JUDICIAL INTERPRETATION OF LIMITATION CLAUSES AT THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS SYSTEMS: LESSONS FOR DOMESTIC COURTS

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Abstract

Most human rights have no absolute character. In this sense, it is permitted to restrict them by balancing their enjoyment against other legitimate reasons or interests. For instance, the right to freedom of expressions, freedom of assembly, freedom of association ad freedom of movement can be limited on grounds of national security or public order. The main challenge in many jurisdictions is how a balance is struck between the enjoyments of human rights on the one hand and the use of legitimate grounds to limit the said rights on the other. The aim of this article is to present international and regional jurisprudence to illustrate how human rights tribunals have attempted to grapple with the problematic aspect of balancing between rights and legitimate interests. This discussion is crucial in a bid to provide lessons to local courts in various jurisdictions, Tanzania inclusive, when interpreting limitation clauses in their constitutions.

Key words: *Limitation clauses, legitimate interests, the principle of proportionality, margin of appreciation.*

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1. INTRODUCTION

It is widely held that the concept of human rights stems from the doctrine of natural rights, which holds that individuals are entitled to fundamental rights beyond those prescribed by law, merely by virtue of being humans.[1] It is also universally accepted in modern democratic states that human rights are of the highest virtue, and their protection is an obligation of every state.[2] Even though human rights occupy such a unique position, at the same time, modern society acknowledges the importance of other legitimate interests as a condition for the existence of each state. For instance, the interest of national security or the preservation of law and order often presuppose the need to narrow some rights by way of limitations. Alderman and Kennedy say, for example, that 'privacy may seem paramount to a person who has lost it, but that right often clashes with other rights and responsibilities that we as a society deem important.'[3]

Thus, when the right to privacy clashes with other more important interests, it will be restricted in order to serve the common good. Consequently, the tension between upholding human rights, which are provided and guaranteed in the international and regional instruments as well as national constitutions, and allowing limitations or restrictions upon the very same rights, has pre-occupied human rights bodies for many years. This has called the need to put appropriate balance between rights and limitations.

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[1] See Henkin, L., *The Age of Rights*, New York: Columbia University Press, 1990 at p. 5.

[2] The Commonwealth., *State's Obligation under International Human Rights Conventions: The Implications for Government Sport Policy*, Commonwealth Secretariat, 2018, at p.10.

[3] Alderman, E., & Kennedy, C., *The Right to Privacy,* New York: Baltimore Sun Publisher, 1997, at p. 14.

2. LIMITATION OF HUMAN RIGHTS

The International community under the UN and other inter-governmental organisations has adopted numerous multi-lateral human rights treaties regulating various aspects of human rights. These rights range in three broad categories. The first category contains Civil and Political rights (such as the right to life, the right to freedom of assembly and association, the right to freedom of expression, etc).[4] The second category is referred to as Economic, Social and Cultural Rights (the right to work, the right to education, the right to health etc).[5] The last category is called solidarity right or group rights (e.g. the right to healthy environment, the right to peace, and minority rights.)[6] All these rights are interrelated and very important when seeking to ensure human existence.

Nevertheless, we have to admit that most of these rights are not absolute; they could be narrowed under certain conditions in order to achieve certain goals which are deemed more important. In other words, human rights contained in international treaties, regional treaties and national constitutions are generally not absolute but are often qualified and subject to some restrictions. Birutė Pranevičienė explains the importance of suppressing certain interests for the greater benefits by saying that sacrificing other values is important in order to protect higher values. This is

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[4] These are provided internationally under the International Covenant on Civil and Political Rights, 1966.

[5] These are provided internationally under the International Covenant on Economic, Social and Cultural Rights, 1966.

[6] These are found in the African Charter on Human and Peoples Rights, 1981 (Articles 22, 23, and 24) and in other specialised human rights instruments.

related to the process of social control, human civilization and individual experience.[7]

However, because of the powerful forces of the State, individuals may start feeling insecure and vulnerable if their rights become more restrained. Indeed, certain limitations are necessary in order to achieve certain goals; nevertheless, the problem is when such limitation of rights of an individual goes to the extent greater than necessary to achieve a particular goal. Speaking on the danger of maintaining a broader interpretation to limitation clauses, the Special Reppourter on the right to freedom of expression, a mandate which began in 1993 under the auspices of the former UN Human Rights Commission[8] warned that, if these limitations are broadly interpreted they would ultimately jeopardize the enjoyment of human rights and that cannot be in line with existing international human rights instruments.[9]

3. LIMITATION CLAUSES UNDER INTERNATIONAL, EUROPEAN AND INTER-AMERICAN REGIONS

3.1 At the International Level

As integral components of human rights system, rights are subject to legitimate limitations by the State. As stated above, limitation is

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[7]Pranevičienė, B., "Limiting of the Rights to Privacy in the Context of Protection of National Security", in Darbai, M. *Jurisprudence: Research Papers,* Mykolo Romerio Universitetas, Faculty of Public Security, 2011, 18 (4), at p. 1615.

[8] The United Nations Commission on Human Rights was the first UN human rights body established in 1946 with the functions of promoting and protecting human rights around the world. It was replaced by the United Nations Human Rights Council in 2006 that was established by the UN General Assembly on March 15, 2006 (by resolution A/RES/60/251).

