empowers legislatures and the courts by: (i) allowing specific limitations on rights; and (ii) placing limits on such limitations, thereby protecting the right against excessive restrictions.

Even if there is no limitation clause, or if the limitation clause is vague, courts typically attempt to define rights in ways that, while protecting the right, recognize the need to balance other competing public and private rights and interests. Conceptually, this approach is different from a ‘limitation’ on rights; rather than defining the acceptable limitations of the right, the court instead defines the boundaries or scope of a right that cannot in principle be limited. A limitation clause asks courts to consider not only whether a right has been infringed, but also whether that infringement is justifiable for the reasons allowed in the limitation clause; an approach based on defining the scope of a right only asks whether a right has been infringed, regardless of whether the infringement is justifiable or not. In practice, a limitations-based approach may make courts more responsive to the public policy implications of their decisions, whereas an approach based on defining the scope of a right may overlook public policy implications.

It is important to note that limitations on rights are not the same as derogations from rights. Limitations on rights are restrictions that are necessary to balance competing or conflicting rights, or to harmonise rights with other public objectives. They are not a response to emergency situations. Derogations from rights are temporary additional limits, or suspensions of rights, imposed during a state of emergency.

## Rights and Their Limits

### *Human Rights Norms*

States that wish to be seen as legitimate members of the international community no longer have a free hand in how to treat their citizens. States, especially those seeking to be recognized as democracies, are increasingly expected to ensure that their laws and practices comply with various global human rights instruments, such as the United Nations’ Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the

International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as with regional instruments such as the Commonwealth Charter, the European Convention on Human Rights (ECHR), and the African Charter on Human and Peoples' Rights (Banjul Charter).

### **Limitation Clauses in Human Rights Treaties: International Covenant on Civil and Political Rights (ICCPR)**

Article 19(3) of the ICCPR states: 'The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.'

Article 20 of the ICCPR states: (1) 'Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

These instruments guarantee certain fundamental rights that are necessary to preserve human dignity (such as freedom from slavery and torture) and to maintain an open and democratic society (such as freedom of speech, association and assembly).

### ***Absolute, Limited and Qualified Rights***

While the rights contained in the various international treaties, charters and conventions, and in many national constitutions, are essential to a democracy, not all rights can—or necessarily should—be protected in absolute terms. For example, freedom of movement does not give one the right to enter other people's homes. Some rights may have to be limited because of the potential adverse impact that the abuse of such rights could have on society at large or on the rights of others: for example, the right to freedom of speech may in many instances legitimately be restricted to prevent harassment of others.

Accordingly, international treaties and almost all national constitutional instruments contain limitation clauses that provide at least some guidance on when rights can be limited. Article 29(2) of the UDHR, for example, states that:

'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.'

Such limitation clauses recognize that there are tensions between:

- (1) Private rights and legitimate public policy objectives needed for the common good (for example, restrictions on the right of freedom of assembly to uphold public order); and
- (2) The competing or potentially conflicting rights of other private persons. (For example, if a newspaper were about to publish an article violating the privacy of an individual, that individual might seek an injunction from a court against the newspaper, preventing the article from being published. The newspaper may argue that its right to freedom of expression would be violated.)

## An Example of Qualified Rights:

### European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 10(1): 'Everyone has the right to freedom of expression...'

Article 10(2): 'The exercise of these freedoms...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.'

Rights may be categorized in a variety of ways, but many jurisdictions (including those influenced by the provisions of the ECHR, which has been influential not only in Europe but also in Africa, the South Pacific and the Caribbean) divide rights into three basic categories:

*Absolute rights:* Absolute rights are not subject to limitations or qualifications. For example, under the ECHR and many national constitutions that have been influenced by derived from it, the right not to be tortured is considered to be an absolute right that cannot be restricted under any circumstances.

*Limited rights:* Certain rights are limited, in the sense that their enjoyment may be curtailed in specific circumstances. For example, the right to personal liberty under the ECHR can be limited if one is convicted of a criminal offence in accordance with the provisions of the Convention related to fair trials and the rule of law.

