



# Data for Governance Alliance Policy Brief No. 7

---

A Need for Derogation Provisions under the  
African Charter

**Justice Alfred Mavedzenge**

20 November 2022

Following the outbreak of the COVID-19 pandemic, several governments across the world and on the African continent declared periods of states of emergencies, states of disaster and other variations, during which certain human rights were either limited or suspended. Amongst the rights suspended were the right to movement, the right to vote, freedom of assembly and the right to peaceful demonstrations. The right to movement was suspended when governments closed international borders, imposed strict stay-at-home orders, and banned all flights.<sup>1</sup> The right to vote was suspended when elections that were due were postponed or cancelled.<sup>2</sup> The right to peaceful assembly was suspended when all forms of human gatherings were banned. At least 19 African countries who are States Parties to the African Charter on Human and Peoples' Rights (the African Charter)<sup>3</sup> imposed all or some of these measures between March 2020 and March 2021.

The African Charter is the main human rights treaty on the African continent. It guarantees a range of human rights and sets out standards to be applied when limiting those rights. Those standards are set out in article 27(2) of the Charter which states that 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' The African Charter does not contain provisions on derogation of human rights during public emergencies. As a consequence, the African Charter permits rights to be limited but does not permit governments to suspend any human rights. Limiting a right implies restricting certain aspects of the right without entirely suspending the exercise of the right or freedom. Let us consider the right to freedom of assembly. When a government imposes restrictions which prohibit public gatherings in certain specified geographic places, such restrictions are limitations rather than a suspension of the right. This is because the right can still be exercised in places and at times other than where and when it has been prohibited. However, when a government imposes a blanket ban against all types of gatherings for a period of time across the entire State, such restrictions are considered a suspension or derogation of freedom of assembly.

In the case of *Constitutional Rights Project & Others v Nigeria*,<sup>4</sup> the African Commission on Human and Peoples' Rights noted that:

'In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.'

Thus, limitation of rights under the African Charter is only permitted under the general limitation clause in article 27(2), which has been interpreted by the African Commission to imply that limitations may only be imposed if they are necessary, and that they must be strictly proportionate.<sup>5</sup> While interpreting these standards, the African Commission has said 'Most important, a limitation may not erode a right such that the right itself becomes illusory.'<sup>6</sup> Derogations by their nature may involve eroding or suspending the entire right for a temporary period of time. Therefore, derogations from human rights are not permitted under article 27(2) of the African Charter.

Other international human rights treaties contain provisions permitting derogation of certain human rights in public emergencies. For example, the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup>

---

<sup>1</sup> See Global Monitor of Covid-19's Impact on Democracy and Human Rights, available at <https://www.idea.int/2020-annual-report/global-monitor-covid-19s-impact-democracy-and-human-rights>.

<sup>2</sup> For example, Ethiopia and Zimbabwe are amongst the States who postponed their elections due to the pandemic.

<sup>3</sup> See the African (Banjul) Charter on Human and Peoples' Rights, available at <https://agp.africanlii.org/akn/aa-au/act/charter/1981/human-and-peoples-rights/eng@1981-06-27/>.

<sup>4</sup> Communication NO. 140/94, 141/94, 145/95 [1999] ACHPR 6; (15 November 1999).

<sup>5</sup> Ibid *Constitutional Rights Project & Others v Nigeria* at para 42. Also see Amnesty International and Others v. Sudan, African Commission on Human and Peoples' Rights, Communication. No. 48/90, 50/91, 52/91, 89/93 (1999) at para 80.

<sup>6</sup> Ibid *Constitutional Rights Project & Others v Nigeria* at para 42.

<sup>7</sup> International Covenant on Civil and Political Rights, available at <https://www.ohchr.org/en/instruments->

contains such a provision in article 4(1), which provides that:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

Similar provisions are contained in article 15 of the European Convention on Human Rights<sup>8</sup> and article 27 of the American Convention on Human Rights<sup>9</sup>.