[9]See, Ligabo, A., "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," A/ HRC/11/4, 30 April 2009. The Report is referred to by Shelton, D.L., "Balancing Rights and Responsibilities: Human Rights Jurisprudence on Regulating Content of Speech," *George Washington Law Faculty Publications and Other Works*, 2010, George Washington University Law School, pp. 211-241 at p. 219.

thus a legitimate way in which legal instruments can accommodate, through democratic means, conflict between entrenched rights and other competing social interests. A cursory glance of international and regional instruments reveals that the structure of limitations clauses is generally of two categories: either *a general limitation clause* or *a right- specific limitation clause*. The general limitation clause limits all sets of rights within the said instrument while the right-specific limitation clause only limits specific rights. Limitation clauses are distinct from 'derogation clauses' because they allow states to limit rights for reasons unrelated to war or public emergency,[10] which is the characteristic of the latter.[11] In other words, a limitation clause is a provision which enables a protected right to be partially limited to a specified extent and for certain democratically justifiable purpose.[12]

The key provision on the general limitation of rights under the UN human rights system is found in the *Universal Declaration of Human Rights*, 1948 (UDHR). It states:

> 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,

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[10]An example of a derogation clause is found under Article 4 of the International Covenant on Civil and Political Rights, 1966. See also Article 31(1) of the Constitution of the United Republic of Tanzania, 1977.

[11]Stapleton, S., "Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation." *31 N.Y.U. J. Int'l L. & Pol. 535* (Winter/Spring 1999) at p. 235.

[12]International IDEA, *Limitation Clauses*, Institute for Democracy and Electoral Assistance, Second Edition, 2017, at p. 3.

> public order and the general welfare in a democratic society.[13]

This provision does not refer to a single human right embedded in the UDHR; rather it refers to all set of rights and freedoms guaranteed therein. It is actually the last but one provision in the UDHR. Under this provision, States are allowed to set limitations by prescribing them in the law to restrict the exercise of all rights and freedoms enshrined in the UDHR, for purpose of safeguarding certain interests. The style of limiting rights by the use of a general limitation clause is followed hook, line and sinker by the *International Covenant on Economic, Social and Cultural Rights*, 1966 (ICESCR), wherein Article 4 states:

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

Unlike the above two instruments, UDHR and ICESCR, the *International Covenant on Civil and Political Rights*, 1966 (ICCPR) does not have a general limitation clause, instead, it opts to use right-specific limitation clauses. The reason for this is not hard to find. A small number of human rights under the ICCPR are recognised as absolute rights which cannot be limited for whatever reason. In the ICCPR, these rights are non-derogable even at the time of public emergence, therefore suggesting that

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[13]Article 29 (2) of the Universal Declaration of Human Rights, 1948.

these rights are absolute.[14] The ICCPR incorporates limitation clauses in recognition of the same reason that there are circumstances under which the State may limit certain rights that are otherwise protected for the common good. Some rights therefore contain express limitation clauses which set out the specific parameters by which these rights may be limited. Limitation clauses under the ICCPR are found on the right to liberty of movement and the freedom to choose a residence (Article 12), the freedom to manifest one's religion or beliefs (Article 18), freedom of expression (Article 19), the right to peaceful assembly (Article 21) and freedom of association (Article 22). Each of these articles starts with a general statement of the right concerned, followed by a more detailed formulation of the content or scope *rationae materiae* of that right and, then, by limitations or restrictions where applicable. It is worth to cite one example. While Clause (1) of Article 22 of the ICCPR, guarantees the right to freedom of association, Clause (2) embodies a limitation clause:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than *those which are prescribed* by law and which are *necessary in a democratic society in*

[14] Article 4(2) of the ICCPR explicitly outlines the set of rights that cannot be derogated from, even in times of emergency. It includes Article 6, the right to life; Article 7, the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment; Article 8, the right not to be held in slavery or servitude; Article 11, the right not to be imprisoned for failure to perform contractual obligations; Article 15, the right not to be subject to retroactive criminal prosecutions; Article 16, the right to recognition as a person before the law; and Article 18, the right to freedom of thought, conscience, and religion.

> *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…. (Underline added.)

A common denominator in the above cited provisions under the UDHR, ICESCR and ICCPR, whether it is a general limitation clause or a right-specific limitation clause, is that not every single limitation of a human right will be considered as lawful. Three conditions must be shown for a right to be limited or restricted. First, a restriction must be 'prescribed' or 'determined' by law. Second, the said restriction must be for a certain purpose or interest. The purposes include, securing the rights and freedoms of others, protection of national security, or public safety, public order, public health or public moral, or promoting the general welfare. Third, the condition which is clearer from Article 22 Clause (2) of ICCPR above is that the restriction must be 'necessary in a democratic society.'

3.2 At the Regional Level

This article will examine limitations clauses at the European and American Regions because the two systems have much in common, from the way the human rights provisions are drafted to the way courts have been interpreting those provisions. The African regional human rights system will be discussed separately in another paper. The first regional human rights instrument to stipulate limitation clauses in the rights is the *European Convention on Human Rights and Fundamental Freedoms,* 1950[15] which has similar stipulation like the ICCPR. It has established a system of rights with specific limitation clauses. The said limitation

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[15] Convention for the Protection of Human Rights and Freedoms, Rome, 4.XI.1950.

clauses can be found in Article 8(2) (right to respect for private life and family); Article 9(2) (freedom of thought, conscience, and religion); Article 10(2) (freedom of expression); and Article 11(2) (freedom of peaceful assembly, association, and the right to form and to join trade unions). As an example, Article 8(2) states that:

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

The second regional human rights system is the Inter-American system which follows the European system in terms of age. It also adopts right-specific limitation clauses. The *American Convention on Human Rights*, 1969 contains limitation in the following rights: Article 12(3) - freedom of conscience and religion; Article 13(2) - freedom of thought and expression; Article 15 – right of assembly; Article 16(2) - freedom of association; and Article 22(3) - freedom of movement and residence. Article 16, for example, states*,* inter alia, thus:

