A Primer on public health-related limitations of human rights

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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

Internal limitations
- The right is not limited

External limitations
- The right is limited but it's ok / justified

No violation
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).

“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.

- **CECSR GC 14 para 29**: least restrictive alternative, of limited duration.


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”

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:


Prescribed by law:

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:  
Useful Resources

Rationality:
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)