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THE LIMITATION CLAUSES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

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Abstract

A society based on democratic rule has to confine some of individual rights for sake of its own existence and the public interest i.e. to preserve its democratic nature, uphold the public health and order and provide public education as well as other national objectives. The state needs to put limitations on the exercise of some rights so that it could achieve these goals. It results in realization of peculiar nature of the democratic political set up which is based primarily on the trust between the society and its members. In order to maintain its standards of a democratic state, United Kingdom, for example battles to preserve a real balance between the public interests and individual rights. Although human rights are believed to a dominant feature in all democracies, however, the degree of its importance differs from democracy to democracy. Consequently, there is lack of consensus on the balance between the rights of individual and the interest of society. This is the point where the principle of proportionality comes to play. This article analyses the limitation clauses on the human rights and argues how the states should put limitations on the exercise of human rights and freedoms. It also tries to point out the grey areas utilized by the states for covering up their poor human rights performances and records. For this purpose, the article uses the jurisprudence of the Court of Justice of the European Union.

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Key words: Limitation Clause, Qualified Rights, State Reservations, Freedom of Speech, Derogation from the right.

Introduction

In this contemporary world human rights are not only considerations to be signified in democracy and especially when states survival is at stake, restrictions on them becomes obvious. Two types of limitations may be put on these rights: The *first* includes limitations that are essential to let others to exercise their own rights. Rights can be restricted by democracies so that they can safeguard "the rights of others".[1] France was the first to acknowledge and disclose this idea and that was in 1789 Declaration of the Rights of Man and the Citizen.[2] Secondly, if the society want to achieve some goals, and for those reason restrictions on the right and freedom is must.[3]

It is trust that the notions of the "right" give birth to the notions of the democratic society and absence of a democratic society there is no meaning of rights. In simple words we can assumed that society acknowledges the rights of an individual along with the rights public at large. Every society has a responsibility to determine the dilemma to confront; when and which limitation can be made on the individual rights. Undoubtedly these limitations do not mean the one imposed by the totalitarian governments; in a democratic society these restrictions are having limits which are prescribed by the law.

Obviously, Human rights carry immense importance in contemporary world and after the World War II and the Holocaust played the predominant part in their construction. If democracy is deprived of human rights; it would have no raison d'etre (reason for being). The removal of human rights from democracy would result in it being like a body without soul, or a vein without blood. However, the use of specific rights (including those such as liberties against incarceration, and freedom of speech/unbiased trial) is paramount to humanity and in a democratic culture. The protection of

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1 E. Nwauche, "The Religious Question and The South African Constitutional Court: Justice Ngcobo in Prince and De Lange", *Southern African Public Law* 32, no.1&2 (2017): 1-17.

2 Frank Maloy Anderson, *The Constitution and Other Select Documents Illustrative of the History of France* (Minneapolis: H.W. Wilson, 1789-1907).

3 G. Van der Schyff, "Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa" (Dordrecht: Springer, 2010).

integral rights versus overwhelming restrictions is the need and asset of constitutional parliament, which is acknowledged regarding universal human rights legislation and numerous state constitutions.[4] Regardless, a limited number of rights can be exercised in unconditional rights.

Most of the rights are influenced by restrictions that are required and sensible in a democratic society for the realization of specific common benefits such as social justice, public order and active parliament or ensuring rights for others are maintained. To illustrate, there may be a restriction on freedom of speech to prevent people yelling "Fire"[5] in a crammed public area, or by sanctions being placed on hate speech toward a certain group or person.[6] Comparatively, free movement is strongly restricted by traffic laws, such laws tie in with incarceration and intervention by immigration authorities. These guidelines may allow the nation to impose on specific liberties, but they ought to be properly validated and for justifiable causes (i.e. necessary, reasonable, proportional). Interests of the society and the rights which regulate the scope of human rights and allows for limitations are included in an integrated legal structure.[7] These quests needs to be answered to work out that when can the state be justified to limit human rights and what is proper connection that should grow between the rights of individual and the interest of society. There is no globally accepted response to the quest. Contrastingly, the quest it responded differently by every society; the issue has been dealt with by every society in accordance with its own circumstances, shaped by its own distinct problems, historical events and the way understands itself. For example, the reason for considering dignity as most cherished element of German democracy is the Holocaust and Nazi atrocities during the Second World War;[8] generally human life, equality and self-respect[9] are the important elements to develop a democratic society.