*Qualified rights:* Qualified rights are those that can be limited under more general circumstances, for example, to balance the potentially conflicting rights of different parties or to reconcile individual rights with common goods. Under the ECHR, these include, among others, the right to respect for private and family life and the right to freedom of expression.

**Think Point:** Which rights should be absolute, and which should be limited or qualified? Should the range of absolute rights be widened or narrowed? Is there a qualitative difference between absolute and limited or qualified rights?

## Legitimate Objectives for Limiting Rights:

Some objectives for which rights may legitimately be limited include:

*Protecting the rights of others:* When a conflict of rights occurs, certain rights sometimes need to be limited in order to protect the rights of others. Under article 19 of the ICCPR, for example, the right to freedom of expression may be limited by the need to respect the rights – including the reputation – of others.

*Public health:* Protecting public health envisages situations where, for example, someone who suffers from a potentially fatal and contagious disease may have their freedom of movement restricted (such as by quarantine laws) in order to protect other people against the risk of contagion. Likewise, the wearing of a religious symbol, which is an expression of freedom of religion, may be limited on grounds of public health if the physical object constitutes a health hazard (for example, a religious symbol worn on a neckless by a nurse may be a source of contamination).

*National security:* Freedom of movement may interfere with the protection of the state's security in some circumstances. Similarly, publishing state secrets, in exercise of freedom of expression,

can be harmful to state security. In many countries, however, concerns about national security are invoked not only to protect the state against terrorism or enemy attack, but also to harass peaceful and democratic dissident groups. These restrictions are often used disproportionately against the poor, workers, trade unionists and other non-elite groups whose campaigns threaten the privileges of powerful economic or governmental interests. Therefore, to prevent 'national security' becoming a catch-all term that is used in ways that curtail or undermine democracy, the definition of what constitutes a genuine threat should be carefully and narrowly determined, such that freedom of expression, protest and dissent are protected.

*Public morals:* The protection of public morals is sometimes cited as a reason to limit rights; for example, it may be used to limit freedom of expression in the interests of regulating pornography. In some states, such as Malaysia and Pakistan, the need to protect public morals can be used to justify curbing the right to free speech and expression so as to prevent blasphemy. Such provisions come at the cost of a significant erosion of freedom of religious dissent. For example, Egypt's 2012 Constitution prohibited 'insult or abuse of all religious messengers and prophets' while at the same time claiming to guarantee freedom of thought and opinion. If limitations on the basis of public morals seem necessary in the political and social context, it may be important to consider how this limitation can be prevented from restricting public debate over sensitive issues of religion or morality. It is also necessary to consider how these restrictions may be particularly harmful to women, whose social and legal equality may be undermined by religious limitations on rights: for example, religiously determined restrictions on dress are more likely to affect women than men.

*Promoting social justice:* It has sometimes been argued that judicially enforced fundamental rights tend to protect the private interests of property owners to the detriment of the poor and of the common good. The US Supreme Court, for example, has used the right to freedom of contract, guaranteed by the 14<sup>th</sup> Amendment to the US Constitution, to limit statutory restrictions on working hours (*Lochner v. New York* 1905), and has used freedom of speech to enable political spending by corporations in ways that could reduce the quality of democracy by giving corporate interests a disproportionate influence in elections (*Citizens United v. Federal Electoral Commission* 2010). Limitations on rights (or, at least, narrower definitions of the nature, extent and application of rights) may be necessary to prevent such outcomes. Thus, freedom-of-speech provisions may be balanced in the constitution by provisions enabling the legislature to regulate campaign finance, while freedom of contract may be balanced by provisions giving the legislature a general but explicit right to regulate economic activities through the enactment of laws on labour standards, working hours, minimum wages, consumer protection and so forth. The Indian Constitution even privileges such social-justice measures, in pursuit of its Directive Principles, over certain fundamental rights (Constitution of India, article 31-C (after the 25<sup>th</sup> amendment)).

## Designing Limitation Clauses in Constitutions

Today, every legal system in the world has its own express or implied limitations on rights, whether contained in the constitution, in case law or legislation. Indeed, almost every constitution contains at least one right-specific limitation clause, and more than 40 per cent include a blanket clause of some type (Law and Versteeg 2013: 863). The practice of limiting rights by balancing them against conflicting public-policy objectives is therefore a near universal reality (Gardbaum 2007: 789).