> 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
> 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

4. JUDICIAL INTERPRETATION OF LIMITATION CLAUSES

In the interpretation of provisions which carry limitation clauses, the case law from international and regional bodies bear the same set of resemblance in terms of criteria to be used. It appears that these judicial bodies learn from each other as they try as much as possible to develop uniform jurisprudence. The United Nations Human Rights Committee (HRC) which is a treaty body that monitors the ICCPR and the European Court of Human Rights (ECtHR) that interprets the *European Human Rights Convention* have the most developed limitation clause jurisprudence. The approach that has been taken by these judicial bodies when construing limitation clauses is basically two fold. The first step is to consider whether the right or freedom complained of has actually been infringed. If there is an infringement, the second step is to decide whether that infringement is justifiable for the reasons allowed in the limitation clause. It is this second limb which is the most problematic as will vividly be demonstrated by case law discussed below.

4.1 The Human Rights Committee

The UN Human Rights Committee (HRC or Committee) has generated authoritative interpretation of the ICCPR provisions through the elaboration of General Comments[16] and through case law. In its General Comment No. 22 (interpreting the freedom to manifest religion or belief) the HRC states that the limitation on grounds of public safety, public order, health, or morals, in Article 18(3) of the ICCPR, is to be strictly interpreted with attention to the

[16] According to the Office of the UN High Commissioner for Human Rights (OHCHR), each of the treaty bodies publishes its interpretation of the provisions of its respective human rights treaty in the form of a document called “general comments” or “general recommendations”. These are useful guides in the interpretation of the treaty in question.

"principles of proportionality" and non-discrimination. The Committee provided the following guidance: First, limitation imposed must be established by law and must not be applied in a manner that would vitiate the right guaranteed. Second, restrictions or limitations are not allowed on grounds not specified in the provision, even if they would be allowed as restrictions to other rights protected in the Covenant. In other words, the Committee is saying that the limitation imposed must be applied only for those purposes for which they were prescribed. Third, the limitation must be directly related and proportionate to the specified need on which they are predicated, and that, restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[17]

The Committee expanded further these guiding principles or criteria in its General Comment No. 27 regarding the right to freedom of movement (Article 12).[18] The Committee noted that in adopting law providing restrictions permitted by Article 12 paragraph (3), States should always be guided by the principles elaborated below.

First, the restriction must not impair the essence of the right. Second, the laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Third, it is not sufficient that the restriction serve the permissible purposes; they must also be necessary to protect them. In other words, the application of restrictions must be based on clear grounds and meet the test of

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[17]See paragraph 26 of the General Comment 22 (Human Rights Committee General Comment 22 CCPR/C/21/Rev. 1/Add.4 of 30/07/1993).

[18] See UN Human Rights Committee General Comment No. 27: Article 12 (Freedom of Movement) CCPR/C/21/Rev. 1/Add. 9 of 2nd November 1999.

necessity. Fourth, restrictive measures must conform to the "principle of proportionality"; they must be appropriate to achieve their protective function; they must be least intrusive instrument among those which might achieve the desired result.[19] The Committee went ahead to warn that "the principle of proportionality has to be respected not only in law that frames the restrictions, but also by the administrative and judicial authorities in applying the law."[20]

The jurisprudence of the HRC can be illustrated by reviewing some cases. The first case is *Faurisson v. France.*[21] The applicant was a British-born French academic who became best known for Holocaust denial. He generated much controversy with a number of articles published in the Journal of Historical Review and elsewhere, and by letters to French newspapers, especially *Le Monde*, which contradicted the history of the Holocaust by denying the existence of gas chambers in Nazi death camps, the systematic killing of European Jews using gas during the Second World War. In one of his statement he said "... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication." Faurisson was prosecuted and fined on the basis of *Gayssot Act*, 1990 which makes it an offense to contest existence of crimes against humanity; and in 1991 he was removed from his university chair on the basis of his views under the Act.

He challenged the statute in 1993 as a violation of freedom of expression under the *International Covenant on Civil and Political*

[19] Ibid., paragraphs 13-14.
[20] Id., paragraph 15.
[21] *No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).*

Rights, at the HRC. The HRC sought to determine if the conditions necessary for limitations on freedom of expression were present in order to justify the *Gayssot Act*. The HRC applied the three-part test to determine this issue. It held that any restriction on the right to freedom of expression must cumulatively meet the following conditions: (i) it must be provided by law, (ii) it must address one of the aims set out in paragraph 3(a) and (b) of Article 19, and (iii) it must be necessary to achieve a legitimate purpose.[22]

Though the applicant contested the *Gayssot Act*, the Committee noted that the "restriction on the author's freedom of expression was indeed provided by law i.e. the Act of 1990."[23] With regard to paragraph 3(a) and (b) of Article 19, the Committee noted that these paragraphs relate to limitation for the interests of other persons or to those of the community as a whole. The HRC stated that since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism. On this issue, the Committee concluded that the restriction of the applicant's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.[24] The last issue was whether the restriction of the applicant's freedom of expression was "necessary" to achieve a legitimate purpose. The Committee decided in the following words:

> The Committee noted the State party's argument contending that the introduction of the *Gayssot Act* was intended to serve the struggle against racism and anti-

[22] Ibid., paragraph 9.4.
[23] Id., paragraph 9.5.
[24] Id., paragraph 9.6.

