



Limits of Freedom

A) Freedom and the Freedom of Others:

Absolute, unlimited freedom means:

Everyone can do whatever she/he wants.

But freedom is limited by the freedom of others, who have the same right:

**Everyone can do whatever she/he wants,
but only
as long as she/he does not harm the rights and freedom of an other person.**

Example: Everyone can play loud music if s/he wants, but not at night when other people want to sleep. In this case the right to have enough sleep limits the right to listen to loud music.

This is expressed in many legal texts:

Article 3 of the old Cambodian Constitution (1947):

“Freedom is the entitlement to do whatever does not threaten the rights of others”.

Article 31 III Cambodian Constitution (CC):

The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others.

Article 4 French Declaration of Human Rights (1789):

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.



B) Limitation of Freedom by Law:

To protect one conflicting right against the other the rights must be balanced. The balance is achieved by restricting the right which is too strong. Only the law shall limit the freedom and rights of a person. This law must have the purpose to protect the freedom of another person.

**Everyone can do what she/he wants
as long as
this is not explicitly forbidden by a law which protects the rights of other persons.**

This is also expressed in some legal texts:

Article 31 III Cambodian Constitution (CC):

The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.

Article 29 II Universal Declaration of Human Rights (UDHR):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 4 French Declaration of Human Rights (1789):

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.



C) Freedom Needs No Permission:

The definition of freedom reads:

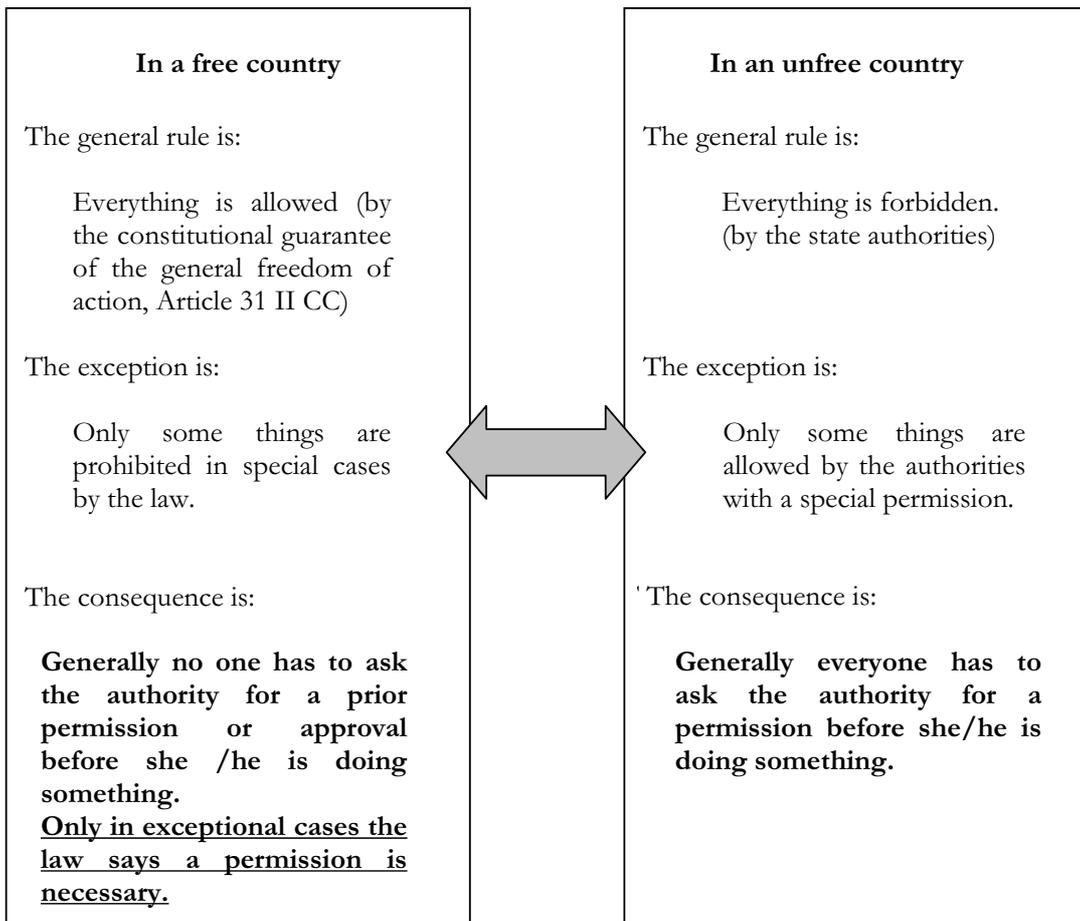
Everything is allowed unless it is not explicitly forbidden by the law.

