



Data for Governance Alliance Policy Submission No.1

Submission to the African Union's African Commission on Human and Peoples' Rights (ACHPR) on the thematic report on declarations of state of emergency and state of disaster laws and practices in Africa

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1. INTRODUCTION

This submission¹ focuses on case law that has emerged in the enforcement and implementation of declarations of state of emergency and state of disaster laws and practices in Africa, and emerging lessons. The takeaway is that there has been extensive litigation in response to COVID-19 response measures across the continent. Litigation has ensued on the following, among others: challenging the legality of declarations of state of emergency and state of disaster; challenging the legality of regulations and their enforcement; enforcing regulations, in both civil and criminal courts; and seeking orders for certain measures to be implemented in response to the pandemic.

On analysis, the plethora of cases suggest deficiencies in the following:

states' compliance with their constitutions and rule of law principles on disaster response and management;

states' provision of appropriate responses to a calamity of the magnitude of COVID-19;

states' approaches in ensuring wide and extensive consultation for popular buy-in and in order to be as responsive as possible; and

consistency of standards and the manner in which various countries have approached various aspects related to COVID-19 response, including inconsistencies in the enforcement of COVID-19 regulations at the domestic level.

The cases and analysis that follow, are given as case studies to exemplify the issues raised above, and to justify the recommendations that are made to the ACHPR at the end of this submission.

2. NATURE OF RESPONSES

African countries did not take similar approaches in response to COVID-19. The following table is illustrative:

State of Disaster (in terms of existing disaster management laws)	State of Emergency	State of Public Health Emergency	Simultaneous State of Disaster and State of Emergency
Malawi Mauritius Rwanda South Africa South Sudan Tanzania Zimbabwe	Angola Democratic Republic of Congo Eswatini Botswana (Later changed to Situation of Public Calamity) Lesotho (for 14 days only) Mozambique Namibia Senegal	Ghana ² Madagascar	Namibia ³

¹ By the Democratic Governance and Rights Unit (DGRU), University of Cape Town and Laws.Africa NPO

² In Ghana, restrictions (without a declaration of state of disaster or state of emergency) were imposed in the early stages of the pandemic, through the Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 5) Instrument, 2020.

³ In Namibia, the state of disaster was under the Disaster Risk Management Act, while the state of emergency was in terms of the Declaration of State of Emergency: National Disaster (COVID-19) Proclamation 7/2020 (GG 7148) and Article 26 of the Namibian Constitution.

Declarations of state of disaster or state of emergency took effect in different periods, with extensions granted in some countries.⁴ Often, the declarations of states of disaster, states of emergency or both, have been accompanied by a number of subsequent regulations and directions, setting out different types, stages and geographical scale of lockdowns, curfews, gathering restrictions, and other restrictive measures. Some proclamations applied only to specific time periods and/or specific areas, while others applied nationally and throughout the declarations of state of disaster and state of emergency.⁵ In some countries, so numerous have been the regulations that they have been difficult to keep track of and follow, raising difficulties with compliance. However, generally, the following have been resultant:⁶

Emergency measures have resulted in the limitation of non-derogable rights including the right to life, freedom from torture and degrading treatment and the right to human dignity;
Some restrictive measures do not meet the requirements of reasonableness, necessity and proportionality. These include, but are not limited to, demolition of vending market stalls and the criminalizing public critique of government responses to the pandemic;
Unreasonably restrictive measures have been deleterious to the right of access to livelihoods;
Several rights and fundamental freedoms have been curtailed as part of the response to the pandemic and these include, but are not limited to the right to social security, adequate health care, adequate housing, access to water, dignity and equality; and
The COVID-19 pandemic has been used as a cover to deprive people of political representation, restrict civil space and strengthen authoritarianism.

3. CONSTITUTIONAL FRAMEWORKS FOR LIMITATION OF RIGHTS

In managing COVID-19, governments have been caught between controlling the disease and ensuring dignified service provision and human rights protection. Naturally, limitations of rights have been invoked.

African Charter on Human and Peoples' Rights standard

In terms of the International Bill of Rights,⁷ all derogations from fundamental freedoms must be provided for by law and be necessary and proportionate. The severity, duration and geographic scope of the restrictions must be limited and responsive to the public emergency. That is to say, restrictive measures must not limit rights save to the extent that is necessitated by the emergency. As confirmed by the African Court on Human and Peoples' Rights on 16 July 2021 in the *Advisory Opinion on Request No. 001/2020 by the Pan African Lawyers Union (ALU) on the Right to Participate in the Government of one's Country in the Context of an Election held during a Public Health Emergency or a Pandemic, such as the COVID-19 Crisis*, "one of the specific features of the [African Charter on Human and Peoples' Rights] is that it does not have explicit provisions for derogation of rights even in emergency situations". Instead, the Charter states that "[t]he rights and freedoms of

⁴ In Botswana for instance, a national state of emergency was introduced by the President acting pursuant to section 17 of the Constitution of the Republic of Botswana (1966), as read together with the Emergency Powers Act of 2020. Initially, the state of public emergency lasted for a month (ending in April 2020), before it was extended further to a six months' period, ending 2 October 2020.

⁵ A comprehensive listing of COVID-19 legislation in some African countries is found on this database jointly curated by AfricanLII and Laws.Africa: <https://AfricanLII.org/AfricanLII-covid-19>.

⁶ See Key findings in African Judges and Jurists Forum, Report on COVID-19 and State Compliance with Human Rights Standards in SADC, December 2020, <https://africajurists.org/wp-content/uploads/2021/08/COVID-19-and-Human-Rights-Report-01.pdf>.

⁷ Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols.

each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." The Court further noted that measures restrictive of rights must also comply with Article 2 of the Charter, which provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status"*.

Global framework of limitations

A global framework exists, as limitations processes are recognised at international law. It is these limitations or savings standards, legislated or otherwise, that delineate the contours of acceptable derogation. And some rights cannot be limited, among them the right to human dignity, fair trial and prohibition from being subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. The African Court on Human and Peoples' Rights considers applicable to the regime of restrictions in Article 4(1) and (2) of the ICCPR, which provides that *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State 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"*, and that *"No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."*⁸ For instance, according to the UN Human Rights Committee's 2020 General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the ICCPR, *"the imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it. Restrictions should not be aimed at discouraging participation in assemblies, potentially causing a chilling effect."* Within the COVID-19 framework, measures adopted by the states must meet the Emergency Measures and COVID-19: Guidance issued by the High Commissioner for Human Rights on 27 April 2020, which require that restrictions *"must meet the requirements of legality, necessity and proportionality, and be non-discriminatory."*

Member States' standards

African Union and international standards and principles on limitation of rights have been codified and have binding effect in many Africa countries. Constitutional frameworks in many African countries now provide for parameters within which rights can be limited. Countries have set minimum standards in their constitutions and legislation, including outlining what must not be undercut. Restraining people from enjoying their freedoms cannot be done unnecessarily, arbitrarily, inequitably, or brutally. Derogations must only be to the extent permitted at law. Most jurisdictions require that the limitation must be necessary, reasonable, proportionate and avoid harm or do the least harm (less restrictive measures). For instance, the severity of the threat posed by the health issue must shape the response as a measure of necessity. In so doing, one evaluates the purpose and nature of the limitation, the nature of the rights concerned, the relationship between the limitation and the purpose, and the need to ensure that the enjoyment of rights and freedoms by any person do not prejudice the rights and freedoms of others. Other criteria developed over the years include transparency in enforcement, fairness and the awarding of just compensation to the affected. For instance, in Mozambique, while a state of emergency is recognized, restrictions under a state of emergency must be in pursuit of a legitimate aim and must be provided by law, and any limitations