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4 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2005).

5 Ineke Sluiter Rosen & M. Ralph, *Free Speech in Classical Antiquity* (Leiden: Brill, 2004).

6 "Fact Sheet Hate Speech", *European Court of Human Rights,* 2020. See https://www.echr.coe.int /Documents/FS_Hate_speech_ENG.pdf (accessed January 27, 2020).

7 Jacco Bomhoff, "'The Rights and Freedoms of Others': The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights" (Antwerp, Oxford: Intersentia, 2008).

8 M. Brüggemann, E. Humprecht, R. Kleis Nielsen, K. Karppinen, A. Cornia & F. Esser, "Framing the Newspaper Crisis: How debates on the state of the press are shaped in

The battle in this case, is to formulate a constitutional delivery that allows rights to be carefully restricted to the degree required to safeguard society and the rights of people's whilst not overlooking fundamental human rights or individual freedoms that give the basis for a conservative society. These means can be met by using a restriction clause, a guide that limits and permits lawmakers and the judiciary by: (i) granting certain restrictions on rights; and (ii) imposing restrictions on certain constraints, subsequently safeguard the right from overwhelming limitations.[10] In situations where there is no restriction clause, or it is vaguely outlined, the judiciary usually tries to establish the ways in which it can safeguard the rights but still acknowledge the requirement to balance other opposing social and private interest and rights. In this notion, this method is dissimilar than the "limitation" on rights; as opposed to outlining the adequate restrictions of the right, the judiciary outlines the constraints or range of the right that in theory could not be limited. A limitation clause prompts judiciary to acknowledge two items. The first of which, is to assess whether a right has been impinged upon, and secondly, whether the reasoning provided for the restriction is valid.[11]

Pragmatically, in a restriction-built method, courts become more sensitised to social legal effects of their rulings; dissimilarly a method founded on establishing understanding of the range of a right may not consider public legislature effects. It is fundamental to mention that restrictions on rights are not equivalent to a derogation of rights. Constraints on rights are required limitations, allowing to balance amongst opposing rights, or to unify rights against other community objectives. This is not a rebound reaction to urgent circumstances. Derogations from rights are short term further restrictions, or deferments of rights, granted during times of urgency. Examples of the central clauses are given below.

Finland, France, Germany, Italy, United Kingdom and United States", *Journalism Studies* (2016): 533-551.

[9] B. Graham, G. Ashworth & J. Tunbridge, *A Geography of Heritage: Power, Culture and Economy* (New York: Routledge, 2016).

[10] C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1992).

[11] John T. Valauri, "Smoking and Self-Realization: A Reply to Professor Redish", *Northern Kentucky Law Review*, 1996.

The Silent Constitution and Limitation of Rights:
Implied (Or Judge-Made) Limitation Clause

The relative nature of the right is indicated by the applicable express limitation clause included in a constitution. However, the non-inclusion of an express limitation clause (neither general nor specific) indicates the absolute nature of those rights. Moreover, in some cases constitution is silent on the limitation of the fundamental rights. For instance, Article 6(1) of the European Convention for the protection of Human Rights and fundamental freedoms, this provision is interpreted as granting a right to access the courts in civil matters[12] asking if this right is limited. It is noteworthy to state that Article 6(1) does not contain a specific limitation clause and also the European convention does not contain the general limitation clause. Despite that it was held that the authority to limit the right to access is well recognized.[13]