> semitism. It also noted the statement of a member of the French Government, the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism. In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.

Briefly, the Committee decided that the restrictions of the *Gayssot Act* were justified because they were provided by law, addressed the aims set out in Paragraph 3(a) of Article 19, and were necessary to achieve the legitimate purpose of curbing racism and anti-Semitism.

Another case worth examining decided by the HRC is *Sergey Kalyakin v. Belarus.*[25] Sergey was a politician, leader of the Belarusian Left Party "A Just World". He was a candidate for presidency in Belarus in 2001 and in 2006. In 2009, he was elected chairman of the Belarusian Left Party. He submitted to the HRC his complaint on behalf of himself and 20 others who were all citizen of Belarus. He claimed that they were all victims of violations by Belarus of Article 22, paragraph (1) and (2), of the ICCPR. Their claim was that on 24 June 2011, as members of the council of the association that they had founded together, they submitted an application to the Ministry of Justice for registration of a non-governmental human rights association, "For Fair Elections". The Ministry of Justice denied registration on the grounds that the application was not in compliance with the requirements of Article 15(3) of the *Law on Public Associations* of

[25] Communication No. 2153/2012, CCPR/C/112/D/2153/2012.

October 1994. In particular, the Ministry of Justice claimed that it had not been provided with a list of the founders of the association; that the record of its constituent assembly had not been signed by the chair; and that there were some concerns with regard to a letter of guarantee confirming the allocation of office space to the association. They filed a complaint against the decision of the Ministry of Justice at the Supreme Court. They claimed that the arguments of the Ministry of Justice were fictitious and based on allegations, rather than facts, and that in fact, the denial was groundless. They argued that the constituent assembly had been held in compliance with the Law on Public Associations and that they had orderly submitted all the necessary documents to register the association. The Supreme Court rejected the claim on grounds similar to those relied on by the Ministry of Justice.

Before the HRC the complainants claimed that the refusal to register the human rights association was not necessary in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others and, that therefore, it amounted to a violation of their rights under Article 22 (freedom of association), read in conjunction with article 2(2) of the ICCPR. The issue before the HRC was whether the refusal of the State party authorities to register the applicants' human rights association, "For Fair Elections", constituted an unjustified restriction of the right to freedom of association of the complainants. The HRC pointed out three tests or conditions which any restriction on the right to freedom of association must meet: (a) it must be provided for by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of those purposes.

The HRC went on to state that even though such reasons were prescribed by the relevant law, the State party had not attempted to advance sufficient argument as to why the registration refusal was necessary in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The Committee stated that, "in the absence of any other pertinent explanations from the State, it gives due weight to the applicants' argumentation, that no explanation was provided by the domestic authorities as to the necessity to restrict the right to freedom of association of the complainants in line with Article 22, paragraph 2, of the Covenant."

The legal standards for assessing whether limitations on human rights are valid are also spelled out in the *Siracusa Principles*, a non-binding document adopted by the UN Economic and Social Council in 1985.[26] These principles hold, among other things, that measures restricting human rights should be legal (i.e., provided by law); neither arbitrary nor discriminatory; should be proportionate, necessary and the least restrictive means that are reasonably available under the circumstances.[27]

Moreover, the Human Rights Committee has adopted the "margin of discretion" doctrine that has been widely used by the European Court of Human Rights. In *Hertzeberg and Others v. Finland*,[28] the HRC considered a case in which the Finish Government invoked public moral ground to justify its restrictive actions. The Committee found no violation of Article 19, stating thus:

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[26] Siracusa Principles are principles of interpretation of the limitation and derogation provisions of the ICCPR developed in Siracusa, Sicily, in April and May 1984 by a group of 31 distinguished experts in International Law.

[27] See principles 7-10 of the Siracusa Principles.

[28] Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985).

> It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities. The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19(3), the exercise of the rights provided for in article 19(2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.[29]

4.2 The European Court of Human Rights

Under the *European Convention on Human Rights*, almost similar, though not identical with other regional and international instruments, grounds for limitations are provided in Article 9(2), Article 10(2) and Article 11(2). The European Court of Human Rights (ECtHR) in Strasbourg has long been at the forefront in developing various principles while applying human rights, including those applicable to limitation clauses. The pertinent case law of the Court is exceptionally rich and developed. It has developed solid principles for interpretation of limitation clauses, especially for making a determination about whether or not

[29] Ibid., paragraphs 10.3-10.4.

interference with a right is in compliance with the requirements set out in the limitation clauses.[30]

According to its jurisprudence, a state which limits or restricts human rights should satisfy the three tier test by showing that these restrictions/limitations are (a) in accordance with the law; (b) pursue one of the specific aims described; (c) necessary in a democratic society. Additionally, to be “necessary in a democratic society,” the Court said, the State must demonstrate that the measure taken is proportionate (i.e., it abides by the principle of “proportionality”). Typically, therefore, the Strasbourg Court addresses four key questions in cases where limitation is pleaded. First, was there an interference with the right in question? Second, if so, was it in accordance with or prescribed by law? Third, was it genuinely in pursuit of one or more of the legitimate purposes at issue? And fourth, taking all the relevant circumstances into account was it necessary in a democratic society for these ends?