⁸ These provisions relate, respectively, to the right to life; the prohibition of torture, cruel, inhuman or degrading treatment or punishment; the prohibition of all forms of slavery, the slave-trade and servitude; the ban of prison for breach of contract; the principle of non-retroactivity of criminal law; the right of everyone to legal personality; the right to freedom of thought, conscience and religion or to adopt a belief of his choice.

must be necessary and proportionate to mitigating or responding to the emergency. These restrictions must be consistent with fundamental rights and freedoms, including non-discrimination. Of importance, the Constitution of Mozambique, as with many in Africa, recognises international treaties which are ratified, and these have the same force and effect as domestic laws. Such treaties include the African Charter on Human and Peoples Rights and the ICCPR. Other relevant instruments include the Convention on the Rights of Children and the Maputo Protocol to the African Charter on the Rights of Women in Africa. These instruments, and other persuasive declarations, require adherence to human rights standards, more so during public health disasters. In Namibia the Constitution guarantees the rights to equality and equal protection under Article 10 of the Constitution. Article 26(5)(b) of the Namibian Constitution empowers the President “to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency”, subject to Article 22 (Limitation upon Fundamental Rights and Freedoms) and Article 24 on non-derogable rights. While rights can be suspended or limited during a state of emergency, this does not apply to all rights. There are some rights that can never be taken away, among them the right to life, the right to human dignity, the right to equality, freedom from discrimination, the right to a fair trial, freedom of speech and thought, freedom of association, and the right of access to lawyers and courts.

4. JUDICIAL DECISIONS ON LIMITATION OF RIGHTS THROUGH COVID-19 REGULATIONS

A range of issues are being litigated on in the response to COVID-19. The following examples of both subjects of litigation and specific cases are far from being exhaustive or even comprehensive, but are simply illustrative. The DGRU is of the firm belief that the ACHPR and African states can and must derive monumental lessons in studying the cases being litigated on across the continent, the decisions being made, and the trends that may be observed.

Lawfulness of regulations

Lockdown regulations have been challenged in countries to include Malawi, South Africa, Namibia and Kenya.

Justification of limitations

In South Africa, on 1 July 2021 the Supreme Court of Appeal (SCA) in *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* [2021] ZASCA 95 overturned a much-criticised high court ruling in the early days of South Africa's COVID-19 lockdown that struck down most of the restrictions imposed by the state as unconstitutional. In June 2020, the High Court in Pretoria had ruled that the government's response to the COVID-19 pandemic was a “paternalistic” one, and struck down as unconstitutional the lockdown regulations under section 27(2) of the Disaster Management Act 57 of 2002.⁹ The High Court judge had ruled that the declaration of a national state of disaster “places the power to promulgate and direct substantial (if not virtually all) aspects of everyday life of the people of South Africa in the hands of a single minister with little or none of the customary parliamentary, provincial or other oversight functions provided for in the Constitution in place.” However, the SCA ruled that the Minister's explanations as to why she was moved to declare a national state of disaster and that she took scientific advice before formulating the regulations were not meaningfully contradicted. The SCA noted that the respondents did not plead, or in any event properly plead, the constitutional attack that was upheld by the High Court. The SCA stated that constitutional questions ought to be approached by litigants and courts alike with the appropriate degree of care and reiterated that constitutional attacks on the validity of legislation must be

⁹ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP) (2 June 2020).

pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so. In essence, the court ruled that the limitation imposed on fundamental freedoms by the regulations was justifiable, when viewed against the provisions of section 36 of the South African Constitution (the limitations clause). According to the court, the movement restrictions “are reasonable and justifiable to protect public good[s] and services. Thus, the extent of the limitation is necessary to reduce the rate of infection and protect [people’s] lives”.

“Secrecy” and “lawfulness” of structure

In June 2020, yet another challenge in South Africa before the Western Cape High Court, *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 2020 (11) BCLR 1371 (WCC), questioned the scope and the rationality of the COVID-19 lockdown regulations – and the lawfulness and constitutionality of the National Coronavirus Command Council (NCCC) that has been set up by the President as a subcommittee of Cabinet. The court dismissed the challenge. A central part of the challenge was lack of transparency and public participation in the processes of the NCCC, but the court ruled that confidentiality of Cabinet discussions are protected by section 12 (a) of the Promotion of Access to Information Act 2 of 2000 which excludes Cabinet and its committees from having to grant access to information required for the exercise or protection of rights, and that the President established the NCCC which was made up of Cabinet Members. The court found that there was nothing sinister or un-transparent about the Minister of Co-operative Governance and Traditional Affairs asserting that minutes of Cabinet meetings as well as those of its committees including the NCCC are confidential, there is it, as “confidentiality is the mechanism by which Cabinet protects the integrity of its discussions”.¹⁰ The court found that the President’s decision to establish the NCCC was neither a decision made in terms of legislation nor are the decisions of the NCCC capable of having legal consequences because they are subject to acceptance, rejection or modification by Cabinet and where applicable, individual Cabinet members.

“Essential goods”

In a separate case *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* 2020 (6) SA 513 (GP) (26 June 2020), the Gauteng High Court dismissed an application brought by Fair Trade Independent Tobacco Association seeking a lift on the ban of the sale of cigarettes in the country. The court rejected to interpret the regulations in a way that would categorise tobacco products as “essential goods”.

“Invalid delegation of power” and “regulations limiting rights should be strictly confined within bounds of necessity”

In Namibia, various stages of State of Emergency – COVID-19 Regulations were issued.¹¹ However, portions of the Stage 1 and Stage 2 State of Emergency – COVID-19 Regulations were declared unconstitutional and invalid by the High Court on 23 June 2020,¹² for invalid delegation of power.¹³ The court in that matter made important pronouncements around constitutional interpretation vis-à-vis derogation of rights, and stated that “the very nature of a Constitution which requires that a broad and generous approach be adopted when interpreting it also requires that where rights and

¹⁰ Paras 90-94.

¹¹ Proclamation 17/2020 (GG 7203) and Proclamation 21/2020 (GG 7225).

¹² *Namibian Employers’ Federation and Others v President of the Republic of Namibia and Others* [2020] NAHCMD 248.

¹³ Both the initial Stage 1 regulations and the subsequent Stage 2 and Stage 3 regulations provided that the President may authorise a minister to issue directives that supplement or explain any of the regulations or assist with their enforcement – with these directives having the force of law if approved by the Attorney-General and published in the Government Gazette.

freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms must be narrowly or strictly construed".¹⁴ In that same matter, the President was also ruled to have made regulations that did not deal with the situation which had given rise to the State of Emergency or which were contrary to Article 24 of the Namibian Constitution, thus had acted *ultra vires* Constitution. While the outbreak and spread of the Coronavirus in Namibia is an emergency which threatens 'the life of the nation or the constitutional order of the Republic', the court found that the President exceeded his power under Article 26(5)(b) by making regulations prohibiting employers to dismiss an employee; or terminate any contract of employment; or serve a notice of intended dismissal in terms of section 34 of the Labour Act; force an employee to take unpaid leave or annual leave; or to reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business during lockdown. The principle pronounced upon was that regulations limiting rights, or derogating from constitutional rights, should be strictly confined within bounds of necessity, to respond to the exigency at hand, and cannot be any broader.

