



A Primer on public health-related limitations of human rights

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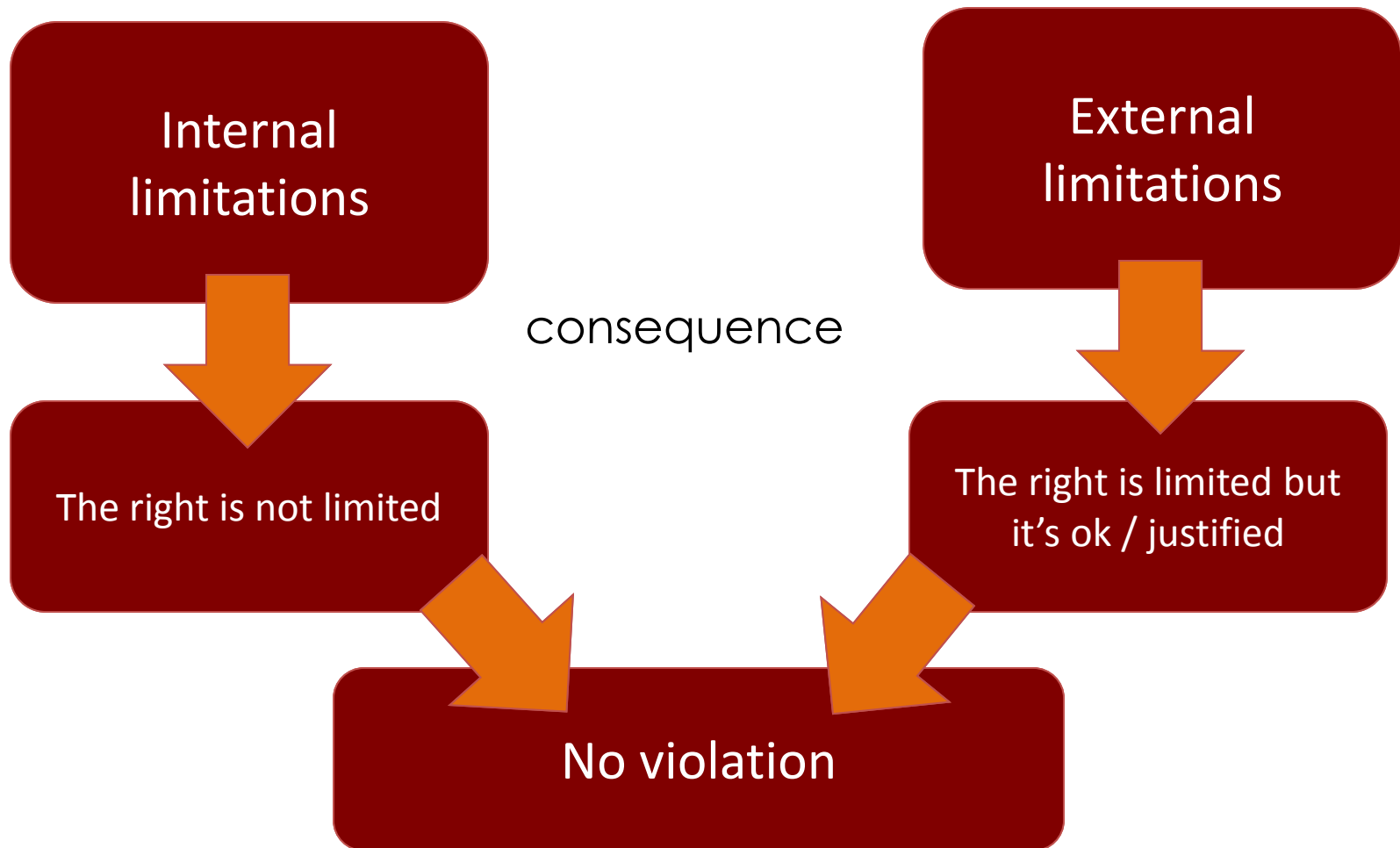
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Examples of regional constitutions with explicit provisions for limiting rights on public health grounds

- Botswana
- Gabon
- Kenya
- Namibia
- Swaziland
- Tanzania
- Uganda
- Zambia
- Zimbabwe
- Lesotho
- Mauritius
- Nigeria
- Rwanda
- Seychelles
- Sierra Leone
- South Sudan
- Sudan
- Tunisia



Rights limitations generally



External limitations

Derogation clause

Suspension of certain rights in case of war / public emergency (SP Part II)

Limitation clause

Restriction of certain rights under specific conditions (SP Part I)

ICCPR

- Art 4: Public emergency: may take measures to extent strictly required, and with no discrimination (except Art 6,7,8,11,15,16,18)
- Some rights (e.g. Art 12, 19, 22) limited if:
 - Provided by law
 - Necessary to protect national security / public order / public health / morals / rights or freedom of others)

ICESCR

- ICESCR Art 14 May be limited only:
 - As determined by law
 - Insofar as compatible with nature of rights
 - Solely for purpose of promoting general welfare in democratic society

LIMITATIONS: General Principles

- Siracusa Principles*

- Strict interpretation. (3).
- Preservation of essence of the right (2), interpretation in context of right (4).
- Not arbitrary (7).
- Non-discrimination (9).

*UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html>

“Permissible purpose”

- Siracusa Principles: 10: objectively “necessary”, based on recognised grounds, responds to pressing public need and pursues a legitimate aim. (public order, public health, public morals, national security, public safety, rights of others)
- **PUBLIC HEALTH:**
 - SP 25: “in order to allow a state to take measures dealing with a serious threat to the health of the population or individual[s]. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”
 - SP 26: “Due regard shall be had to the international health regulations of the [WHO].” ([See Ng’Etich & Others v the Attorney General & Others](#))
- **PUBLIC SAFETY** (danger to safety, life, physical integrity)
 - Cannot be used for arbitrary or vague limitations and only if adequate safeguards and effective remedies against abuse.

“Prescribed by law”

- Siracusa Principles:
 - 15 national law of general application, in force at time;
 - 17 clear and accessible;
 - 18 adequate safeguards against abusive application
- The law must use “precise criteria” for imposition of the restriction and must not leave its application to the discretion of those charged with its execution. U.N. Doc. CCPR/C/21/Rev.1/Add.4, General Comment No. 27 (1999) paragraph 11.

Proportionality

- Siracusa Principles: 10(d) limitation must be proportionate to aim; 11 least restrictive means.
- [CESCR GC 14 para 29](#): least restrictive alternative, of limited duration.
- African Commission generally applies proportionality test (see e.g. Communication 211/98, *Legal Resources v Zambia* (2001) AHRLR 84 (ACHPR 2001) (14th Annual Activity Report) para 69.

UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html>

Right to a remedy (& reciprocity?)

- Siracusa Principles: 18 “Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights”

UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html>

The importance of the State's onus of justification

- Siracusa Principles (12); [CESCR General Comment 14](#) para 28.
- A mere bald assertion (e.g. of public interest) is insufficient. (See resources).

DEROGATIONS: Public Emergency

- SP 39: exceptional and actual or imminent danger which threatens the life of the nation.
- SP 51: Severity, duration and geographic scope only as strictly necessary to deal with threat and proportionate to nature and extent of threat.
- SP 56: Effective remedies shall be available to persons claiming derogation not strictly required.
- SP 58: NON-DEROGABLE: life / freedom from torture, inhuman and degrading treatment / medical experimentation without consent / slavery / retroactive criminal conviction / legal personhood / freedom of thought, conscience and religion.
- African Charter: no derogation clause for states of emergency

Useful Resources

General:

(Limitations and the Right to health) - UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: <http://www.refworld.org/docid/4538838d0.html>

Prescribed by law:

ACHPR: Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report); Communication 101/93, Civil Liberties Organisation (in respect of Bar Association) v Nigeria (2000) AHRLR 186 (ACHPR 1995) (8th Annual Activity Report) para 15 and Communications 27/89, 46/90, 49/90, 99/93 (joined), *Organisation Mondiale Contre la Torture and others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) (10th Annual Activity Report).

Olsson v. Sweden, (A/250), 17 Eur. H.R. Rep. 134, 162 (1994).

Useful Resources

Necessary in a democratic society:

[Charles Onyango Obbo and another v Attorney General](#) (Uganda) [Objective standard]

Proportionality:

R v Oakes [1986] 1 SCR 103. (Canada)

[Mark Gova & Another v Minister-of Home Affairs & Another](#) (Zimbabwe Supreme Court)

Reciprocity:

Da Silva DS and Smith MH “Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principles of Reciprocity can Enrich the Application of the Siracusa Principles” [Health and Human Rights 17/1 \(2015\)](#)

Useful Resources

Rationality:

R. v. Chaulk [1990] 3 S.C.R. 1303 (Canada)

[S v Makwanyane and Another \(CCT3/94\) \[1995\] ZACC 3](#)

Limitations interpreted strictly

[Attorney-General v Dow \(2001\) AHRLR 99 \(BwCA 1992\)](#) (Botswana)

Onus to justify limitation on State

Republic v. Tommy Thompson Books Ltd (Ghana) (Also purpose of limitation analysis and reasonableness)

[Municipality of Mossel Bay v Evangelical Lutheran Church](#) [2013] SAZCA 64 at para 6. (South Africa)

[Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another](#) (CCT 12/13) [2013] ZACC 35

[Tapela and Others v the Attorney General & Another](#) (Botswana Court of Appeal)