



II) Rights and Duties:

1) Cutback of Human Rights by Too Narrow Description of Rights:

The problem with this part of the law as with all other parts can be an unclear terminology. Unprecise terms leave it open what the scope of the right and the duty really is. The true dimension of the human right itself can be cut short by an unclear or insufficient description of this right.

Example:

Imagine a Law on Public Security that stipulates that “Every group with a minimum number of ten people and an elected leader has the right to meet freely on a public place”. Such a law would give a too narrow description of the scope of the freedom of assembly. It would cut back this right because already a small group of just two or three people has the right to meet and come together. Furthermore the freedom of assembly can be claimed by any group of people without having an elected leader.

2) Insufficient Protection of Rights:

A further problem may also be that the draft law text simply does not provide enough rights to protect the human rights of a person sufficiently.

Example:

The Fishery Draft Law does not acknowledge the right of Fishery Communities to conduct enforcement activities by themselves in urgent cases when they discover illegal fishing activities. But such a right of self defense is necessary if there is no authority around that efficiently protects the property right (Article 44 I 1 and II CC) at this very moment²⁴.

3) Unconstitutional Purpose of Restriction:

When the lawmakers impose duties or prohibitions this regularly restricts the exercise of the human right of the law addressee. This is why it takes great diligence to stipulate prohibitions and duties in the law text. Restrictions on human rights can not be imposed in an unlimited way but only by following certain conditions. Every lawmaker must take care that the **imposed restriction follows a purpose which is authorized and approved by the Cambodian Constitution or an International Convention**. The danger here always is that the lawmakers claim to restrict the human right for a purpose which is not explicitly mentioned in the special human rights article of the Cambodian Constitution or in the general restriction clause of Article 31 III CC.

Example

Article 12 I Press Law partly follows unconstitutional restriction purposes: It prohibits publications which affect “national security” and “political stability”. So the freedom of expression is restricted not only for the purpose to protect “national security” but also for the purpose to protect “political stability”. But according to Article 41 I 2 CC and Article 19 III a) b) ICCPR the freedom of expression can be restricted by the lawmaker only for the purpose to protect “national security”. These articles do not include any authorization for the lawmaker to restrict this freedom for the purpose to protect “political stability”.

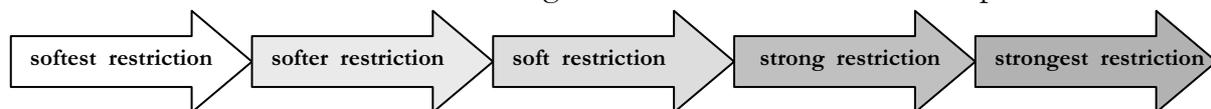
²⁴ See the abovementioned Oxfam Report, pages 34 and 35: The consultative process resulted in a proposal to add Article 77 E) and F) which grant such a right explicitly.



4) Disproportionate Restriction on Human Rights:

Moreover the restriction must be proportionate that means it must not exceed the limit of necessity (“principle of proportionality”).

The lawmakers have different measures to regulate the behavior of the law addressees by restricting their freedom with different intensity. They can for example impose a general prohibition of an activity. This would be the strongest possible restriction. Or they can prohibit an activity but include the possibility of granting an exception of this prohibition. This would be a softer restriction. The danger is that the lawmakers do not think about alternative softer measures and that they impose stronger restrictions and duties than necessary. From the following list of measures which starts with the strongest restriction and ends with the softest possible restriction the lawmakers always have to chose the measure which restricts the rights of the addressees as soft as possible:



- **GENERAL PROHIBITION of an activity WITHOUT ANY EXCEPTION:**

(=strongest measure: **no right at all** to conduct activity)

Example:

The prohibition to promote racial hate or the prohibition to torture someone does not have any exceptions because these prohibited activities are such severe human rights violations that they never can be accepted (see Article 26 sentence 2 ICCPR: “Every” discrimination is prohibited. Also see Article 2 II CAT: Not even war or national security is an excuse for torture).

- **GENERAL PROHIBITION of an activity with the possibility of an EXCEPTIONAL PERMISSION:**

(= softer than general prohibition: activity in general is prohibited but **exceptional permission** for activity is possible)

Example: In general it is prohibited for everyone to possess and use firearms because firearms are usually very dangerous and their use regularly does not solve conflicts but creates severe human rights violations. But there can be some exceptional situations that render the use of firearms necessary. Therefore the law must be open to grant exceptions for these limited number of situations: For example it must be possible to get an exceptional fire arms license for someone who works as a guard of a money transport service (see also Article 8 II Weapon Draft Law: Exception to carry arms for body guards of a foreign head of state)

- **DUTY to obtain a PERMISSION first :**

(=preventive control: **activity is allowed** but only **under condition of prior permission**)

Example:

Activities like building a house or driving a car are generally accepted exercises of the right of private property or the general freedom to move around freely. So they must be granted. But driving a car can be dangerous because it can cause damages. Building a house may be dangerous too, if rules of safe construction are not respected and the house collapses.



To constrain these dangers it is necessary to limit the exercise of those activities and grant the right only after a prior check by the authorities has shown that the activities are not dangerous.

The lawmakers ensure such a prior check by stipulating the necessity of a permit or a license: A permission to drive a car will be given only after the potential driver has successfully passed a prior test of his knowledge of traffic rules (see Article 29 I and VI Street Traffic Law). The permission may also be issued only under certain conditions: For example driving license for big trucks will only be given to older and experienced drivers. A permission to build a house will only be given after the building department has checked the construction plans. Or a permit for construction is only granted if the building keeps a certain distance to the neighboring house.