"Very old and ill-equipped" law and "a state of emergency through the back door"

In Malawi, in the matter *The State on application of Kathumba and others v President of Malawi and others* [2020] MWHC 29 (03 September 2020), the Constitutional Court condemned the country's Public Health (Corona Virus Prevention, Containment and Management) Regulations 2020. The High Court stopped a lockdown decree from coming into effect by granting an initial seven-day injunction against the lockdown order, which was later extended to a permanent injunction. The court found that the rules under which the lockdown order was given, were unconstitutional as they were *ultra vires* the provision of section 31 the Public Health Act, under which they had been made. The court also condemned the parent legislation, the Public Health Act, as "very old and ill-equipped to deal with a pandemic of the COVID-19 magnitude". The court found there was no provision in the Public Health Act that envisages a lockdown. The judgment observed that "*By its very nature, the declaration of [lockdown] measures will have an impact on the exercise of constitutional rights of the populace. [However] even public health emergencies must always be handled within the framework of the rule of law. The alternative is social chaos*". An argument raised was that the lockdown order was a punishment to innocent Malawians as the government had not put in place adequate social security measures for people to rely on during the lockdown. The court considered the socio-economic realities of the many poor Malawians and criticised the government for imposing a lockdown without concern for this group who would not have access to food and other essentials if they could not leave their homes. The court encouraged parliament to pass new legislation as soon as possible, that would allow the regulations needed in a national health emergency to deal with "the issue of pandemics".

Another of the lockdown rules dealt with courts and the judiciary and stipulated how matters were to be heard and the directions that the Chief Justice may issue. But the court pushed back on this and said that "*By no stretch of Section 31 can such a measure be justified. The affront to the rule-making powers in subsidiary legislation posed by this particular rule is substantial.*"

This case was seen as the judiciary halting executive encroachment on the doctrine of separation of powers, with the court describing what the executive had done in promulgating the regulations as follows: "*Consequently, a state of emergency was imposed through the back door*".

The Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 under the Public Health Act, 12 of 1948 - which constitute delegated legislation - were not brought before Parliament and so the legislature did not have any input on their content. An argument raised was that the decree of the lockdown without a declaration of a state of emergency violated fundamental rights under the Constitution of the Republic of Malawi. The High Court held that the lockdown rules implemented in response to the coronavirus pandemic so significantly impacted fundamental rights

¹⁴ *Namibian Employers' Federation and Others v President of the Republic of Namibia and Others* [2020] NAHCMD 248 para 64.

that they constituted a derogation of those rights and were therefore unconstitutional. The Court found that the restrictions negated the “essential content” of the rights and therefore constituted derogations and not merely limitations of the rights. The Court held that as derogations are only permitted when a state of emergency has been declared and that the rights to freedom of conscience, religion and association could never be derogated, the Rules were unconstitutional.

The court considered the Malawian Constitutional limitations clause, section 44, which states that “no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards, and necessary in an open and democratic society”. Section 45(1) states that “[n]o derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section”. However, subsection (2) states that “There shall be no derogation with regard to ... (h) the right to freedom of conscience, belief, thought and religion and to academic freedom”.

The Court discussed the difference between limitations and derogations and described limitations as “restrictions that are necessary to balance competing or conflicting rights, or to harmonise rights with other public objectives”, whereas derogations are “temporary additional limits, or suspensions of rights, imposed during a state of emergency”. It added that there will be a derogation of rights if the restriction on the rights is such that they “negate the essential content of the rights”, and that in these cases those restrictions will have to meet the criteria as set out in section 45 of the Constitution. If the rights are merely limited – that is, their essential content remains intact – all that needs to occur is that the limitations pass the test set out in section 44. In applying these principles to this present case, the court held that the restrictions on movement, sale and purchase of alcohol, trading, and religious and social gatherings “all curtailed or would curtail essential commercial activity and the lifeline of the citizens whose constitutional rights to life and dignity were therefore threatened in view of the impact of the restrictions to” various rights, including the rights to freedom of conscience, religion, association, movement and access to justice.

The Court held that as there had been no declaration of a state of emergency and as certain non-derogable rights had been impacted by the Rules, the Rules had been enacted against the stipulations of section 45 and so were unconstitutional. The Court added that many of the safeguards in the declaration of a state of emergency – such as the requirement of a two-thirds majority vote in Parliament to extend the state of emergency – did not exist in respect of a state of disaster. It stressed that “[i]mbued in the checks and balances under section 45 is the right of the populace to challenge the imposition of measures that derogate rights” and reiterated that these were simply not present in the Rules enacted pursuant to a declaration of a state of disaster.

Another legal challenge on Malawi’s COVID-19 response hinged on the right of entry into the country, as there were also restrictions placed on the country’s borders and airports to prevent the importation of the disease. In *The State (on the application of Lin Xiaoxiao et al.) v The Director-General—Immigration and Citizenship Services and The Attorney General* [2020] MWHC 5 (3 April 2020), the court found the country’s disaster management laws to be outdated and inadequate, such that the declaration of state of disaster could not be found to be supported under the outdated laws, amounting to “rule by decree”. The court stated: “On the other hand, resort could be had to the Disaster Preparedness and Relief Act which, as has already been observed, is not only very much outdated (already raising the question of its compatibility with the Constitution) but its provisions are also not that useful apart from providing a forum where officials from different Ministries and about 5 or so representatives of non-governmental organizations can discuss how to coordinate the implementation of measures. As the matters stands, there is no evidence before the Court regarding the law under which the declaration of state of disaster was made”.

“Right to education” and “online education without prior consultation”

In another case in Malawi, a group of students challenged as unconstitutional and an infringement of their right to education, the closure of all educational institutions from 23 March 2020 in terms of the

declaration of the state of national disaster. In *The State and The President of the Republic of Malawi and others Ex Parte Steven Mponda and others* Judicial Review No. 13 of 2020, HC, ZA, the court ruled that the declaration was lawful and constitutional. The court was of the view that the declaration had been issued under the Disaster Preparedness and Relief Act (DPRA), which vested such authority to the presidency and therefore did not breach any provision of the Malawian Constitution. The students complained that a section of the Disaster Preparedness and Relief Act (DPRA) was unconstitutional because it gave the President and others the power to limit rights and freedoms in contravention of section 45 of the Constitution. Similarly, they challenged sections of the Public Health Act, and asked for a declaration that only the national assembly had the power to limit constitutional rights and freedoms in response to a disaster. The other point of contention raised was that the declaration of the state of national disaster derogated from the provisions of Section 44 of the Malawian Constitution. This section provides that there may be no restrictions or limits on the exercise of rights and freedoms under the Constitution unless these are lawful, reasonable, and recognized by international human rights standards and necessary in an open and democratic society. The court decided that the declaration satisfied these requirements and was therefore lawful.