Article 5 French Declaration of Human Rights (1789):
... Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.

The opposite definition is true in countries without freedom:

Everything is forbidden unless it is explicitly allowed by the state.

So there is a main difference between a free and an unfree society:





As **Cambodia** is a liberal democracy (see Article 1 I, 51 I CC) and grants general freedom (Art.31 II CC) it **is a free country**.

Therefore everything is allowed by the basic human rights which are guaranteed in the constitution. Consequently the following rule applies:

No one in Cambodia needs a special permission of the authorities before s/he does something unless the law states explicitly the need of such a permit to protect the rights of other persons!

Examples:

- The teachers in Cambodia wanted to found a teachers union. They came together for this founding activity. The police surrounded them and told them, this meeting is illegal, because they did not have a permit to found a union.

This was wrong:

The teachers did not need a special permit of the state authorities to found a union.

Their constitutional basic right to found an association gives them the general freedom to do so (Art. 42 I and II CC: “Khmer citizen shall have the right to establish associations and political parties”). This freedom is not limited by a special law which requires a special permit to do so. A law which would limit their freedom of association would be unconstitutional because this law could not have the purpose to protect another human right as the existence of a teachers union does not harm any other basic rights of other human beings.

- In many cases political parties wanted to put up party sign in the front yard of the houses of a party member in villages in the province. The local authorities ordered the party members to remove the sign and threatened with consequences. The authorities claimed that the party sign was illegal because the party member had no permission to it put up. They said such a permit could only be granted if the party had put up an office on the district level, or if the party member paid a certain fee, or if there was an approval by the Ministry of Interior and so on.

This was wrong:

The party members did not need a special permit to put up a party sign, because the

constitution in general allows Cambodians to found a political party (Art. 42 I CC see above). To make sense this constitutional provision includes the right to do everything which promotes the achievement of the party goals. Putting up a party sign clearly is such an activity. The Law on Political Parties does only regulate a duty for parties to register but shows no regulation about special permits for putting up party signs. On the contrary: Article 9 III of the Law on Political Parties allows political parties to put up their party signs already during the period of its registration. Any registered party can do what it wants to promote its goals. If this activity violates the rights of others, for example the party sign is put up in the middle of the road and creates a danger for the traffic, then the authorities can order its removal to protect the right of the traffic



participants. But they can not claim the party sign is illegal because there was no permission given for putting it up. The authorities can order the removal of the party sign because it is illegal to disturb the traffic (Article 52 Law on Land Traffic).

D) Intensity of Limitations of Freedom:

If a person (A) disturbs and violates the freedom and rights of another person (B) the law has to limit the exercise of freedom of A to protect the freedom of B. This leads to the question: **How strong must the restriction be?**

The answer is: **It shall only be as strong as it is necessary to find a balance between the right of A and the right of B.**

The reason is: The right of A has basically the equal value like the right of B. This means the freedom of A shall not to be sacrificed fully only to protect B.

Example:

When A plays loud music at night, but B wants to sleep, the conflict could be solved by a regulation saying: B must bear the noise until 9 pm. But then A must stop the music, because B needs the night to sleep. His right to maintain his health then has more weight than A's right to exercise his freedom by playing music. If A can not play music after 9 pm this only affects his fun of life but not his health.

So there always must be a process of balancing and weighing the rights. Limitations of freedom are only justified if they are necessary. This means that every limitation is only justified if there are no other softer means to achieve the same goal. The restriction must be **proportionate**. The purpose of the restriction is to protect the right of one person. But this good purpose does not justify every means to achieve this goal. There always has to be a **balance between the purpose of the restriction and the means**. This balancing is called:

“The Principle of Proportionality”

The principle of proportionality

The principle of proportionality is composed of two elements:

- **suitability:** Is the means of restriction suitable (effective)?
In other words: Is the means of restriction you choose legal and can you achieve your goal (protection of someone's right) with it?
- **necessity:** Is the means of restriction necessary?
In other words: Are there other means of restriction which are not so strong? Are there softer means of restriction?