Asking for such permissions does not mean that it is up to the discretion of the authorities to grant it or not. The authorities **have to grant** it when the conditions are fulfilled. Anybody who can prove that his/her activity is not dangerous has a **right to be granted permission** !

In case an activity generally is not dangerous it would be disproportionate to impose the requirement of a prior permission. For example the exercise of free expression is regularly not dangerous. Therefore censorship – which means prior control of a speech or publication – is not allowed (see Article 3 Press Law) because it would restrict this freedom in a disproportionate way. It is sufficient if the Press Law provides regulations that authorize the executive or judiciary to take measures only after an abuse of free expression has really happened.

- **DUTY only to INFORM** the authority in advance before starting the activity:
(=very soft preventive control: **activity is allowed after prior indication**)

Example:

To hold a public assembly (demonstration) normally is not a dangerous activity. Furthermore it is a human right to demonstrate, Article 41 I 1 CC. So in general it is legal to exercise this right. Therefore it is no necessary to impose a duty to ask for a prior permission. But there is a always a realistic chance and possibility that an assembly turns dangerous. A huge crowd of people may lose discipline, get out of control and start with violent actions (see the Anti-Thai-Riots in Phnom Penh in January 2003 that started peacefully and ended in mob violence). Therefore it is necessary that the authorities can take the necessary precautions to prevent violence and protect other peoples' rights. As the authorities and the police are only able to do this if they know when and where the demonstration will take place there is a need to inform them about these facts in advance. To ensure such an information of the authorities in due time the lawmaker can impose a duty to inform the authorities. This gives the authority a chance to take preparation measures in advance to protect the demonstration against counter demonstrations, to post police forces to protect shop keepers property along the road and to take the necessary arrangements to detour street traffic. Furthermore a prior indication of a demonstration gives the authorities a chance to check if there is a need to ban the demonstration. For example a demonstration can be banned in advance if the demonstration explicitly calls for violence or clearly follows racist goals that violate the human rights of minorities (for example demonstration against all Vietnamese people in Cambodia)²⁵.

Therefore the lawmakers impose the duty to inform authorities in advance about a demonstration planned to take place on public streets (see Article 2 III Law on

²⁵ see also KID's Study Text Book Part I "Critical Legal Thinking – Human Rights", pages 55 – 57



Demonstration). After receiving this information the authorities are able to check and to decide if they issue a ban on the demonstration because of clearly indicated danger of violence (Article 3 I Law on Demonstration). If the duty to inform is violated and the demonstration took place without information the police can stop the demonstration (Article 4 I Law on Demonstration).

So an information duty gives the authority the chance to take precautions and to intervene in case a legal activity turns dangerous.

But notice ! : To “inform” the authorities does not mean to ask for permission!

The condition that an activity can only legally take place after prior information of the authorities is a softer restriction than the law condition that an activity can only legally take place after prior permission by the authorities. Someone who just needs to inform the authority can simply legally start his/her activity after informing the authority. It is up to the authorities to decide if there is a need to intervene and stop him/her. Someone who first has to obtain a permission can not legally start his/her activity without such a permission but has to wait for the authority decision.

- Authorization of authority for **SUBSEQUENT INTERVENTION** in case of abuse of rights
(=softest possible measure: **Chance of restriction after activity turns illegal**)

Example:

Normally the law trusts people that they will exercise their rights and freedoms in a peaceful and harmless way. Therefore restrictions are only provided for the case that people do not fulfill this expectation and violate the law.

The Draft Law on Domestic Violence for example provides authorization for the police to send a husband out of his house after he has turned violent to his wife or children. Or the Criminal Code authorizes the judiciary to punish people after they have abused their freedom and have put damage to other people.

These measures are called **repressive control** measures. Unlike **preventive control** which is exercised in advance, repressive measures are taken after an activity has turned illegal and then represses (i.e. sanctions or punishes) this illegal action.

Proportional Restrictions on Human Rights in a Law

- Law restricts activities of human beings to protect other human beings
- Intensity of restriction of an activity depends on how dangerous the activity is

How dangerous is the activity?	activity = most dangerous and violates human rights severely <u>Example:</u> - Torture - Promoting racial hate	activity = in general very dangerous but in exceptional cases acceptable <u>Example:</u> - using fire arms	activity = only dangerous if certain security standards are not fulfilled <u>Example:</u> - driving a car - construction of a building	activity = not dangerous but chance that it can turn dangerous <u>Example:</u> - making peaceful demonstration	activity = harmless, no danger at all but chance of abuse <u>Example:</u> - exercise of freedom of speech	
Intensity of restriction	strongest possible restriction →	less strong →	soft →	softer →	softest	
Legislative Measure	general prohibition without any exception (no right for activity at all)	prohibition but possibility of exceptional permission (exceptional right)	duty to obtain prior permission gives authority the chance to check activity in advance (right to get permission when security standard fulfilled)	duty to inform gives authority chance to check and decide about necessity of prohibition (right to be active after having indicated that one will exercise the right)	authorization of later intervention in case of abuse (unlimited right but possibility of punishment)	<u>Example:</u> - Article 2 II CAT - Article 26 S.2 ICCPR
	<u>Example:</u> - Article 2 II CAT - Article 26 S.2 ICCPR	<u>Example:</u> firearms permit for body guards (Article 8 II Weapon Draft Law)	<u>Example:</u> - driving license - building permit	<u>Example:</u> Article 2 III Demonstration Law	<u>Example:</u> No prior censorship of free speech but later punishment in case of defamation	