Indeed, there has been a trend toward including limitation clauses in constitutions: most post-World War II constitutions state that rights provisions are capable of being limited by other rules or values of constitutional rank (Matthews and Sweet 2008: 73).

## General Approaches

Constitutional designers can handle the limitation of rights in three ways:

- (1) *No limitation clause*: A minority of constitutions are silent on limitations (e.g. Argentina and the United States of America), meaning that limitations are established solely by legislation and case law. The First Amendment of the United States Constitution, for example, states simply that, ‘Congress shall make no law [...] abridging the freedom of speech, or of the press.’ This is often regarded as an ‘absolutist’ protection, which protects freedom of speech even ‘to the detriment of other constitutional values and the disregard of social concerns’ (Dorsen et al. 2010: 854). This does not mean, however, that all forms of speech are constitutionally protected. The United States Supreme Court held, in *Chaplinsky v. New Hampshire* (1942), that, ‘There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem.’ In the absence of specific constitutional provisions, it is primarily the responsibility of the courts to determine the nature and extent of protected rights. Having no limitation clause, and leaving the scope of rights to be worked out by the courts after the adoption of the constitution may be a reasonable approach in established democracies with credible courts, but this is risky in countries where neither the legislature nor the courts are experienced or strong enough to organically develop limitations without further guidance.
- (2) *General limitation clause*: Rather than specifying particular circumstances, such as health or morals, under which each particular right can be limited, some constitutions include a single, general limitation clause. For example, the Canadian Constitution ‘guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’ (article 1 of the Canadian Charter of Rights and Freedoms, emphasis added). Such a general limitation clause can be flexible and allow room for interpretation, but its non-specific nature also means that it could over- or under-limit rights depending on the orientation of the court.

Note: Some Muslim-majority countries have also adopted a general clause limiting rights that contravene Islamic norms. For example, article 16 of the Maldives Constitution guarantees rights only ‘in a manner that is not contrary to any tenet of Islam’. Such ‘repugnancy clauses’ are discussed in the Primer on Religion-State Relations.

- (3) *Right-specific limitation clauses*: Some constitutions adopt limits in relation to specific rights. For example, article 19 of the Indian Constitution establishes the freedom of speech, expression, assembly and other rights and then sets out specific limitations that apply to the exercise of each of those rights. A specific limitation clause can be designed to suit the importance and nature of specific rights. Under the ECHR, for example, ‘it is legitimate to pursue national security, public safety and economic well-being to the detriment of privacy, but only national security and public safety to the detriment of freedom of expression, and only public safety to the detriment of freedom of religion’ (Rivers 2006: 195).

## Drafting of Limitation Clauses: Means of Preventing Abuse

Constitution-makers should give careful consideration to the wording of limitation clauses because there is some potential for abuse.

Authoritarian constitutions typically allow the legislature to determine the limitations on rights, with few restrictions on the discretion of the legislature to determine the extent of those limits. In other words, constitutional rights exist only to the extent that legislatures (which themselves are often politically weak and under the domination of powerful executives) allow them to. In practice,

such constitutions have not provided for the effective protection of human rights, as the legal limitations on rights have rendered the proclaimed rights quite meaningless.

### **Abuse of Limitations: the Egyptian Constitution of 1971.**

Article 47 of Egypt's 1971 Constitution stated that: 'Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally or in writing or by photography or by other means within the limits of the law.'

This constitutional rule placed no restrictions on how far those law-imposed limits might extend. Under this constitution, a law was passed that prohibited any public discussion of the president's health on public security grounds. Laws were also passed that prohibited any public criticism of the police, the army or the courts. It became nearly impossible to criticize the state, which meant that freedom of expression was essentially non-existent despite article 47's apparently broad and generous wording.