Derogation provisions are necessary because public emergencies which threaten the life of a nation are an inevitable reality. These can be in the form of outbreaks of pandemics such as COVID-19 or of a war, a terrorist attack, or a natural disaster. Scientists predict that outbreaks of diseases and natural disasters are likely to increase due to climate change and other reasons.<sup>10</sup> During a public emergency, undertaking exceptional restrictive measures may become necessary to protect the life of a nation. The ordinary powers given to governments under article 27(2) of the African Charter to restrict human rights may be inadequate to address the threats posed by a public emergency effectively. For example (as indicated above), at the peak of the outbreak of the COVID-19 pandemic, it became necessary to suspend certain human rights in order to combat the spread of the virus and protect human life, which was in grave danger. Governments, for instance, suspended the right to freedom of assembly by prohibiting all kinds of human gatherings. It is important to ensure that the powers to undertake such drastic measures are controlled by certain legal provisions. Derogation provisions provide a way of controlling the imposition of such measures to protect people against governments taking arbitrary drastic action. Derogation provisions control the exercise of such powers by imposing legal requirements or standards which must be complied with when undertaking derogation measures. For instance, derogation measures under article 4 of the ICCPR may only be imposed if (i) a law has been enacted specifically to permit the imposition of such measures and due process was followed when undertaking the measures; (ii) the measures were necessary for the protection of the legitimate interests threatened by the public emergency; (iii) derogation measures were strictly proportionate; and (iv) the derogation measures do not suspend certain human rights which may not be subjected to derogation measures. During a state of emergency, the power of the courts to conduct judicial review of the emergency measures is not suspended, which ensures that derogation measures can be checked to ensure that they comply with all these standards.

In the absence of derogation provisions, the African Charter does not provide a legal framework for controlling the imposition of derogation measures by governments during public emergencies. Article 27(2) of the African Charter is insufficient as it only permits limitations to be imposed and does not permit suspension of rights. It may be argued that the drafters of the African Charter deliberately left out the derogation provisions because they considered suspension of human rights as far too drastic and as unnecessary, because States can respond to public emergencies by limiting rather than suspending human rights.<sup>11</sup> It is not always necessary to suspend human rights in order to address a public emergency. However, in some cases it may become necessary to suspend human rights. For this reason, many domestic constitutions of States Parties to the African Charter provide for powers to introduce derogation measures during public emergencies, and some States invoked these powers during the COVID-19 pandemic.<sup>12</sup> For example, it became necessary to suspend freedom of assembly by prohibiting all forms of public gatherings for a certain period of time, in order to reduce human contact and the

---

[mechanisms/instruments/international-covenant-civil-and-political-rights](#) .

<sup>8</sup> European Convention on Human Rights, available at [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>9</sup> American Convention on Human Rights, available at <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>.

<sup>10</sup> <https://www.reuters.com/business/cop/delay-means-death-un-climate-report-urges-immediate-drastic-action-2022-02-28/>

<sup>11</sup> Laurent Sermet captures and discusses some of these arguments in much greater detail. See "The absence of a derogation clause from the African Charter on Human and Peoples' Rights: a critical discussion" (2007) 1 AHRLJ 142-161.

<sup>12</sup> These include Mozambique, Angola, and Botswana.

spread of COVID-19 infections. It is therefore necessary to put in place legal measures at the regional level to control the power of governments (already provided for in their domestic constitutions) and ensure that, when they invoke these powers, they comply with certain clearly defined standards to protect people against arbitrary action.

## **Author**

Justice Alfred Madvezege PhD is a constitutional lawyer and teaches cyber law at the University of Cape Town (UCT) and is a senior researcher at the Centre for Law and Technology and the African Legal Information Institute (African LII) at UCT.

## **About Data for Governance Alliance**

The Data for Governance Alliance is a four-year project that promotes data-based advocacy and engagement between pan-African civil society organisations (CSOs) and African Union organs. The project is led by Afrobarometer with partners, including CDD Ghana, the Institute for Development Studies at the University of Nairobi, the Institute for Justice and Reconciliation and Laws.Africa. The project is funded by the European Union.



# Data for Governance Alliance

African voices for African policy

## Partners



Funded by  
the European Union