4.2.1 Whether the Interference is Prescribed by Law

When a case of limitation or restriction of right is brought before the court, the first part of the test requires that the restriction/limitation be prescribed by law. There are different ways to pose an issue under this first test. It can be asked whether the interference is “in accordance with the law”, or whether the interference is “prescribed by law” or whether the limitation is “subject to the conditions provided by law.”In order to meet this test, the ECtHR do apply a threefold inquiry.[31] Firstly, it assesses if the measure of restriction has some basis in domestic law. This

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[30] See Pati, R., “Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective.,” *23 Berkeley J. Int'l L. 223* (2005), citing Dominic McGoldrick, The Human Rights Committee; Its Role in the Development of the International Covenant on Civil and Political Rights, 54 (1991), at p. 468.

[31] See the European Court in *Sunday Times v. United Kingdom*, 26 April 1979, para. 49.

rarely poses a problem. For, in most cases, limitation or restriction of right will be clearly stated in legislation. Secondly, the court will have to assess the accessibility of the law. Here, the law must be adequately accessible to a person concerned. This means that the law which limits a right must have been published so as to be known. Secret laws cannot be compatible with the rule of law. However, it has been held that this does not mean that the law must have been codified; it is sufficient if it is part of Common law.[32] The term 'law', the Court stated, must be understood in its substantive meaning and not its formal expression. Both enactments of lower rank like subsidiary legislation and unwritten law have been accepted by the Court as 'law'.[33]

Third, the court would examine the quality of the law, requiring it to be compatible to the rule of law, so that there is "a measure of legal protection in domestic law against arbitrary interference by public authorities with the rights safeguarded".[34] The law must be unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful. It was held that a norm cannot be regarded as a 'law' unless it is "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able, if need be with appropriate advise, to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail"[35] There is also a requirement that adequate safeguards and

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[32] Johannessen, L., "Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards", *S. Afr. J. On Hum. Rts*. Vol. 10, (1994) 216, at p. 231.

[33] *Kruslin v. France*, (1990) 12 EHRR 547, para 29.

[34] See Application 8691/79: *Malone v. United Kingdom* (1984) EHRR 14, at para 67. The basis for the lawfulness requirement was further explained by the English House of Lords in *R (Gillan) v. Metropolitan Police Comr* (2006) UKHL 12; (2006) 2 AC 307, para 34.

[35] See Application 26229/95: *Gaweda v. Poland* (2002) 12 BHRC 486, para 39.

effective remedies should be provided by law against illegal or abusive imposition or application of limitations on human rights.[36]

4.2.2 Whether the limitation pursues one of the specific aims

The specific aim or sometimes called 'legitimate purposes or interests' are usually listed in the limitation clauses. They essentially require that the authorities act to achieve a goal specified in the limitation clause when restricting rights.[37] Under the European Convention, legitimate "interests" or "purposes" include national security; territorial integrity and public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; the protection of the rights, freedoms, and reputation of others; the prevention of disclosure of information received in confidence; and the impartiality of the judiciary.[38]

4.2.3 Whether the limitation is necessary in a democratic society

The third prerequisite is that the limiting measure be "necessary in a democratic society." Most of arguments adduced before courts concentrate on this question whether the interference, limitation or restriction to a human right at issue is "necessary in a democratic society" to achieve a certain legitimate interest. Even if a limitation is in accordance with a clear law and serves a legitimate aim, it will only pass the test of human rights standards if it is truly "necessary" for the protection of that legitimate aim. The Court's

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[36]See, for example, Application 11105/84: *Huvig v. France* (1990) 12 EHRR 528 and Application 13616/88: *Hentrich v. France* (1994) 18 EHRR 440, and a House of Lord decision in *R (Munjaz) v. Mersey Care NHTS Trust* (2005) UKHL 58, (2006) 2 AC 148.

[37] Pati, R., "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective," *23 Berkeley J. Int'l L. 223* (2005), citing Dominic McGoldrick, The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights, 54 (1991)., at p. 252.

[38] See Article 9 (2), Article 10 (2) and Article 11 (2) of the European Convention on Human Rights.

jurisprudence regarding this requirement was summarized in the case of *Silver v. United Kingdom:*[39]

> (a) the adjective 'necessary' is not synonymous with 'indispensable,' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'reasonable,' or 'desirable'';
>
> (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
>
> (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, *correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'*;
>
> (d) those paragraphs of ... the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted. (Emphasis supplied).

Briefly stated, the jurisprudence from European Court suggests that the phrase "necessary in a democratic society" is to be construed on a case-by-case basis,[40] and the phrase has been interpreted as requiring every restriction to meet three

[39] (A/61), 5 Eur. H.R. Rep. 347, 376 (1983) (citing *Handyside v. United Kingdom*, (A/24), 1 E.H.R.R. 737, 754-55 (1979-80)).

[40] See, for instance, Case of *Nada v. Switzerland*, Application No. 10593/08 Judgement of the Grand Chamber of September 2012, para. 177.

requirements: (i) is responding to a pressing public or social need; (ii) is actually pursuing a legitimate aim and (iii) is proportionate.[41]

Let us review facts and decisions of a few cases to see how the ECtHR has invoked these requirements. The case of *Handyside v. United Kingdom*[42] which dealt with freedom of expression is the most cited case as far as freedom of expression is concerned. Handyside was the owner of "Stage 1" publishers. He purchased British rights of "The Little Red Schoolbook", written by Søren Hansen and Jesper Jensen. The book was initially published in 1969 in Denmark and translations were later published in other European countries as well as several non-European countries. One of the chapters contained a 26-page section concerning "Sex", including sub-sections on issues like masturbation, contraceptives, menstruation, pornography, homosexuality and abortion and addresses for help and advice on sexual matters.