Consider, for example, the following two hypothetical provisions:

#### Example 1:

1. Everyone has a right to freedom of speech; the law defines the extent of this right and the limitations upon it.
2. Abuses of this right to undermine national security, the authority of the state or the reputation of the president or to promote sedition, disorder, secession, blasphemy, heresy or immoral or anti-social opinions shall be punishable according to the law.

This example offers little constitutional protection against a legislative majority intent on limiting freedom of political dissent. It seems to specifically target political dissent (criticism of the president and the advocacy of certain political and religious positions) as grounds for the restriction of the right. One might wonder which right is actually protected by such a constitutional formulation: is it the severely limited right of free speech or the extensive right of the legislature to restrict freedom of speech? Indeed, this approach reflects what is often found in the sham constitutions of authoritarian states.

#### Example 2:

1. Everyone has a right to freedom of speech; subject to the provisions of this article, the law defines limitations upon this right for the protection of national security, the preservation of public order and the protection of the rights of others.
2. Such limitations may be imposed only to the extent that is necessary and reasonable in a democratic society.
3. The essence of the right, including the right to freely criticize public policies and officials and to freely communicate facts and opinions on political, social, economic, religious and academic subjects may not be infringed.
4. Only an organic law may impose limitations on freedom of speech.
5. A law limiting the right to freedom of speech shall remain in effect for a period of up to five years, after which it lapses unless extended for a further period of up to five years by another organic law.

The second example shows some ways—based on real provisions found in various existing democratic constitutions—by which the grounds for limiting rights can be made more specific and rights can be protected against abuse.

- (i) The *grounds* on which the right can be limited are more narrowly specified. A limitation must have a *legitimate objective*. In this case, the legitimate objectives are ‘the protection of national security, the preservation of public order and the protection of the rights of others’. Other objectives, such as the prevention of embarrassment to public authorities, may not be legitimate in a democratic society, since they would unacceptably narrow the scope of public criticism and debate.
- (ii) The *extent of the limitation* may be framed in terms of necessity, proportionality or reasonableness. In this hypothetical example, which is similar to provisions found in the ECHR, it is specified that the right may only be limited on grounds that are ‘necessary’ or ‘reasonable in a democratic society’. This creates a test that legislators must consider in enacting laws and that the courts must consider in determining the constitutionality of laws. Necessity, in this context, is a higher barrier than reasonableness; a restriction may be reasonable without being strictly necessary, but necessity would itself be proof of reasonableness. Jurisprudence in this field has increasingly relied on the concept of *proportionality*; that is to say, that the limitation on the right must be proportional to the effect to be produced by limiting the right.
- (iii) The *essential core* of the right to freedom of speech may not be infringed. Where the boundaries of this essential core lie must be determined by a politico-judicial process, but legislators and courts are given, in the sample text above, some guidance on what the *purpose* of the right to be protected is (i.e. to allow free circulation of facts and opinions on matters of public and social concern). The doctrine of substantial essence was embedded in the German Basic Law of 1949, and from there has been incorporated into the constitutions of several other countries, although, in practice, the principle of proportionality tends to be much more relied upon by the courts.
- (iv) There is a *procedural check*, in that a law limiting rights must be an organic law. Many jurisdictions make a distinction between ordinary laws and organic laws (important laws concerning the organization of public powers, which are typically subject to increased majority or threshold rules or a more extensive legislative procedure). Even in jurisdictions where no distinction between organic laws and ordinary laws is made, certain laws limiting rights may be subject to an additional procedural hurdle. Sweden (Instrument of Government, article 22), for example, enables one-tenth of the members of parliament to impose a suspensive veto on a bill for the limitation of rights; this lasts for at least a year, and can be overridden only by a five-sixths majority, so as to protect against hasty or partisan infringements of rights.
- (v) There is a *sunset clause* attached to any law restricting the protected right. This means that the law remains in effect for a fixed maximum period and then automatically lapses unless it is renewed by the legislature. An advantage of this provision is that it keeps the limitation of rights in the political spotlight: supporters of limitations on a right must periodically make their case for such limitations, thereby forcing them to justify their positions. This may prevent people from thinking that limitations are perpetual, automatic or to be taken for granted. It also gives people who oppose a limitation on a right a periodic opportunity to make their case anew.