A similar approach adopted regarding Article 3 of the First protocol to the European Convention, which required that the contracting state provides to hold "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".[14] The European court of human rights interpreted this provision as guaranteeing a general right to vote and to be elected. The court further added that these rights are not absolute and are bound by the implied limitation clause.[15]

The Implied Limitation Clause

The Bill of Rights included in the American Constitution contains a list of constitutional rights. On the surface, some of those rights seem absolute. A typical example is the First amendment, which provides, inter alia:

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[12] D. Sartori, "Golder v. United Kingdom, App. No. 4551/70, 11 EHRR 524 (1979-80)", *The lex certa principle, From the Italian Constitution to the European Convention on Human Rights* (Doctoral dissertation, University of Trento), 2014.

[13] Marc-Andre Eissen, "The Principle of Proportionality in the Case-law of the European Court of Human Rights." In *The European System for the Protection of Human Rights*, by F. Matscher and H. Petzold R. St. J. Macdonald, 125-147 (Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1993).

[14] Article 3, "Protocol to the Convention for the Protection of Human Rights", *European Court of Human Rights,* ECHR 1952, at https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed January 29, 2020).

[15] *Mathieu-Mohin and Clarfayt v. Belgium,* App. No. 9267/81, 10 EHRR 1 (European Court of Human Rights, 1987).

Congress shall make no law curtailing the freedom of speech.[16] This provision is not accompanied by an explicit limitation clause. Similarly, the Bill of Rights has no general limitation clause. Despite that, in the long and consistent line of cases, the US supreme court has ruled among others that the right of freedom of speech may be limited by an act of congress, provided that such an act was designed to achieve a compelling state interest or a pressing public need or a substantial state interest, and the means designated by such an act were "necessary", that is, "narrowly tailored" to achieve those ends. Such acts were held to be constitutional.[17] How should those rulings be considered in relation to the right itself? Should it be seen as if it has determined the scope of the right to freedom of expression? This view asserts that the right is protected to its fullest extend; that extend (or scope), however, was narrowed by Judicial interpretation. According to another view, these rulings had nothing to do with the scope of rights; rather, they have prescribed (Judicial) limitations on the rights' realization. Thus, the scope of the right was not affected by the rulings; rather they provided the criterion by which the right may be realized. This view asserts that the rights to free speech is not protected to its fullest extend; instead, judicial limitations of this right were acknowledged by the system.

Constitutions Deterring That Human Rights Can Be Limited "By Law"

Human rights provisions in several constitutions are accompanied by provisions of specific limitation clause allowing for the limitation of those rights "by law".[18] In most cases, these constitutions provide no additional guidance as to the conditions required for imposing such limitation.[19] The recognized interpretation is that the constitutional requirement for limitation "by law" also entails a "rule of law" component in both the formal and substantive meaning of the term.[20] This requirement is based

[16] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York: Routledge, 2017).

[17] F. Schauer, "Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture", *Harvard University, John F. Kennedy School of Government, Working Paper Series*, 2005.

[18] G. Van der Schyff, "Judicial Review of Legislation".

[19] Iain Currie, Johan de Waal and Gerhard Erasmus, *The Bill of Rights Handbook* (Juta & Co Ltd, 2000).

[20] J. Andrew, "A Marginal Doctrine and Strasbourg's Power of Appreciation: Free Expression and the Discourse of the European Court of Human Rights", Geneva Academy of International Humanitarian Law and Human Rights, 2008.

on the substantive test which provides it with the necessary legitimation. This "rule of law" notion may be reduced down, in essence, to the requirement of the proportionality. As Professor Grimm observed:

> "laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests … any restriction of human rights not only needs a constitutionally valid reason but also to be proportional to the rank and importance of the right and stake".[21]

Accordingly, any limitation clause (either specific or general) which provides that the right may be limited "by law" is not an open invitation to the legislator to limit the right as it sees fit. The limitation must be proportional; it should serve the proper purpose. This means it should be necessary and rational; the damage to the constitutional right must be proportional to the benefit gained from the limitation itself which means proportionality *Strict Sensu.*[22]

Specific Limitation Clauses

The most prevalent method of limiting constitutional rights in modern constitutions is by adopting several constitutional limitation clauses.[23] These are the specific limitation clauses. They provide specific arrangements for each constitutional right (or group of rights). Thus, they provide both the purpose for which a limitation of a right is valid and the means by which such a purpose may be attained. This method was adopted by The European Convention for the Protection of Human Rights and Fundamental Freedoms,[24] and the most Western European constitutional democracies established after the Second World War have also adopted this method.