In Kenya, eighty law students of Kenya's University of Nairobi went to a magistrates court on 29 June 2020, challenging the use of online learning platforms for classes and scheduled examinations in response to the COVID-19 pandemic restriction, arguing that the university adopted e-learning without prior consultation with the students. The students cited inequalities exacerbated by online learning, noting that there had been glaring gaps in learning due to a lack of broadband internet access in rural areas where most students have been living since the university was closed on 15 March 2020.¹⁵ From the above, it is apparent that in the promulgation of COVID-19 response regulations, states must take care to ensure that powers are not exercised *ultra vires*, that there be a proper legal framework supporting interventions made, and that the substantive aspects of the limitation of rights be considered, both within the framing of the law, and within the practical context of the realities of the ground.

Criminal litigation

Common court processes across the continent involved criminal proceedings for those deemed to be in violation of lockdown regulations.

In Nigeria, four supermarkets in Abuja were prosecuted in June 2020 for price gouging. These four were brought before the Federal High Court by the Federal Competition and Consumer Protection Commission (FCCPC), the agency mandated primarily to protect the rights of Nigerian consumers. Six-count charges were filed. In one of the charges, the FCCPC said the mega stores were "engaged in making false, misleading, deceptive representation in relation to the price of sanitizers, hand-wash liquids, and disinfectants of various existing brands at 'your' retail outlet and thereby committed an offense contrary to section 125 (1) (a) of the FCCPC Act, 2018".¹⁶

In Zimbabwe, as effects of the national lockdown became apparent on the working class, protests against the weakening economy started to sprout. The first of the protests was led by opposition MDC Alliance youth leaders on 13 May 2020 in Harare. The flash "hunger protest" was aimed at highlighting the plight of citizens. Police officers responded by initially arresting Joana Mamombe Member of Parliament for Harare West, and two MDC Alliance youth leaders for defying the lockdown regulations. Under unclear circumstance, the trio found themselves outside police custody, and instead as victims of a gruesome abduction and subsequent torture. They were discovered dumped on 14 May in Bindura, a town outside Harare, following a period of their lawyers failing to locate them. MDC Alliance youth leader Obey Sithole was also arrested and detained for one night on 26 May in connection with the same protest. Similarly, on 29 June, a student leader Makomborero Haruzivise was arrested at Mbare Magistrates Court in Harare over the flash demonstration and was taken to

¹⁵ "Law students approach courts to challenge online exams", 1 July 2020, <https://www.universityworldnews.com/post.php?story=2020070108564996>

¹⁶ "Nigeria: COVID-19 - Four Abuja Stores Charged Over Price Hike" 9 June 2020, <https://allafrica.com/stories/202006100214.html>

Harare Central Police Station where he was detained for 5 hours before being released without charge. On 20 June in Mutare, at least 35 nurses protesting against the lack of personal protective clothing were arrested for staging a demonstration, ostensibly for violating COVID-19 regulations. On 6 July, police officers in Harare also arrested 12 nurses and charged them with contravening COVID-19 regulations, for protesting salary cuts and lack of PPEs. On 19 June 2020 police officers arrested pro-democracy protesters, Namatai Kwekweza and Vongai Zimudzi outside the New Government Complex in Harare for allegedly participating in a gathering with intent to cause public violence, breach of peace, bigotry as provided under section 37 of Criminal Law (Codification and Reform) Act. The duo sat with placards outside the complex urging the government to consult three million people who voted in favour of the Constitution to gather their input before amending the Constitution as the government plans to do. On 31 July, police officers arrested eighteen people including award-winning novel writer Tsitsi Dangarembga and MDC Alliance Spokesperson Fadzai Mahere, for staging peaceful and socially distanced protests against corruption. In the Gambia, a journalist was recorded to have been arrested and detained for filming the police arresting COVID-19 protestors.¹⁷

It is pertinent to note that there is illustrative evidence of lack of compliance by states with Resolution ACHPR/Res. 449 (LXVI) 2020 on *Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts*, which among others, require that "Personnel of law enforcement institutions are given strict and enforceable guidelines on enforcing emergency regulations, with priority being given to the use of persuasion and community engagement for fostering public compliance and to use force or detention only as a last resort measure in exceptional cases" and that "No arbitrary arrest and detention are carried out and all arrests are carried out with judicial oversight".

In Zimbabwe, Statutory Instrument 200 of 2020 was significant in that it introduced prosecution for false reporting during the national lockdown. Any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State's enforcement of the national lockdown, would be liable for prosecution under section 31 of the Criminal Law Code and liable to the penalty of a fine up to or exceeding level 14 or imprisonment for a period not exceeding twenty years or both. There have been at least two prosecutions under this law as at August 2021.¹⁸ This law has been widely criticised as seeking to stifle media freedoms and freedom of expression. A similar law in South Africa has been a subject of calls for its repeal.

As ARTICLE 19, a free speech activist group, states on its website, "*While most aspects of the Regulations Issued in terms of Section 27(2) of the Disaster Management Act, 2002 (2020) (the Disaster Management Regulations) are intended to protect public health during the COVID-19 pandemic, Section 11(5) of the Regulations creates several content-related offenses with respect to publishing statements surrounding COVID-19. These offenses are punishable by fines or up to six months' imprisonment. Specifically, Section 11(5) criminalises publication, in "any medium" of information with "intention to deceive any other person about" COVID-19, the COVID-19 infection status of any person; or Government measures taken in response to COVID-19*". ARTICLE 19 states that it is "concerned that the Disaster Management Regulations are a part of a broader effort to suppress 'false news' in South Africa, particularly in light of extremely problematic reporting and shaming mechanisms endorsed and promoted by the South African Government".¹⁹

¹⁷ "Gambian police detain journalist documenting COVID-19 protests", July 15, 2020, <https://cpj.org/2020/07/gambian-police-detain-journalist-documenting-covid-19-protests/>

¹⁸ "Arrested Zimbabwe journalist in prison isolation over COVID", 9 January 2021, <https://apnews.com/article/journalists-coronavirus-pandemic-africa-arrests-zimbabwe-26206a8b2a16e94b59799168ac03427a>

and "Zimbabwe: Man Remanded in Custody Over Fake ED COVID-19 Statement", 21 April 2020, <https://allafrica.com/stories/202004210358.html>

¹⁹ ARTICLE 19, "South Africa: Prohibitions of false COVID-19 information must be amended" 23 April 2021, <https://www.article19.org/resources/prohibitions-of-false-covid-information-must-be-amended/>

Generally, media freedoms and journalism have also been a subject of court proceedings. In Zimbabwe, the government through Statutory Instrument 93 of 2020 gazetted on 19 April 2020, categorized the media as an essential service, among other critical sectors. However, journalists continued to be interrupted in their work by law enforcement. In 2020, the Zimbabwe Human Rights NGO Forum documented 20 cases of attacks on journalists in Mutare, Gweru, Chinhoyi, Harare, Chiredzi, Masvingo and Beitbridge.²⁰ Journalists discharging their duties were subjected to assaults, arbitrary arrests, unlawful detention and harassment. In the documented cases, journalists explicitly produced their press cards, yet they were subjected to harassment and/or assault. The Media Institute of Southern Africa (MISA) had to approach the High Court for relief and on 20 April 2020, the Harare High Court ordered the police and other law enforcement agencies charged with enforcing the COVID-19 lockdown not to arrest, detain or interfere with the work of journalists. The judge also ordered police to recognize 2019 press cards and not to interfere with the work of journalists on the basis that their press cards were issued in 2019. The Commissioner-General of Police was also ordered to ensure that a statement by the Zimbabwe Media Commission (ZMC) regarding the validity of the 2019 press cards was communicated to all police stations in Zimbabwe.