**Think Point:** What is the purpose of the limitation clause under consideration? Is it to limit rights, or is it to protect rights by defining the circumstances and conditions under which they can be limited? How are these aims reflected in the wording of the clause?

## Contextual Considerations

The particular form that the limitation clause should take depends on the historical and cultural context of the country in question. In countries with strong democratic institutions and a good record of human rights, open-ended and even vague limitations clauses, which leave a lot of discretion to legislatures and courts, may be acceptable. In countries where democracy is more fragile, and where there is a recent record of human rights violations, more detailed and specific limitations may be necessary in order to prevent abuses of power.

*Democratic values and civil society:* In a society where strong and pervasive democratic values are embedded in the history and culture of the society, and where civil society is robust in the defence of rights and liberties, it is possible that little harm will result from loosely-worded limitation clauses. This is because unnecessary encroachments are likely to be politically resisted by the legislature and by public opinion, at least as long as these values endure. This puts a premium, however, on civic education and on the maintenance of democratic values and norms in society at large. On the other hand, in a society with a long history of dictatorial rule, where authoritarian values predominate, or where civil society is weak, narrower and more explicit limitation clauses may be required to prevent abuse.

*Minorities and marginalized groups:* In countries where racial, ethnic, cultural, religious or other minorities have suffered exclusion, oppression or discrimination in the past, it may be particularly necessary to ensure that limitations on rights are not used in a discriminatory way, such that they disproportionately disadvantage the members of such marginalised groups. A strongly worded anti-discrimination clause may help to prevent this. Of course, such provisions are more likely to be effective if combined with other measures intended to promote the inclusion of members of such groups in the legislative, executive and judicial branches of government (for example, through a quota system).

*Effectiveness of legislative institutions:* The less specific the limitation clause, the more the defence of liberty depends upon the goodwill and independence of legislative institutions. If there is a strong, pluralistic legislature that has some genuine independence from the executive and is committed to the defence of rights, then simple clauses enabling rights to be limited by law may be sufficient. However, where legislatures are weak, reactive or subordinate to the executive, simply enabling rights to be limited by law is likely to be insufficient to guarantee rights, since the law will – in effect – merely embody the will of the executive. Institutional arrangements that balance and distribute legislative power (proportional representation, strong bicameralism, and perhaps also a presidential-congressional system of government) are likely to protect against undue the limitation of rights, but in the absence of these political checks, it may be necessary to strengthen constitutional and judicial checks, not least through a highly specific and tightly worded limitation clause.

*Effectiveness of judicial institutions:* Are judges to be trusted to interpret limitation clauses and to develop them in ways that do not defeat the spirit of constitutional rights? If the courts have a long tradition of respecting rights and of independence from political pressure, they might be relied upon to interpret very general limitation clauses and to define terms such as ‘necessary and reasonable in a democratic society’ in ways that support rights. In a country emerging from authoritarian rule, however, or where courts have historically been deferential to the executive, a more tightly specified limitation clause is likely to be required in order to prevent abuses.

*Legitimacy and public perception:* There are also questions of legitimacy to consider: do judges have the legitimacy, in the eyes of the public, to develop their own interpretations of open-ended limitation clauses? If not, more specific clauses that more closely bind and instruct the judiciary may be required. If the judiciary itself develops limitations through case law with minimal or no constitutional or legislative guidance, there is a possibility that this may create friction with the executive or legislative majority that has a different vision of limitations. There may then be a backlash where the executive or legislature curtails the power of the courts or seeks to reduce its

legitimacy. This can be quite harmful in a new democracy where courts are building up institutional legitimacy to have their decisions accepted. This becomes all the more important since, in new democracies, it is often the courts, and not the legislature, that assume a disproportionate role in implementing vague constitutional standards.

*Who is proposing limitations on rights, and why?* It is important to consider who is proposing limitations on rights and what ends they are pursuing. Are they part of the old regime or military forces that are opposed to civil liberties and are therefore seeking to limit rights, or are they human rights activists that want limitation clauses specified so as to prevent abuse? A clause sought for benign reasons might still be open to future abuse unless it is very carefully worded.