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[21] D. M. Beatty, *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1994).

[22] A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015).

[23] M. N. Ngcobo, "The Constitutional Dynamism of a Multilingual Language Policy: A Case of South Africa", *South African Journal of African Languages* (2012): 181-187.

[24] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (New York: Cambridge University Press, 2012).

General Limitation Clauses

A list of human rights which does not contain specific limitation clauses is determined by the Universal Declaration of Human Rights, 1948. However, the relative nature of the rights in the declaration is preserved through the inclusion of general limitation clauses. These general clauses apply to all the rights in the declaration; Article 29 (2) provides 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".[25]

Hence, the General limitation clauses can be used to limit the rights and freedoms of an individual by the state at the time of emergency.

Hybrid Limitation Clauses

Different constitutions have adopted different arrangement to limit the rights they contain. There is no agreed-upon arrangement shared by all constitutions. In fact, some of the constitutions include both general and specific limitation clauses. This is the case, for example, with the Constitution of the Republic of South Africa.[26] These situations are called "hybrid arrangement".[27] However, sometimes, theses hybrid arrangements can raise serious issues in examining the relationship between the general limitation clause and specific limitation clause. These are interpretive questions. Both the general and specific limitation clauses make up a part of the constitution.[28] They are of equal normative status. Accordingly, while applying constitutional purposive interpretation to these provisions we should make every effort to read them together harmoniously.

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[25] Article 29, UDHR, *International Council on Human Rights Policy,* at http://www.ichrp.org /en/ article_29_udhr (accessed February 7, 2020).

[26] Constitution of the Republic of South Africa, Arts. 9, 15(3), 26, 27, 30, 31 (special limitation clause), and Art. 36 (general limitation clause).

[27] F. Schauer, "Freedom of Expression Adjudication in Europe and America".

[28] Kevin Iles, "Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses", *South African Journal on Human Rights* (2004): 448-455.

A State's Right to Derogate subject To Fulfilment of Certain Conditions: Reservations, Limitations and Derogation

The states actions that come under the ambit of the doctrine of margin of appreciation have to be examined thoroughly. Hence, it is timely important to explore those conditions meticulously in which the state can derogate from its responsibility and acknowledged ECHR in Article (15 and 57). This section of the Article explores more the rights of the State's to derogate, while not exceeding the limitations recognized by the Margin of appreciation doctrine.

The analytical research in this section will also be helpful to determine the state responsibilities and its limitations to draw the conceptual background, which will be useful when determining the role of "doctrine of proportionality"[29] as a tool of judicial review later. The doctrine of proportionality will be used to determine the balance between the interest of the society and right of an individual. Weather the States actions are *ultra vires* or *intra vires* this study will also help us to understand the "doctrine of proportionality" when applied on a High-profile case.

The international human rights law recognizes three conditions in which the state may restrict or limit the scope of the human rights;

1. Reservations to treaties.
2. Express Limitations to rights.
3. Derogation from rights.

These fields reveal those conditions that empowered the state to strike a balance between right of an individual and interest of a society. It is further asserted that these derogations are only permissible in extra-ordinary circumstances. "Life of the nation is at stake" this concept is significant in this regard that it gives an authority of a state to limit or restrict the scope of its obligations. While applying limitations it is obvious that "core of the right" may not be affected and at the time of reservations "the object and purpose" of the treaty must not be destroyed. ECHR has not given an unlimited power to the states to derogate, but limited powers with a time scale.