The book became subject of extensive press comment, with mixed reactions with regards to the content. After receiving a number of complaints, the Director of Public Prosecutions asked the Metropolitan Police to investigate whether the book breached obscenity laws. As a result, more than a thousand copies of the book were provisionally seized under the *Obscene Publications Act*. On trial, Handyside was found guilty of possessing obscene publications for gain, fined and ordered to pay costs. His appeal was unsuccessful. The applicant filed a human right complaint before the European Court on Human Rights. The Court applied the three-tier test and finally held that the confiscation of a book which was aimed at teenage readers did not violate the right to

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[41] See, *e.g., Sunday Times v. United Kingdom* (1979) ECHR 1; *Canese v. Paraguay* Judgment of August 31, 2004, Inter.Am.Ct. HR (ser.C) No. 111; *Hertel v. Switzerland*, Application No. 25181/94.

[42] Application no. (5493/72).

freedom of expression. In reaching this decision, the Court held that Handyside's conviction constituted an interference with the right to freedom of expression which had been 'prescribed by law.'[43]This was not even contested by the applicant who complained that the competent authorities in the UK applied the law against him.

Having thus ascertained the interferences complained of satisfied the first of the conditions in paragraph 2 of Article 10 of the European Convention on Human Rights, the Court then investigated whether such interference complied with other two tests. The Government argued that the interferences were "necessary in a democratic society", "for the protection of ... morals".[44] The Court accepted this argument and held that the British Government had the legitimate aim of protecting public morals as provided under Article 10 (2) of the European Convention.[45] The Court attached particular importance to the fact that the publication was aimed, above all, at children and adolescents aged from twelve to eighteen. The Court ruled that Mr. Handyside, in exercising his freedom of expression, did not undertake the "duties and responsibilities" attached to freedom of expression in a democratic society. On the last issue, whether the interference had been "necessary in a democratic society," the Court answered in the affirmative.[46]

Kokkinakis v. Greece[47] is another landmark case of the Court decided in 1993, concerning compatibility of certain sanctions for

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[43] Ibid., paragraph 57.
[44] Id., paragraph 58.
[45] Id., paragraph 59.
[46] Id., paragraph 67.
[47] Application No. 14307/88.

proselytism with Articles 7 and 9 of the European Convention. The issue raised in this case related to, inter alia, freedom of thought, conscience and religion under Article 9 and freedom of expression under Article 10 of the Convention in relation to the crime of proselytism under Greek law.[48]

The Applicant, Mr. Kokkinakis, was a Jehovah's Witness and, with his wife, called at the home of a Mrs. Kyriakaka, the wife of a cantor of the local Orthodox Church. Mr. and Mrs. Kokkinakis entered into a discussion with Mrs. Kyriakaka about religion with a view to converting her to their religious beliefs. Mr. Kyriakaka on hearing of the visit contacted the local police and Mr. and Mrs. Kokkinakis were arrested, charged and ultimately convicted of proselytism. With regard to alleged violation of Articles 9 and 10 which contain limitation clauses, the Applicant submitted that Greek law was contrary to everyone's right to manifest their religion in general on the basis that declaration of faith contrary to the Greek Orthodox faith could give rise to prosecution. Additionally, the right to manifest a religious belief is one that should exist in any tolerant democratic society. The Greek government responded on the basis that whilst it was not contended that Greek laws prohibiting proselytism were *prima facie* contrary to Article 9 of the Convention, they were intended to protect the dominant Greek faith and were therefore necessary.

The ECtHR was required in this context, because of the Greek government's admission regarding the *prima facie* violation of the

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[48] Proselytism is defined as any determined attempt to entice individuals away, by undermining beliefs, using inducements or moral support or material assistance, or by the use of fraud or taking advantage of trust, inexperience, need, low intellect or naïveté (originally, from the dominant Greek religion; that religion being that of the Christian Eastern Orthodox Church). The definition of proselytism offered in Greek law – specifically from Article 13 of the Greek Constitution and law 1363/1938.

Article, to consider whether the violation was justified under Article 9(2), as being prescribed by law and necessary in a democratic society in pursuit of a legitimate aim. The Court held that, *prima facie* the sentence passed to the applicant amounted to an interference with his right to freedom to manifest his religion. However, taking into account the circumstances of the case the Court considered the measure that had been taken by the government was in a pursuit of a legitimate aim, namely the protection of the rights and freedoms of others. The difficult part was whether the Government's actions, could be considered necessary in a democratic society.

The Government maintained that the Greek courts had based themselves on plain facts which amounted to the offence of proselytism: Mr. Kokkinakis's insistence on entering Mrs. Kyriakaki's home on a false pretext; the way in which he had approached her in order to gain her trust; and his "skilful" analysis of the Holy Scriptures calculated to "delude" the complainant, who did not possess any "adequate grounding in doctrine". They pointed out that, if the State remained indifferent to attacks on freedom of religious belief, major unrest would be caused that would probably disturb the social peace.

The Court invoked the doctrine of "margin of appreciation," holding that a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to Court supervision, by looking at both the legislation and the decisions applying it, even those given by an independent court. To determine whether the measures taken were necessary in a democratic society, the Court invoked the "principle of proportionality."It held, the "Court's task is to determine whether the measures taken at national level

were justified in principle and proportionate."[49] It was contended by Greece that the punishment afforded to the Applicant was necessary to protect Mrs. Kyriakaka's religious beliefs on the basis of her inexperience and feebleness of mind. The Court was not persuaded by this argument. It stated, "In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused."[50]

In the context of this case, the Court reasoned, the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. Mr. Kokkinakis's discussions with Mrs. Kyriakaka were open and not unreasonable in respect of manifesting his beliefs. The Court held that the punishment was disproportionate to the conduct manifested by Mr. Kokkinakis, making it incompatible with the tolerance expected of a democratic society.