*Constitution-building negotiations:* Highly detailed and specific limitation clauses could be harder to negotiate, and attempting to specify limitations in detail could potentially extend or derail constitution-building processes. For example:

- Disputes between clerical and secular parties in a constituent assembly could be exacerbated by trying to agree on whether blasphemy should be a specific restriction on freedom of expression. A less specific limitation clause that must then be applied to this particular issue by the legislature and the courts might be more easily agreed upon. However, one could argue that this only delays resolution of the matter, and shifts responsibility from the constituent assembly to the legislature and the courts. On the other hand, it also means that the interpretation might change over time.
- There may be disputes in a constitution-building process about what a right actually means, or about the extent of a right's application. For example, parties may agree that a right to life must be enshrined in the constitution, but they may disagree among themselves whether such a right should allow an individual to take his own life when he falls terminally ill or whether the right to life extends to fetuses. These are issues that may invoke passions and lead to a costly deadlock in negotiations. Accordingly, rights are often stipulated in vague, incomplete and non-specific terms, leaving them up to subsequent legislative and judicial interpretation.

*Future flexibility and constraint:* The needs of a society can change as preferences and circumstances evolve. When negotiating constitutional rights, no one can reliably predict the future consequences of their choices. For example, a constitution may be negotiated during a period when the state is ethnically and culturally homogeneous. A few decades later, however, the country may have become ethnically and religiously diverse because of immigration. In this hypothetical example, although the costs of allowing certain types of freedom of expression that had the potential to offend minority groups or harm public order was low in the initial period, diversification of the state means that limits need to be imposed now to preserve order. Conversely, new groups could also invoke rights such as freedom of religion to suppress legitimate criticisms that may be expressed about their beliefs through the right to free expression. Rejecting these interpretations of freedom might thus also be necessary to prevent the compromise of others rights in both cases.

The essence of this problem is the balance between constitutional flexibility and rigidity: to what extent should changing understandings of rights require a formal amendment to the constitution, or and to what extent should ordinary legislative and judicial decision-making be sufficient? Excessive reliance on formal amendments, especially if the amendment process is difficult, may mean the constitution fails to meet changing challenges; excessive flexibility, on the other hand, may provide no meaningful limits on the abuse of power. Thus, flexible and vague limitation clauses might be acceptable where courts and parliaments are embedded in a deep democratic history and culture, but perhaps should be avoided in other states where these institutions cannot be trusted to set limits that are conducive to democracy. In such cases, future flexibility may need to be compromised in the interests of protecting rights from abuse.

**Think Point:** How should the ‘limits on the limits’ be detailed in the constitution? The more specific the clause is, the more helpful it may be for downstream decision-makers; specificity might also help make the constitution more enduring and resilient. But is it feasible to be specific during negotiations?

## Comparative Jurisprudence

Regardless of the specific provisions (or lack thereof) in the constitutional text, courts will often be called upon to assess, within broader or narrower parameters, the extent and legality of limitations.

To do this, courts typically employ a two-prong test, first asking whether a right has been infringed and then considering whether the limitation was justifiable in accordance with (constitutionally specified or judicially inferred) criteria such as being ‘necessary’, ‘minimally restrictive’, ‘non-discriminatory’ and ‘proportionate’ when viewed in relation to legitimate state objectives (Pati 2005: 223).

The concept of **proportionality** increasingly determines the content of the analysis as to the legality of the limitation. In determining whether a right guaranteed by the ECHR has been violated, for example: ‘The court needs to establish first whether a right has been impinged on at all, and then, if it has, whether this limitation can be justified. The doctrine of proportionality in the wide sense is the name given to the tests used to establish whether a limitation of rights is justifiable. Proportionate limitations of rights are justifiable; disproportionate ones are not’ (Rivers 2006: 174). The way in which the test for proportionality is applied in different countries varies, but conceptually it can be broken down into several sub-stages (Rivers 2006: 181): (i) ‘Legitimacy: does the act (decision, rule, policy etc) under review pursue a legitimate general aim in the context of the right in question?’; (ii) ‘Suitability: is the act capable of achieving that aim?’; (iii) ‘Necessity: is the act the least intrusive means of achieving the desired level of realization of the aim?’; (iv) ‘Fair balance, or proportionality in the narrow sense: does the act represent a net gain, when the reduction in the enjoyment of rights is weighed against the level of the realization of the aim’.