[29] M. K. Hattab, "The Doctrine of Legitimate Expectation & Proportionality: A Public Law Principle Adopted into the Private Law of Employment", *Liverpool Law Review* (2018): 1-26.

Reservation

The first and the most important rights which have been given by the international law to the states in order to limit or restrict their obligations towards treaty is a reservation. According to international law, reservation is a proviso (caveat) that a state accepts at the time of ratification of a convention or a treaty. This concept has been defined in Vienna Convention on the Law of Treaties 1969 (VCLT) as Article 2 (1) (d) states that "a unilateral statement however, phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby, it purports to exclude or to modify the legal effect of certain provision of the treaty in their application to that state".[30]

It means that when a state signs a treaty with a reservation, it excludes that state from the legal effects of that specific provision in the treaty to which it objects. The principle of reservation puts an obligation on the states that it should note its reservations at the time of accepting the treaty or at the time of ratification. Second optional protocol to the international covenant on civil and political rights,[31] where aiming at the abolition of the death penalty (1989), there its article 2 also safe guards the rights of the reservations of the state, however, with few limitations. Article 19(2) of the Vienna Convention on the Law of Treaties (VCLT) is very significant in this regard. It states that;

> "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

Reservations are also permitted in ECHR in its article 57 which states that:

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[30] Article 2(1)(d), "Vienna Convention on the Law of Treaties (VCLT) 1969".

[31] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty Adopted and proclaimed by General Assembly resolution 44/128 of December 15, 1989.

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
> 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

As mentioned in the article 57, a reservation may not be general and also should not be having a general character, which means that the state at the time of asserting reservation should not use broad or vague terminologies, to make it difficult to understand the meaning and scope of the reservation. Article 64 (1) requires from the state that its reservation should be precise and clear. Article 57 also demands that states should describe "legal certainty", which means that the "brief statement of the law concerned". In reference to article 64 (2) which provides a guarantee that a reservation should not exceed from the provisions expressly acknowledge by the state concerned. As stated above there are few stipulations which should be fulfilled by the states at the time of making the reservations. ECHR is fully competent to supervise and validate the compatibility of reservation according to the law. *Belilos v. Switzerland* is a very important case to define the principle of reservation, its structure and applicability. Such jurisdiction has been conferred on ECtHR by article 45 and article 49 of the ECHR.[32] The human rights committee with reference to ICCPR general comment 24, para 18[33] is also competent to check the validity and compatibility of the reservation. Reservation should not have a general character which means that the state at the time of asserting reservation should not use broad or vague terminologies, to make it difficult to understand the meaning and scope of the reservation.

Furthermore, article 20 of VCLT provides for that firstly, a reservation is not obliging to any following acceptance by the other contracting States that is approved by the treaty until it is stated in the treaty. Secondly, when there is limited number of negotiating states and it's a significant condition that

[32] *Belilos v. Switzerland,* Application No. 10328/83 (European Court of Human Rights, 1988).

[33] Human Rights Committee, *Reporting obligation (Thirteenth session, 1981), Compilation of General Comments and General Comment 1, Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev1 at 2,* 1994.

aim and objectives of the treaty are approved by all, acceptance is demanded from all partied by a reservation. Thirdly, a reservation requires the acceptance of the capable structure of that organization, when a treaty plays the part of being a fundamental tool of the international organization and unless it else delivers. Fourthly, in cases that are not the part of the following paragraphs and unless the agreement otherwise explains: (a) When the treaty is in power for the contracting states, approval by the other contracting State of a reservation constitutes the reserving State a party to the agreement in relation to that other State. b) Unless a conflicting goal is undeniably expressed by the objecting State, disapproval to a reservation by another contracting State does not prevent the entrance into force of agreement. (c) An act expressing a State's promise to be a part of the agreement and the reservation is successful when one of the contracting states recognized the reservation. Fifthly, the points seen in paragraph 2 and 4 and until the agreement otherwise states, a reservation is well-thought-out to have been recognized by a State, in case it doesn't opposes a reservation till twelve months after being told about the reservation or till the period on which it agreed to be a part of the treaty, whichever happens to be later.