Examples:

- The police want to investigate a crime. Its goal is to protect the victim. Therefore the police choose to torture a suspect to get information.

Question: Is torture of a suspect a proportionate means of restricting the rights of the suspect to protect the victim?

Answer: No, it might be effective but it is not suitable because the means of torture is illegal (see Art. 38 CC: “Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited”).

Therefore the means of torture is not proportionate.

- The authorities want to stop violent demonstrators who destroy the property of other people. The authority says: We only have two options. Either we shoot the demonstrators or we let them go on with their violence.

Question: Is shooting a demonstrator a proportionate restriction to protect the right of property of other people?

Answer: No, is not proportionate because this would be not necessary. There are softer means of restriction. These softer means have to be used first. If these softer means prove to be not strong enough then step by step other means can be used. Only the final ultimate mean could be shooting at demonstrators, when they start killing and attacking the police and the police has to act in self-defense.

The proportionate answers to solve the conflict between the rights of the demonstrators and the rights of property can be found in Article 4, 5 and 6 of the Law on Demonstration:

- At first the demonstration can be banned.
- Then the ban has to be issued twice to the demonstrators to warn them.
- If they still go on the police is allowed to disperse them with means that do not endanger life.
- If the demonstrators are armed with weapons the police is allowed to arrest the demonstrators temporarily and to take away their weapons. Later on they have to be released again and their weapons have to be returned to them, if the weapons are not illegal.
- If the demonstration turns violent, the police can take the **“appropriate”** measures to stop it. The softest measures come first (warning and shooting in the air) and the strongest restrictions last (shooting at armed and attacking demonstrators).

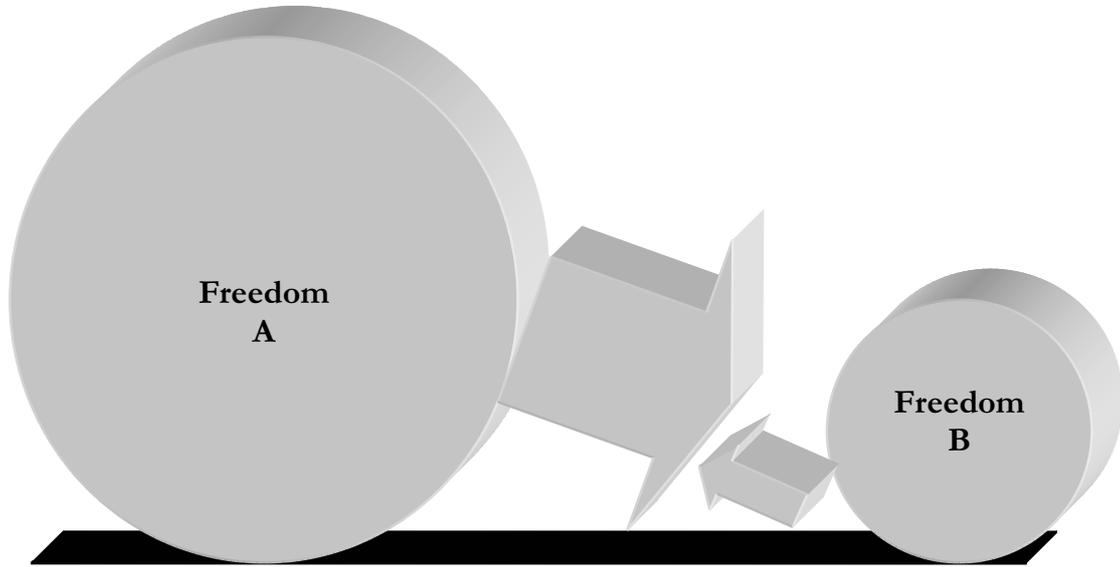


Unbalanced Relation:

