Rights and their limits

In this module, you are learning about the civil and political rights protected by international law.

These include:

- rights that protect physical integrity, the right to life, the right not to be tortured
- rights that prohibit arbitrary arrest and protect procedural fairness before criminal and civil courts and tribunals
- rights guaranteeing equality and prohibiting discrimination
- basic civic freedoms – free opinion, expression, association, religion, assembly; and
- political freedoms – to vote in periodic elections, to participate in political life

You’ve been introduced to the International Covenant on Civil and Political Rights (ICCPR). And I hope you have read it carefully. It contains all of these rights.

But if you’ve read the ICCPR, you will have noticed something. A number of the human rights protected in that treaty include clauses that appear to limit these rights. For example, Article 18(1) provides:

“everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion of his choice, and freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.”

But, Article 18(3) says:

“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

Or consider Article 21, which says:

“Article 21 - The right of peaceful assembly shall be recognized.”

But adds, “No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public) the protection of public health or morals or the protection of the rights and freedoms of others.”

These clauses that set out the permissible grounds on which certain rights might be limited are referred to as the limitation clauses. And it is fair to say that they grant considerable scope to states to place restrictions on human rights.

This might seem odd. Why proclaim “fundamental” freedoms and “inalienable” human rights, if states are permitted to place limits on them?

Well, if you think about it, most rights are not absolute. For example, where a parent’s religious belief would deny a blood transfusion to his or her child (who is not yet at the age to make a decision for him or herself), then the state might legitimately step in to require the transfusion; similarly, the state might refuse to recognize religious opposition to vaccination campaigns. The “protection of public health” or the protection of the “rights and freedoms of others” might justify such an interference with religious belief.
Similarly, people have a right to protest, but it may be unreasonable and a threat to public order and safety to allow them to do so in the middle of a public highway.

And the right to free expression shouldn't permit people to preach racial discrimination.

Such limitations were already envisioned in the Universal Declaration of Human Rights, Article 29(2): “UDHR – Art. 29(2) 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.”

And most national constitutions that protect human rights include a clause or clauses which set out the basis on which rights might be limited.

For example, 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.”

In thinking about these limitation clauses, it is important to bear in mind four points:

First - Not all human rights include such limitation clauses. For example, read Article 3 (gender equality), or Article 7 (prohibiting torture).

Even Article 18 – the limitation clauses in Articles 18(3) that I drew attention to earlier do not apply to the right to hold religious beliefs or to freedom of conscience, or the right to adopt a religion of one’s choosing. They are concerned with the manifestation of religious belief.

The lesson here - read the provisions carefully!

Second, the international bodies that supervise the treaty have made clear - the burden to demonstrate a limitation is required falls on the State. That is, interference with rights must be explained and justified by the state.

Third, the state must demonstrate that the limitation is done in accordance with law (“prescribed by law” “provided by law” “in conformity with the law”, “determined by law”). This is not a simple technical requirement to show that the law permitting the limitation exists. Rather, it points to a guarantee that the limitation must not be applied arbitrarily. Relevant questions here include - was the law duly passed in accordance with correct legal process? Are its provisions public and its operations of the law accessible? Can it be challenged in court?

Fourth, the limitation must bear a rational justification to one of the permitted grounds for limiting the right in question, AND, the state must show it is necessary and proportionate to achieve the aim sought.

To return to our example regarding religious freedom, and to take some recent Canadian controversies …. does a ban on the wearing of the niqab (full face covering) when testifying in court, or a ban on the wearing of the Sikh turban while playing soccer, interfere with right to manifest one’s religious beliefs or are such bans justified by one of the grounds in Article 18(3)? We’ll look at questions like these in the Discussion Forum.

There is a second basis upon which civil and political rights might be subject to limitations.

Article 4 of the ICCPR says: “ICCPR – Art. 4 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.”

This is called the derogation clause. Read it carefully. In emergency situations, it allows states to further limit the extent to which they uphold the rights in the ICCPR. It anticipates events like war that might give rise to a declaration of martial law, or a natural disaster that might require extraordinary efforts by the state to maintain public order.

Again, however, as with the limitation clauses, there are strict limits to the application of the derogation clause – consider the language of Article 4:

First, there is the requirement that it be invoked only “in time of public emergency which threatens the life of the nation”

This is the threshold test.

Not all emergencies will meet this test. Consider the 1970 October Crisis, when due to the kidnapping of two public officials (one of whom was later found murdered) by a small, armed group in Quebec, the Canadian government invoked the War Measures Act, suspending some civil liberties. Most commentators agree the threat – though clearly criminal and intended to terrorize – did not justify such a heavy-handed response.

Second, derogation does not mean the right can be fully suspended. Limits must be those that are “strictly required by the exigencies of the situation”

This is the proportionality test. Further, there must be no discrimination in the application of such limits, and they must be consistent with other international law obligations.

Third, there is the test of legality

The emergency must be officially and publicly proclaimed – through accepted constitutional processes. And, under ICCPR, there is a duty to inform other states, and justify the restrictions

FINALLY, read Article 4 carefully. Article 4(2) says: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” There are some rights that can never be limited, regardless of an emergency. These are called non-derogable rights, and include:

- right to life
- freedom from torture
- prohibition on slavery and servitude
- recognition before the law
- freedom of thought, conscience, religion

So to recap – many human rights are not absolute.

International law permits certain limitations to certain human rights, but this is not a blank cheque – states must justify the restrictions they impose.

And in emergency situations, states may take measures to derogate from their obligations under the ICCPR, but similarly only within carefully prescribed limits.
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