Limitations

However, applying limitations as a mode of striking down its obligations, there are several aspects which must be taken under consideration. The first one is the balance of legitimate interest. There should be no time limitations, strict interpretations, the limitation should be necessary in a democratic society, and (margin of appreciation) must be used in a democratic way. The doctrine of proportionality should be used to verify the balance between the limitations and the rights.

International Covenant on Economic Social and Cultural Rights describes and limits the scope of derogation under limitations mode; Article 4 of ICESCR provides that:

> "... 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."

Limitation clause also puts embargo on the states that if they are limiting any right it should be according to the proper procedure mentioned in ECHR and its various protocols. Unlimited derogation from any human right and fundamental freedom is not permissible and against the principle of European Convention of Human Rights.

The Grounds for Legitimate Restrictions May Vary Between the Different Treaties

Limitations can be divided into two main themes:

1. Strict interpretation.
2. Permissible limitations.

Strict interpretation is well defined in one of the case *Golder v UK* paragraph 44 of the court's judgment of 21 February, 1975 "strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning".[34] Strict interpretation also is concerned with a proportionality of interference in a relation to a legitimate aim and it also puts a responsibility to use minimum interference to secure the aim and achieve the goal.

Permissible limitation is defined as the only limitation which is permissible and is authorized by the law. It should be in accordance with the law and expressly and impliedly prescribed by the law. Common law, administrative law and international treaties are those laws which should be complying while striking the principle of limitation. A lawful limitation should be clear, accessible, foreseeable and accurate. Lawful limitation must not reveal the excessive rigidity. It is also concerned with the legitimate aim of the limitation; the aims listed in the provisions must be taken into consideration. These restrictions have a great concern on the limitation which is necessary in a democratic society. They also define a detail list of legitimate aims which should be considered at the time of applying the principle of limitation.

[34] *Golder v The United Kingdom,* App No. 4551/70, ECHR 524 (1975).

A permissible limitation also declares that the limitation which is imposed by the state should be "necessary" for the existence of democratic society. The word "necessary" is significant in this context and many scholars have taken it in to consideration and defined this term proficiently. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable.[35] One must consider whether the interference complained of corresponded to a passing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10 (2)".[36]

A List of Rights Where Limitations Are Permissible

ECHR	ICCPR	Other provisions of relevance	Rights and freedoms
Art. 8	Art. 17, 23		Private and family life
Art. 9	Art.18	Art. 4.2 ICCPR	Freedom of religion and belief
Art. 10	Art. 19, 20	ICERD Art. 4, 4.a)	Freedom of expression
Art. 11	Art. 21, 22	Art. 8.1.a,c, 8.2 ICESCR, Art. 4.b ICERD	Freedom of assembly and association
Art. 2 Protocol 4	Art. 12		Freedom of movement/residence
Art. 1.2 Protocol 7	Art. 13		Expulsion of aliens
Art. 16		Cf. Art. 25 ICCPR	Political activity of aliens
Art. 1 Protocol 1			Right to property
		Art. ICESCR	Economic, social and cultural rights

[35] *Handuside v the United Kingdom,* 1 EHRR 737 (1976).
[36] *Sunday Times vs the United Kingdom,* 2 EHRR 245 (1979).

Derogation

Derogation is a method that should be used in rare situations and needs to be for a short period of time. State is only allowed to derogate from its duty when the threat is imminent and can put the "life of the nation" in jeopardy. This view is supported by Article 4[37] of ICCPR, Article 15 of ECHR and Article 3 of ECHR protocol 6, which gives a detailed description of the unusual situations. In this view, article 2.1 of second optional protocol carries immense importance as it talks about the derogations and reservations that can be applied in the times of war. The international law has defined certain circumstances for the state where it can exempt from its duties. The court once discovered that "an exceptional situation or crises of emergency which affects the whole population and constitutes a threat to organize life on the community of which the state is composed".[38]

Article 15 (1) of the ECHR: which talks about the principles of public emergency allows the states to derogate from its duties according to the followings.