Nonetheless, the rights of the media continued to face attacks. On 22 May 2020, journalists Frank Chikowore and Samuel Takawira were arrested by police officers in Harare. The two journalists were arrested for going to a hospital where three opposition activists who had been abducted and tortured were receiving treatment. The journalists were detained at Waterfalls Police Station and charged with violating the lockdown regulations. They appeared at Mbare Magistrate Court where they were initially denied bail only to be granted bail by the High Court after spending 4 days at Harare Remand Prison. They were acquitted on 9 September 2020 of the charges.

Freedom of religion

In South Africa, in *Mohamed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP) (30 April 2020), the court dismissed a challenge that the word “gathering” in the regulations, where gathering was proscribed, was overbroad, excessive and unconstitutional. The applicants also wanted the government to amend the regulations to permit movement of persons between the residence and places of worship on such reasonable conditions as the court deems appropriate; and that the applicant Muslims be allowed to conduct each of the five daily prayers for a congregation limited to 20 people each under certain strict sanitary precautions. This request too was denied. The applicants claimed that the Lockdown Regulations violated their constitutional rights to freedom of movement, freedom of religion, freedom of association (including religious association) and the right to dignity. In dismissing the case, the court stated that “*At present, there is no vaccine available, no efficacious treatment and no cure. It is the great equalizer: COVID-19 affects all regardless of race, age, religion, qualifications, background and social standing and is particularly concerning to the elderly and people with pre-existing health conditions*”. The court applied the constitutional limitations test and concluded that “*In my view, in South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of “the greater good”, the spirit of “Ubuntu” and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic*”. The court continued: “*To the extent that the Government has put together its Task Team, has consulted exhaustively with them to ensure the safety of its citizens in order to “flatten the curve” and prevent an already fragile health system from being overwhelmed, I cannot find that the restrictions imposed are either unreasonable or unjustifiable and thus the application must fail*”.²¹

²⁰ Zimbabwe Human Rights NGO Forum, 180 Days of What: A Summary Review of the First 180 Days of the COVID-19 National Lockdown in Zimbabwe, September 2020, <https://kubatana.net/wp-content/uploads/2020/10/180-Days-of-What-lr.pdf>

²¹ Paras 70-72.

“Illegal” requirements by those enforcing COVID-19 restrictive measures

In Zimbabwe, the Zimbabwe Republic Police had issued a press statement on 25 July, listing in minute detail the documents that would be required at checkpoints throughout the country, with immediate effect.²² However, the Young Lawyers Association of Zimbabwe (YLAZ) contested this in the High

²² “ZRP Press Statement, Enforcement of COVID-19 Regulations by Police with Effect from 5th January 2021

In view of the revised COVID-19 regulations announced by the Government on 2nd January 2021 and the subsequent publication of Statutory Instrument 10/2021, the Zimbabwe Republic Police reiterates that only employees in the essential service sectors such as health, food distribution, bank institutions, mining services, communication and telecommunications, agricultural production will be allowed to pass through checkpoints and roadblocks. [...] For ease of reference and effective maintenance of law and order in the country, employers in the essential services sector which were given authority to operate in the pronouncement by the Government are required to adhere to the listed movement guidelines: –

Health

Uniforms and health ID cards

Those in civilian attire, a letter from Medical Superintendent or Chief Executive Officer (CEO) stating the place. Dates and times of reporting on and off duty.

Companies Organisations

Letters from Company Chief Executive Officer (CEO) or General Manager [GM] whichever the case, stating the place, days and times of reporting on and off duty.

Letters should bear full particulars of the issuer, including his or her contact details.

Letters should be taken to the Officer in Charge of a local Station for authenticity to guard against fake letters

Ministries Parastatals and Provincial Levels

At National level, an exemption letter from Directors and above and Headmasters, stating the duty, place, days and times of reporting.

At Provincial level, an exemption letter from Provincial Heads stating the duty, place, days and times of reporting.

Commercial A2 and A1 farmers

An offer letter/ lease agreement and an exemption certificate from Officer in Charge Station.

Communal Farmers

Supporting letter from the Headman/Village Head stating the business to be done, the date, time, place and an exemption letter from Officer in Charge Station.

Food Retailers

Certified photocopies of a shop licence and an exemption letter from Officer in Charge Station.

Sole Traders

Shop licence accompanied by an exemption letter from Officer in Charge Station.

Private Security Services

Uniform, company ID and letter from the management stating dates and times of reporting on and off

Court, challenging the lawfulness of the police action. The High Court granted an interim order barring the police from demanding the documents listed in the press statement. The YLAZ argued that the police had acted outside their power by demanding that anyone going to work had to produce certain documents in order to be allowed through police roadblocks. While the police notice said that their requirement for documents to be produced on demand was to prevent the spread of COVID-19, the requirement was widely seen as part of the general crackdown on fundamental rights being experienced in Zimbabwe.

The police later issued another press statement stating that “Members of the public, entities in the essential services sector such as food distribution and retailers, mining, communication and telecommunication, agricultural production, security companies and companies as pronounced by the Government and the media are advised that after consultations with the COVID-19 Ministerial Task Force, movement and exemption letters will now be issued by the Ministry of Industry and Commerce. May the relevant institutions and companies be guided accordingly.”

Quarantine conditions

In March 2020 the government of Botswana made a decision to quarantine people coming into the country and erected quarantine centres across the country. However, the government failed to provide an acceptable standard of conditions of sustenance in the centres leading to complaints and court cases. There was an overall outcry for improved conditions in government isolation centres, citizens decried unkempt centres with lack of protective items, poor food provision, shared rooms and dirty ablutions among other factors. The dehumanizing conditions seemed common across the country. Botswana lawyer Carr-Hartley took the matter to court, citing the Attorney-General and others, and pleading for improved conditions for his daughter Kristin Carr-Hartley and all others in quarantine at that point in time. The High Court of Botswana ordered that the government should provide segregated sanitary and hygienic conditions and provide for reasonable dietary requirements.²³

Freedom of movement, excessive nature of restriction and penalties and police brutality

In Kenya, the Law Society challenged curfew regulations and the excessive use of force in

duty.

Medical Supplies

Medical cards / prescription / National Blood transfusion service documents.

Attendance of Funerals

Officer in Charge Station, Officer Commanding District and Officer Commanding Province to issue exemption letters showing destination and dates of going and returning.

To stick to the restricted attendance of 30 mourners or less.

Clarity on access to food / medical supplies

There is no need for movement exemption letters for those going to buy or restock foodstuffs or medication within a 5km radius from the place of residence, unless there is no such establishment within that radius or the needed service is not available there, in which case one may obtain it from the nearest location to his or her home. [...]"