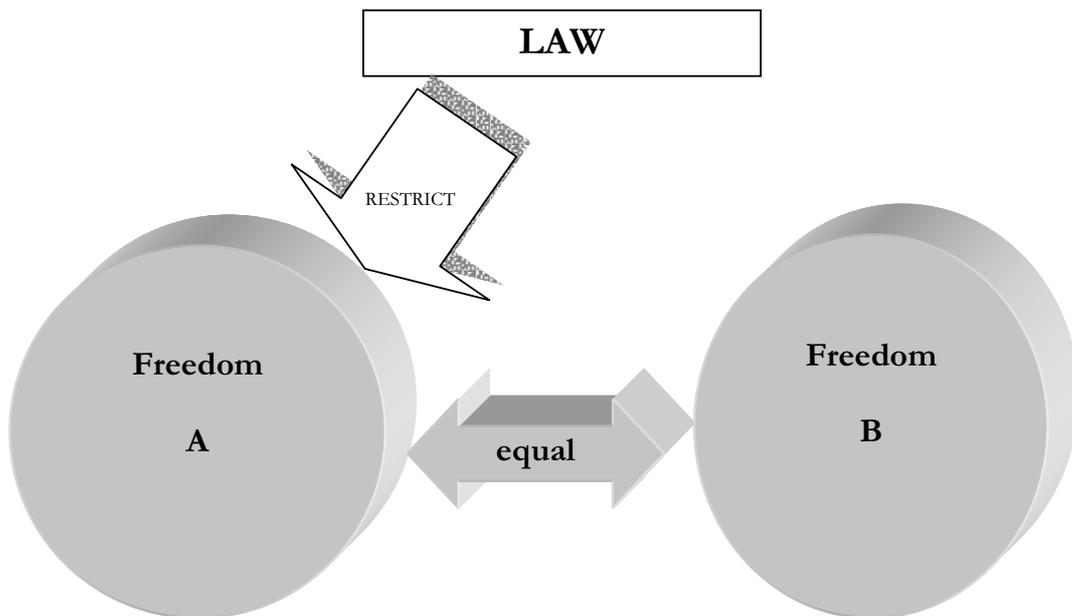
Freedom A

overriding

Freedom B

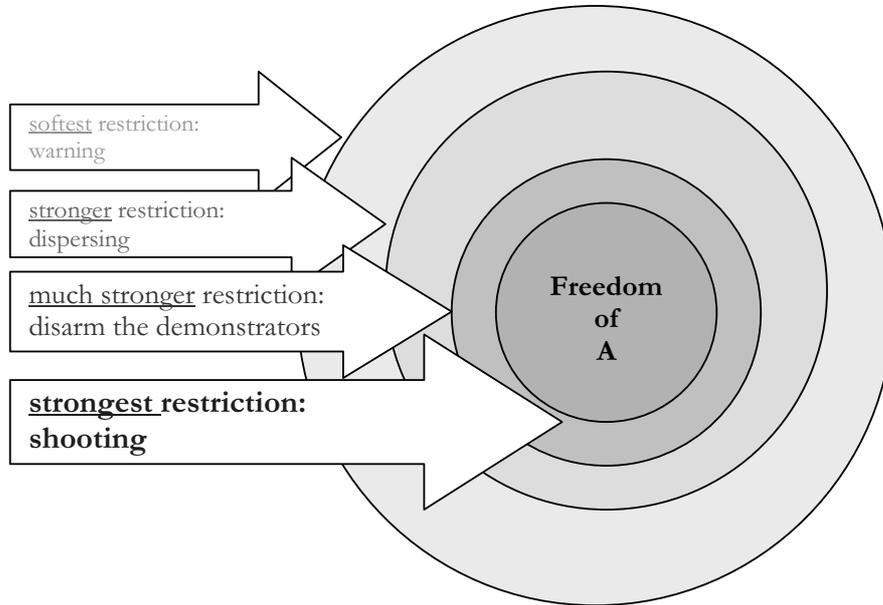


Balanced Relation: Law imposing restriction on A to protect B





Proportionate Restriction:



This scale shows the different intensity of a restriction of the freedom of demonstrator (named A). The principle of proportionality means that the softest restriction measure, which hurts the rights of A (free expression, health, life) least, has to be tried first. Only if it proves ineffective a stronger measure can be taken in a next step.