> "In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law".[39]

A standard for examination was set by the court in this situation in Greece vs. UK. The court clarified "public emergency" as is suggested in article 15 in the way mentioned below:

1. It must be real or coming close.
2. It must affect the whole nation.

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[37] R. Higgins, "Derogations Under Human Rights Treaties", *British Yearbook of International Law* (1977): 281-319.

[38] Derek Jinks, "International Human Rights Law and the War on Terroism", *Denver Journal of International Law and Policy*, 2002.

[39] Oren Gross Aoláin, and Ní. Fionnuala, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", *Human Rights Quarterly*, 2001.

3. It must threaten the continuance of the organized life of the community.

The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[40]

The article 15 allows the states that have signed the treaty to deviate when the threat or the danger is such as war or public crisis that can be threatening to the life of the nation.[41] The researcher, in this writing has basically emphasized on public emergency condition, which is known to be the most usual method that state uses to depart. In one case famously known as Lawless case, the ECtHR has defined the notion of public emergency in a following manner.

> "Other public emergency threatening the life of the nation" is "sufficiently clear whereas they refer an exceptional situation of crises or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed".[42]

The primary criteria for the rationalization of derogation is said to be "threatening the life of the nation." The derogation should be in accordance with the principles given by the international law. Derogations should not be contrary to the rights which are non-derogable mentioned in Article 15 of ECHR[43] or Article 4 of ICCPR.[44] Another requirement is that derogations should not conflict with the other human rights stipulations mentioned in a national or international law. Such derogations are

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[40] *Greece v United Kingdom* (International Court of Justice, 1952).

[41] J. F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations", *Harvard International Law Journal*, 1981.

[42] *Lawless v. Ireland* (European Court of Human Rights, 1961).

[43] J. Quigley, "Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations", *Michigan Journal of International Law*, 1993.

[44] P. Primatesta & M. J. Goldacre, "Inguinal Hernia Repair: Incidence of Elective and Emergency Surgery: Readmission and Mortality", *International Journal of Epidemiology* (1996): 835-839.

safeguarded in Article 53 of ECHR.[45] It is a necessity that the derogation should be provisional as stated in Brannigan and McBride "the validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of insuring greater conformity with the convention obligations".[46] Undeniably, such a procedure of continued reflection keeps up with article 15 para 3 of ECHR which requires permanent evaluation of the necessity for emergency measures and is also contained in the notion of proportionality.

Conclusion

The preferred regime: general, specific, or hybrid limitation clause?

Hence, in order to solve the interesting question of what arrangement is the best to limit constitutional rights? In terms of legal certainty, the best regime seems to be a general limitation clause. It can be well concluded that a general, comprehensive clause would enable the legal system to develop a general, comprehensive theory of rights limitation. Certainly, a heavy burden would be placed on the judicial branch, which will have to play a significant role in developing a uniform approach to this complicated issue while reconciling the different constitutional cases. Another view considers the best approach in terms of the rights' protection, were, the preferred approach is that of several specific limitation clauses. By providing a unique arrangement for each right (or group of rights), the constituent authority may accurately reflect its view as to the relative importance of each right. Accordingly, the constitutional authority may "derive" a unique arrangement for limitation that takes into account each of the many complicated constitutional features of the specific right.[47] Thus, for example, while general limitation clauses rarely include a detailed list of the proper purposes for which a limitation is justified, specific limitation clauses do contain such an account in many cases. The judicial task thus becomes easier as purposes not included within the constitutional provision are eliminated. Accordingly, hence, it can be well concluded that in most cases, the right itself is better protected.

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[45] R. Higgins, "Derogations Under Human Rights Treaties".

[46] *Brannigan and McBride v UK,* ECtHR 5/1992/350/423-424 (1992).

[47] M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", *International Journal of Constitutional Law*, 2004.