Despite the fact that the word "proportionality" hardly features expressly in the international and regional human rights instruments, the principle has gained universal acclaim and is apparently applied almost globally now, including in Tanzania. It is believed that this principle was initially borrowed from the German Constitution of May 23, 1949, designed basically as the Basic Law of the Federal Republic of Germany.[51]According to Article 19 of the said Basic Law, there are five requirements that apply generally to limitation of rights. Requirements Nos. 4 and 5 are most relevant in this discussion, namely the statute must provide

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[49] Ibid., paragraph 47.
[50] Ibid.
[51] Pati, R., "Rights and Their Limits: The Constitution for Europe, International and Comparative Legal Perspective," *Berkley Journal of International Law*, Vol. 23, Issue 1 pp 223-280, at p. 234.

legal certainty by being clear and unequivocal, and the statute must satisfy the three tests of the principle of proportionality: suitability, necessity, and appropriateness.[52]

The European Court of Human Rights first adopted the principle in 1968 in the *Belgian Linguistic* Case (No. 2).[53] The applicants, whose children totalled more than 800, asserted that the law of the Dutch-speaking regions where they lived did not include adequate provisions for French-language education. They also complained that the Belgian state withheld grants from institutions in these regions that did not comply with the linguistic provisions set out in the legislation for schools and refused to homologate certificates issued by these institutions. Further, the State did not allow the applicants' children to attend French classes in certain places, forcing applicants to enroll their children in local schools, contrary to their aspirations, or send them further afield, which entailed risks and hardships.

The Court found by a majority of 8 to 7 that the Belgian Act of 2 August 1963 did not comply with Article 14 of the Convention (prohibition of discrimination) read in conjunction with Article 2 of Protocol 1 on the basis that it prevented certain children from having access to French-language schools in the communes on the outskirts of Brussels solely because of the residence of their parents. In reaching its decision the Court considered that the principle of equality of treatment enshrined in Article 14 was violated if the distinction had no objective and reasonable

[52] Ibid., at p.238.

[53] *Case "Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium* (Merits), (Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64); Also (A/6) 1 Eur. H.R. Rep 252 (1968).

justification, did not pursue a legitimate aim, and was not proportionate to the aim pursued.[54]

Ever since then, the principle of proportionality has been used by the European Court to determine the justification of State interference with human rights, ensuring that the State places no greater limitation on rights than necessary.[55] In the *Sunday Times v. United Kingdom*,[56]the Court clarified further the principle of proportionality. The Court held that an injunction restraining *the Sunday Times* from publishing an article related to a settlement being negotiated out of court violated its freedom of expression. The Court found that the interference with the applicant's freedom of expression pursued a legitimate aim because the interference sought to maintain an objective judiciary. However, the Court posed the point of controversy holding that, it was not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10(2) which had been invoked; neither was it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms, instead, "the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[57]

The Court found that such interference did not meet the "necessary within a democratic society" standard because "the inference…did not correspond to a social need sufficiently

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[54] Ibid., p. 31 of the Judgement.

[55] See Legg, A., *The Margin of Appreciation in Interpreting Human Rights: Deference and Proportionality*, London: Oxford University Press, 2012, at p. 178.

[56] Application No. 6538/74, (1979) 2 EHRR 245, [1979] ECHR 1.

[57] Ibid., paragraph 65.

pressing to outweigh the public interest in freedom of expression within the meaning of the Convention."[58]

4.3 The Inter-American Court of Human Rights

In the Inter-American human rights system, both the Inter-American Commission on Human Rights and Inter-American Court of Human Rights are primarily responsible for monitoring the implementation by State Parties of the human rights obligations contained in the *Charter of the Organization of American States* (OAS) and the *American Convention on Human Rights*, 1969. However, under the Convention, only State Parties and the Commission may refer cases to the Court or be parties before it, even though the active party to a contentious proceeding is the victim who possesses the rights alleged to have been infringed. The role of the Commission is to receive petitions from any person or group of persons or any non-governmental entity legally recognized in a Member State, regardless of whether or not the petitioner is the victim.[59] After the Commission completes its consideration of a petition, it prosecutes the victim's case before the Court.

In the interpretation of limitation clauses, the Inter-American Court is not different from other judicial bodies discussed above. The Court has always been inspired by international and other regional tribunals' decisions and international human rights instruments to interpret and apply the Inter-American norms,[60] though, as its own jurisprudence has expanded, the Court has been using fewer

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[58] Ibid., paragraph 67.
[59] Articles 44 through 51 of the American Convention on Human Rights, 1969.
[60] Shelton, D., "The Jurisprudence of the Inter-American Court of Human Rights," *American University International Law Review*, Vol. 10, Issue No. 1, 1994, pp.333-372, at p. 357.

references from outside in its recent decisions.[61] Interestingly, the *American Convention on Human Rights* has provisions that direct how the Convention would be interpreted. Article 29 states, inter alia, thus:

> No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.