Canada: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as ‘can be demonstrably justified in a free and democratic society’. The courts can grant appropriate remedies if a law that limits a right does not pass this test, which can include the nullification of legislation. The Canadian Supreme Court adopted the so-called ‘Oakes test’ (*R. v. Oakes*, 1986) to assess whether the limitation of a right or freedom guaranteed by the Charter is justified. In answering this question, the Court first ascertains whether a protected right or freedom has been infringed, and then asks:

- (i) Whether the law infringing the right does so for a legitimate purpose which is sufficiently important in a ‘free and democratic society’. Such purposes include: respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.
- (ii) Whether the limitations imposed are ‘rationally connected’ to the objective in question. They must not be arbitrary, unfair or based on irrational considerations.
- (iii) Whether the limitations impair the right or freedom in question ‘as little as possible’.
- (iv) Whether there is proportionality between the effects of the measures which limit the Charter right or freedom, and the objective which has been identified as being of sufficient importance.

South Africa: The South African Constitution has a general limitation clause (section 36) that says that rights may be limited by a law of general application that is ‘reasonable and justifiable in an open and democratic society based on dignity, freedom, and equality’. The provision then sets out the factors that must be taken into account when deciding if a limitation on a right is constitutional. Like the Canadian Supreme Court, the Constitutional Court of South Africa engages in a two-stage analysis. First, it must determine whether the impugned provision limits a constitutional right. If it does, the second enquiry determines whether the limitation of the right is justifiable in terms of the limitation clause (*S v. Jordan and Others* 2002). Essentially, ‘the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be’ (*S v. Manamela* 2000 at para. 32).

Germany: Like the Canadian and South African courts, the German Constitutional Court focuses most of its analysis on the second stage: i.e. whether limiting or overriding the right is justified. The German Constitutional Court has stated that the limitation must be: (1) appropriate; (2) represent the least restrictive means necessary to achieve the ends in view; and (3) proportionate.

## Decision-making Questions

- (1) Is the country a young, aspiring democracy or is it an established democracy rewriting a constitution; what bearing does this have on the need to prevent limitations on rights from being abused?
- (2) What did the country’s previous constitution provide in terms of limitations; did it have many open, generic, ‘limited by law’ clauses? Were such limitations effective in constraining abuses of state power?
- (3) Who are the parties arguing for a constitutional incorporation of a limitation clause and who are those arguing against it? Are members of the former regime taking a particular position, and if so, why?
- (4) Will the constitution state that some rights are not to be limited, e.g. prohibitions on torture and slavery, the right to human dignity or freedom of conscience? Which other rights should be absolute?
- (5) What values are prevalent in the judiciary? Is it likely to take a broad or narrow view of limitations on rights? Is the judiciary capable of enforcing the limits on limitations clauses?
- (6) Are there any particular minorities who might require special protection? How can limitations on rights be framed in a way that protects these minorities?

# Examples of Constitutional Provisions

<p><b>South Africa</b>  <b>Constitution of 1996</b>          Decentralized mixed jurisdiction with common-law and civil-law influences (Detailed general limitation clause; some rights subject to additional qualifications)</p>	<p><b>36 Limitation of rights</b>          (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.</p>
<p><b>Germany</b>  <b>Constitution of 1949/1990</b>          Federal, civil-law jurisdiction with strong judicial review          General clause setting out general limitations, backed by specific clauses relating to particular rights</p>	<p><b>Article 5</b>          (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.          (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.</p> <p><b>Article 19</b>          (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.</p>
<p><b>Canada</b>  <b>Constitution of 1867/1982</b>  <b>(Canadian Charter of Rights and Freedoms)</b>          (Predominantly common-law jurisdiction with civil law in Quebec)          General limitation clause.</p>	<p>The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</p>

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