²³ “Coronavirus: Top attorney wins against govt in quarantine case”, 25 March 2020, <https://www.mmegi.bw/news/coronavirus-top-attorney-wins-against-govt-in-quarantine-case/news>

enforcement of the curfew in *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR (Petition 120 of 2020)*. The Law Society asserted that the Curfew Order was “illegal, illegitimate and un-proportionate” as it was “blanket in scope and indefinite in length”. The Law Society also contended that the Curfew Order did not contain any reasons or rationale for the curfew, among other claims. The Law Society further argued that the curfew order was ultra vires as it was established pursuant to section 8 of the Public Order Act, yet “public health emergencies” are governed by section 36 of the Public Health Act, 2012. Other claims included seeking declarations and orders for the state to ensure the highest attainable standard of health and consequently, an order directing the Cabinet Secretary in Charge of Health to exercise his powers under section 36 of the Public Health Act, and issue proper guidelines for curfew, quarantine, containment of COVID-19 that specifies inter alia testing kits, facilities, health workers, resources and access to information. The petition partially succeeded. The court pronounced that looking at the curfew notice it was clear that the period of the curfew was not specified, and that this was a clear breach of section 8(3) of the Public Order Act which states that a curfew order “shall remain in force for the period specified therein”. A curfew order cannot last forever, the court said. However, the court concluded that the curfew passed the limitations test under article 24(1) of the Kenyan Constitution, and that it had been established that the Curfew Order was backed by law, and applied to each and every person in the Republic of Kenya except those who offer essential services. According to the court, the government could not be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The court however ordered the police’s unreasonable use of force in enforcing the Public Order (State Curfew) Order, 2020 was unconstitutional, and a directive was issued compelling the Cabinet Secretary for Interior and Coordination of National Government to amend, within five days from the date of the judgment, the Schedule to the Public Order (State Curfew) Order, 2020 so as to include the Independent Police Oversight Authority (IPOA) and the members of the Law Society of Kenya in the list of “services, personnel or workers” exempted from the provisions of the Curfew Order.

In Zimbabwe, the inclusion of the army as law enforcement officers brought a fearful expectation of violence as soldiers have been previously implicated in gross human rights violations in the recent past. Human rights groups in the country have recorded that soldiers are identified in the major categories of human rights violations documented, especially cases of assault and harassment of civilians.²⁴ The violations forced a citizen and the Zimbabwe Lawyers for Human Rights to obtain a court judgment prohibiting the police from using unwarranted and disproportionate force against citizens in the enforcement of the national lockdown in the case of *Lucia Masvondo & Zimbabwe Lawyers for Human Rights v Minister of Home Affairs and Cultural Heritage & Others HC 2170/2*. However, excessive use of force has continued even after the judgment was issued, pointing to disregard of court rulings and impunity.

One particularly egregious case of police brutality in Zimbabwe occurred in Bulawayo on 16 April 2020, when two sisters Nokuthula Mpfu and Ntombizodwa Mpfu were brutally assaulted for hours with batons on their backs, hips and legs by police officers who accused them of violating the national lockdown. The two sisters were leaving a supermarket, when they were confronted by the police, handcuffed to their backs and repeatedly assaulted with baton sticks. The National Peace and Reconciliation Commission (NPRC) intervened and assisted the two women in filing a formal police complaint. Six (6) police officers were arrested in connection with the case and brought on trial before the Magistrates Courts in Bulawayo.²⁵

Recognition as “essential service”

²⁴ Zimbabwe Human Rights NGO Forum, 180 Days of What: A Summary Review of the First 180 Days of the COVID-19 National Lockdown in Zimbabwe, September 2020, <https://kubatana.net/wp-content/uploads/2020/10/180-Days-of-What-Ir.pdf>

²⁵ “Zimbabwe: Six Bulawayo Assault Cops Want Charges Dropped” 19 July 2020, <https://allafrica.com/stories/202007190019.html>

Various regulations contained exceptions for sectors deemed to be essential, and workers deemed to be essential, to be able to operate notwithstanding lockdown or movement restrictions. A number of court challenges came up to do with designation as essential services. In Zimbabwe, the Young Lawyers Association of Zimbabwe filed an urgent chamber application at the High Court in Harare on 6 January 2021 seeking an order to compel the government to urgently place them on the list of essential service personnel to allow them to offer legal assistance to those in need during the subsistence of the national lockdown period. The Minister of Health had on 2 January 2021 announced the imposition of another national lockdown which took effect from 5 January 2021. During this period, the Minister of Health authorised some selected essential services and providers to remain open and operational and ordered all non-essential enterprises and service providers to shut down. The government also announced a dusk to dawn curfew aimed at curbing the spread of coronavirus. The lawyers protested that government's conduct in not recognising lawyers as part of essential service providers was a violation of lawyers' rights as well as litigants and arrested persons provided in sections 50, 64, 66, 69 and 70 of the Zimbabwean Constitution. They argued that government was oblivious of the role that lawyers play in society, arguing that the non-designation of lawyers as essential services was an impermissible limitation of rights in terms of the provisions of section 86(2) of the Constitution hence the limitation was not fair and reasonable and was not necessary and justifiable in a democratic society. The lawyers stated that section 86(3) of the Constitution provides that no law may limit the right to a fair trial, the right to obtain an order of habeas corpus among other fundamental rights. Before the matter was heard, lawyers were designated as an essential service through a subsequent regulation.

Access to water

In Zimbabwe, inadequate water supplies by local municipalities forced residents to spend long hours in queues at community boreholes, in contravention of lockdown and social distancing regulations. In Bulawayo, there was an outbreak of diarrhoea, dysentery and typhoid linked to water shortages facing the city. Residents in Bulawayo resorted to open wells dug out in wetlands as a source of water. Six residents associations from Harare, Mutare, Masvingo, Gweru, Chitungwiza and Hwange filed lawsuits before the High Court, to force their central and local governments to ensure safe, portable, and uninterrupted supply of water during the lockdown, given the severity of the lack of water in these areas. In all but two of these cases, the High Court ordered the government of Zimbabwe and the responsible local authorities to urgently take concrete steps to improve water supplies in the face of the COVID-19 and the subsequent lock down.²⁶ Scarcity of water has been documented to have particular bearing on women, who were the majority violating the lockdown rules to congregate at water collection sites out of necessity. Cases of abuse of women have also been document at these sites, at times by men who go and seek to take control of the water collection sites. Cases of harassment, verbal and sexual abuse of women were rampant at the water collection points.²⁷

Access to healthcare and capacitation of medical facilities

In Uganda, on 8 July 2021 the High Court in Kampala heard the case of Mulumba Moses and Centre for Health Human Rights and Development (CEHURD) vs Attorney-General, The Medical and Dental Practitioners Council and The Minister of Health Miscellaneous Application no 489 of 2021. The case challenged the government and the Medical and Dental Practitioners Council for failure to act in response to exorbitant, unjustified, and extortionate fees hospitals were charging for the management and treatment of COVID-19. The High Court handed down an order by consent ordering that: 1. The Government, Minister of Health and Medical and Dental Practitioners Council make regulations on

²⁶ "Victory as Residents Win COVID-19 Case", 31 March 2020, <https://kubatana.net/2020/03/31/victory-as-residents-win-covid-19-case/>