Article 30, on the other hand, says:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

Moreover, Article 32 (2) of that Convention establishes that: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." This means that the American Convention sets forth some indispensable requirements that all interferences with human rights must meet, by precluding interpretations which would allow for unnecessary restrictions of rights protected in the Convention (except within the bounds set by the Convention). The Inter-American Court has elaborated on these articles to emphasize that a generalized assertion of the public good is not a sufficient specific legitimate aim. The Court held that grounds for limiting human rights must be strictly limited to the "just demands"

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[61] Ibid,. p. 358.

of “a democratic society,” which takes account the most important requirement of balancing the competing interests involved and the need to preserve the object and purpose of the Convention.[62]

In this sense, the case law of the Inter-American system has equally developed a three-part test to control the legitimacy of limitations, according to which, they must meet a set of specific conditions in order to be admissible under the American Convention. In the landmark case of *Herrera Ulloa v. Costa Rica,*[63] the Court was confronted with a complaint against violation of freedom of expression under the Costa Rica’s criminal defamation law, which formed the basis for convicting journalist Mauricio Herrera-Ulloa for exposing the corruption of a public official. Herrera-Ulloa and the newspaper’s representative submitted that the criminal defamation law restricted media outlets’ ability to act in the public interest by preventing them from reporting on public officials.

They also alleged that the statute violated Article 13 of the American Convention, which protects freedom of expression. Costa Rica argued that the purpose of the statute was to protect an individual’s right to privacy and one’s honor. The Inter American Court held that “Freedom of expression is not an absolute right; instead, it may be subject to restrictions, as Article 13 paragraphs 4 and 5 of the Convention provide.”[64] The Court went ahead to adopt the three-tier tests namely, (i) the restrictions must be previously established by law; (ii) they must be intended

[62] Inter-Am Ct. H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) Advisory Opinion AO-5/85, paragraph 67.

[63] Judgment of July 2, 2004, [2004] IACHR 3, IACHR Series C No 107, IHRL 1490 (IACHR 2004).

[64] Ibid., paragraph 120.

to ensure the rights or reputation of others or to protect national security, public order, or public health or morals; and (iii) they must be necessary in a democratic society.[65]

The court reiterated its previous decision by saying that it is incumbent upon the authority imposing the limitations to prove that these conditions have been met. Furthermore, all of the stated conditions must be met simultaneously in order for the limitations to be legitimate pursuant to the American Convention. The Court cited with approval its previous decision as well as the decisions of the European Court of Human Rights[66] and elaborated the above three conditions in the following words:

> the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental

[65] Ibid.

[66] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 del 13 November 1985. Series A No. 5, para. 30, para. 46. Also Eur. Court H. R., Case of *The Sunday Times v. United Kingdom*, (supra), para. 59; and Eur. Court H. R., Case of *Barthold v. Germany*, Judgment of 25 March, 1985, Series A no. 90, para. 59.

> interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.[67]

While interpreting the right to privacy under Article 11 of the Convention, the Court, in the case of *Tristán Donoso v. Panama*,[68]affirmed the principles of legality, necessity and proportionality by saying that the right to privacy is not absolute. It can be restricted or interfered with, provided the interference is not abusive or arbitrary. Any restriction to such right must be statutorily enacted, serve a legitimate purpose, and meet the requirements of suitability, necessity, and proportionality which render it necessary in a democratic society.[69]

In the same manner, the Court, in the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador,*[70] made a quite lengthy elaboration holding that:

> [I]t is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial

[67] Judgment of July 2, 2004, [2004] IACHR 3, paragraph 121.
[68] Inter-Am Ct. H.R., *Tristán Donoso v. Panama*, Judgment of January 27, 2009.
[69] Ibid., Paragraph 56, See also IACHR, *Escher et al. v. Brazil*, paragraph 116.
[70] Judgment of November 21, 2007, *Tristán Donoso v. Panama*, IHRL 3044 (IACHR 2007).

> system is a legitimate purpose; ii) that the measures adopted are appropriate to achieve the purpose sought; iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional, and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the Convention.[71]

Briefly, the *American Convention on Human Rights* is interpreted by the Court consistently with other relevant international treaties which recognise rights and freedoms, in the sense that three conditions must be met in order for a limitation to be admissible: (1) the limitation must have been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve the said compelling objective.

[71] Ibid., paragraph 93.

5. CONCLUSION

This article features an investigative exposition of how judicial bodies at the international and regional arena of both the European and Inter-American human rights systems, have interpreted the limitation clauses in the human rights instruments. Its stating point was an assertion that, while human rights are the highest virtue and their protection is an obligation of every state, modern society acknowledges also that there are other important legitimate interests which equally require the protection by the government in order to serve the common good. There can be no viable notion of rights without a corresponding notion of responsibility. The legitimate interests or purposes that may warrant rights to be limited include national security, public safety, public order, public health, public morals, the rights and freedoms of others, etc. In cognizance of these overarching interests, both international and regional human rights instruments, as shown in this article, ensure that rights are balanced and limited against other protected rights, values and common needs in the form of inclusion of limitation clauses.

The common statement inherently contained in the said limitation clauses is that the exercise of rights shall be subject to such restrictions/limitations as established by law, as may be necessary in a democratic society for the interest of national security, public safety, public order, public morals, or the rights and freedoms of others. This formulation has helped judicial bodies to determine under which circumstances rights and freedoms can justifiably be limited. In this article, we have illustrated by way of case law how human rights and freedoms are balanced against other legitimate state interests. The jurisprudence shows that judicial bodies have accepted limitations to be legally justifiable when the said

limitations are: firstly, established by law; secondly, address one or more of the legitimate purpose; thirdly and lastly, are necessary to achieve a legitimate purpose. Additionally, the principle of proportionality has been used as an important criterion for assessing whether an interference or limitation with rights is "necessary" in a democratic society. Domestic courts and other authorities in various jurisdictions which have not yet adopted similar principles or criteria in balancing rights and other interests in their practice can borrow a leaf from the jurisprudence elaborated above.