²⁷ Zimbabwe Human Rights NGO Forum, 180 Days of What: A Summary Review of the First 180 Days of the COVID-19 National Lockdown in Zimbabwe, September 2020, <https://kubatana.net/wp-content/uploads/2020/10/180-Days-of-What-lr.pdf>

fees chargeable by hospitals managing and treating COVID -19 patients, and 2. The Medical and Dental Practitioners Council make recommendations to the Minister of Health on reasonable fees chargeable by hospitals for treatment and management of persons suffering from COVID-19. In Zimbabwe, public health care facilities to which most are depended on have deteriorated due to lack of adequate funding by the government. At the onset of the pandemic, the inadequacies came to the fore, with many facilities in the country reporting that they were ill prepared to deal with cases of COVID-19 due to lack of ventilators, personal protective equipment for frontline health workers, water, electricity and other crucial medical resources to adequately respond to the pandemic. As a result of the inherent incapacitation of the health sector, the Zimbabwe Association of Doctors for Human Rights (ZADHR) filed a court application to compel the government to take effective and proper actions to handle COVID-19 at public hospitals.²⁸ The High Court granted the order. In Harare, the Wilkins Hospital was prepared as an isolation and treatment centre. But the first reported case of COVID-19 death exposed huge discrepancies between government announcements and the realities at the hospital.

Right to trade and occupation – informal traders

In Sub-Saharan Africa, lockdowns brought peculiar challenges to informal traders, who depend on daily presence on the streets or informal trading sites for survival. Because the informal labour sector is comprised of enterprises that are small in terms of revenue and capital, lockdown periods may have a permanent negative impact on these businesses, as they might never be able to resume operations if the owners are forced to sell assets as a response to lost income.²⁹ In Zimbabwe, according to the country's 2019 Labour Force Survey released by the Zimbabwe Statistics Agency in March 2020, 74% of the Zimbabwean workforce is in the informal sector. However, the figure could be higher. It is estimated that close to 90% of Zimbabweans depend on informal trade to either supplement low income from formal employment or to survive. COVID-19 restrictions during the national lockdown banned informal trading for the greater part. During the relaxed Level 2 lockdown, informal traders were required to register with local authorities for them to be allocated trading spaces. The registration and allocation process, however, requires financial obligations on the part of informal traders. Bearing in mind that informal traders have not been productive for the greater part of the lockdown, this regulation severely affects the capacity of informal traders to resume operations. Further, local authorities nationally demolished vending stalls, temporary structures and informal traders' workshops, removing the capability of traders to continue with their informal business. The demolishing of vending stalls and other temporary structures disrupted livelihoods of the majority of Zimbabweans. During the demolitions, goods and products belonging to informal traders were destroyed and confiscated by local authorities. In April at a farmers' market in Mutare, police officers raided and destroyed vegetables, fruits and other agricultural products during a raid of the farmer's market. The destruction and confiscation of vendors and informal trader's goods further impoverished the vulnerable group. A number of court challenges were brought by local residents associations to halt the demolitions.

Elections

According to the International Institute for Democracy and Electoral Assistance (IDEA), between 21 February 2020 and 21 August 2021, 17.7% of national and subnational election in Africa were

²⁸ "Doctors sue Zimbabwe government over lack of Covid-19 protective equipment" 9 April 2020, <https://www.theguardian.com/global-development/2020/apr/09/doctors-sue-zimbabwe-government-over-lack-of-covid-19-protective-equipment>.

²⁹ Karment Naidoo, "The Labour market challenges of COVID-19 in sub-Saharan Africa", Africa Portal, June 10, 2020. Available at: The labour market challenges of COVID-19 in sub-Saharan Africa (africaportal.org) and Africa Judges & Jurists Forum (AJJF), Addressing the Gendered Impact of COVID-19 on ESC Rights in Southern Africa, June 2021, <https://africajurists.org/wp-content/uploads/2021/publications/28.06-gendered-impact-of-COVID-19-in-Southern-Africa-Final.pdf> page

suspended on account of the pandemic.³⁰

A standard was set by the African Court on Human and Peoples' Rights in the *Advisory Opinion On Request No. 001/2020 by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of one's Country in the Context of an Election held During a Public Health Emergency or a Pandemic, such as the COVID-19 crisis* on 16 July 2021. In this request, PALU raised that the COVID-19 crisis presents unprecedented challenges for democratic governance and rule of law in Africa and that, in response to the pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections. PALU affirmed that those measures taken "also have the practical effect of constraining democratic competition, could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise. At least 22 AU Member States were scheduled to hold presidential and/or legislative and/ or local government elections in 2020". PALU the requested for an Advisory Opinion from the Court on the following questions:

a. What, if any, are the applicable obligations of State Parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the COVID-19 crisis, in light of the express provisions of the African Charter and of the African Charter on Democracy Elections and Governance (ACDEG)?

³⁰ International Institute for Democracy and Electoral Assistance (IDEA), Global Overview of COVID-19 Impact on Elections, 28 August 2021, <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>. Elections postponed in Africa are as follows:

Local by-elections for Metsimotlhabe and Boseja South wards, Botswana (originally scheduled for May 2020)

Legislative elections, Chad (originally scheduled for 13 December 2020) moved to 24 October 2021

Parliamentary election, Ethiopia (originally scheduled for 29 August 2020) moved to 21 June 2021

Partial legislative election, Lékon-Lékori (Akiéni), Gabon (originally scheduled for 4 and 18 April 2020) moved to 31 January 2021

National Assembly by-election, Niamina West constituency, Gambia (originally scheduled for 16 April 2020) moved to 7 November 2020

County Assembly and National Assembly by-elections, Kenya (originally scheduled for April, June–July 2020) moved to 15 December 2020

Midterm Senatorial elections and national referendum, Liberia (originally scheduled for 13 October 2020) moved to 8 December 2020

Municipal elections, Libya (originally scheduled 18 April 2020) moved to June 2020.

Local elections, Niger (Originally scheduled for 1 November 2021) moved to 13 December 2021 (Not directly related to Covid-19)

Senatorial by-elections in Bayelsa, Imo and Plateau districts, Nigeria (originally scheduled for March 2020) moved to 5 December 2020

Parliamentary elections, Somalia (originally scheduled for 27 November 2020) and Presidential elections (originally scheduled to take place before 8 February 2021) moved to 25 July - 10 October 2021 as indirect Parliamentary and Presidential elections are postponed.

All municipal by-elections and voter registration activities in South Africa (originally scheduled for March–May 2020) moved to 11 November 2020

Municipal in elections in Hassi El Ferid, and Jbeniana, Tunisia (originally scheduled for 28–29 March 2020) moved to 5 July 2020

Special interest groups elections, Uganda (originally scheduled for April–May 2020) moved to 11, 13, 17 August 2020

Rural district council by-election, ward 16 of Chiredzi, Zimbabwe (originally scheduled for 4 April 2020); Legislative and council by-elections, Zimbabwe (scheduled for 5 December 2020) suspended and then moved to 2021

b. What, if any, are the legal standards founded in treaty law applicable to the State Parties that choose to conduct elections vis-à-vis Member States that choose not to conduct elections during the pendency of the COVID-19 disaster or emergency measures?

c. What, if any, are the legal standards applicable to States precluded by reason of a public health emergency, such as the one caused by the COVID-19 pandemic, from organising elections as the basis of the democratic mandate of government?

The Court reaffirmed that its advisory opinions are designed to provide guidance to all Member States of the AU in fulfilling their international human rights commitments. The court provided guidance as follows:

On the decision to conduct or not conduct elections in the context of a public health emergency or a pandemic

- States may decide to conduct or not to conduct elections in the context of a public health emergency or a pandemic. Such a decision requires prior consultation with health authorities and political actors, including representatives of civil society.

On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

- Measures restricting rights, applied by States in elections conducted during a public health emergency or a pandemic, must, in accordance with Article 27(2) of the Charter, be in the form of general law; pursue a legitimate purpose; be proportionate; must not undermine the essential content of rights; must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), in Articles 11, 15, 16 and 18, in accordance with Article 4(2) of the ICCPR; and must not be discriminatory.

On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

- The postponement of an election because of a public health emergency or a pandemic must comply with Article 27(2) of the Charter mutatis mutandis and Article 4(1) of the ICCPR. On the standards applicable in the event the term of office expires.
- It is for domestic law to outline the applicable legal standards when the term of office of elected officials expires, including to an interim replacement, to an extension of term of office with full powers, or to a caretaker arrangement. Where appropriate legislation does not exist at the time of a public health emergency or a pandemic, a law may be enacted by the competent bodies, based on prior consultation with political actors, including representatives of civil society.

In making its determination, the Court recalled that AU Member States have adopted democracy as their political system and are committed to respecting the principles of the rule of law and to promoting and protecting human and peoples' rights under the provisions of Article 3 (g) and (h) of the AU Constitutive Act. The Court considered that one of the fundamental principles of democracy is

the regular conduct of transparent, free and fair elections aimed at creating the conditions for the possibility of democratic alternation and, at the same time, affording the electorate the opportunity to regularly evaluate and politically sanction the performance of those elected officials, through universal suffrage. It follows, then, that State Parties can decide to conduct elections within the timeframe provided for by law, notwithstanding the situation of the Covid-19 pandemic, if they deem it possible.

The Court was of the view that “States should regularly conduct elections within the electoral calendar. In a situation of an emergency, such as the Covid-19 Pandemic, it is incumbent upon the States which are sovereign to determine when to conduct elections and to take appropriate measures to protect the health and life of people without undermining the integrity of the elections”. The Court recalled that one of the specific features of the Charter is that it does not explicit have provisions for derogation of rights even in emergency situations. This means that, under the Charter, States that choose to conduct elections during a state of emergency, as is the case with COVID-19, are obliged to respect human rights. Where they take measures that restrict human rights, they must observe the provisions of Article 27(2) of the Charter, which sets out that “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

The Court expressed the view that there are some aspects which form the essential content of the right of citizens to freely participate in the government of their countries through elections. These aspects comprise “*the effective participation in the electoral process, including campaigning, fair and equitable access to the State controlled media; the monitoring of the electoral process by candidates, political parties and the competent voter registration public institutions; the secret ballot; participation in the process of vote counting and publication of the election results by political parties, candidates and any other relevant actors for the transparency of the elections; the possibility of contesting the results before the competent administrative and judicial bodies, if appropriate*”. These aspects of citizens' right to participate in the government of their countries, the court said, cannot be suppressed, even in an emergency situation such as the COVID-19 Pandemic, without undermining the integrity of the electoral process. The Court expressed the opinion that particular attention should be given to the right of movement of persons during the election period, so restrictions on movement, besides not being absolute, other measures should be considered to mitigate restrictions such as creating conditions for meetings to be held virtually, which requires improving the coverage of the telecommunications network, lifting restrictions on the use of online communication platforms, namely social media.

Finally, measures restricting rights must not be discriminatory. That is, a State should seek to ensure that, within the overall framework, the measures taken do not, in practice, create an advantage for one party, notably, the incumbent governing parties or candidates, to the detriment of other candidates or parties. On applicable standards in the event the term of office of the elected officials expires without elections having been held, the Court opined that in principle, States must have their own legislation on the consequences of the expiry of the term of office of elected officials without elections being held due to the declaration of a state of emergency.

Member States have applied these standards in divergent ways, with some countries going on to hold national elections including presidential elections, often with success. Some have indefinitely suspended all manner and form of elections, such as the indefinite ban on by-elections in Zimbabwe. In South Africa, the Electoral Commission has applied to the Constitutional Court to rule on whether local government election due in October 2021 may proceed under the COVID-19 circumstances. The Constitutional Court heard the matter on 20 August 2021 in *Electoral Commission of South Africa v Minister of Cooperative Governance and Traditional Affairs and Others* CCT 245/21. This was after an independent inquiry commissioned by the Commission, headed by former Deputy Chief Justice Dikgang Moseneke, issued a verdict that elections under the current circumstances would not be free and fair, and the Electoral Commission adopted the report. With this in mind, the standards developed by the African Court in the *PALU Advisory Opinion*, should be considered for reduction into a guiding addendum to the African Charter on Democracy Elections and Governance (ACDEG).

5. ACCESS TO LEGAL INFORMATION

The DGRU, through the AfricanLII programme, and Laws.Africa collect and update COVID-19 legislation and caselaw from across Africa. In the course of the project, we directly observed the profound difficulties many African citizens have in accessing authoritative and updated rules, regulations and policy information on the management of the COVID-19 pandemic in their countries. Access to government legal information is severely constrained in many of the countries covered by

our Covid-19 regulations service: <https://africanlii.org/africanlii-covid-19> . The government gazette, or official journal as it is known in many jurisdictions, is the official and authoritative gazette of record for any government. African countries published legislation, regulations and rules relating to restrictions of Africans' rights, livelihoods and businesses. Yet, due to delayed or non-existent electronic publication of the gazettes, these regulations remained out of reach of citizens. Save for a few countries, such as Kenya, South Africa, Namibia, Mauritius, Mozambique, most African countries lack proper digital channels of communication of government information.

We believe that this fundamental lack of access to government information can lead to an erosion of the rule of law and prevent Africans from realizing their fundamental rights and obligations as citizens, including the right to participate in the formulation of government policy and laws that affect them. Availability of government legal and policy information relating to COVID-19, but in fact legal information more broadly, is easily achievable by instituting digital mandates of existing communications structures, such as the Government printers. Support for and investment in an open legal information policy will ensure Africans' right to receive information, and practically provide a powerful counter point to false and misleading information, including such that relates to the Covid-19 pandemic.

Many countries have now gazetted so many of these regulations/statutory instruments, but in addition to limited public access, these are not always being consolidated for easy access and comprehension by citizens, who are then expected to comply. Governments must be encouraged to ensure regular consolidation, and even simplification of regulations for better general understanding.

6. RECOMMENDATIONS

As has been concluded by the Africa Judges and Jurists Forum; "In spite of these legal obligations, these states have implemented measures restricting the enjoyment of fundamental freedoms, including rights which are absolute under domestic and international law. In extreme cases, the derogations have included extra-judicial killings, abductions and acts of police brutality, thus highlighting grave threats to the legal and constitutional order. Even though the restrictive measures have been prescribed by law, some still fail the necessity and proportionality tests. Laws which criminalized criticism of governments' response to the pandemic were clearly unnecessary and disproportionate, as was the demolition of informal market stalls. Broadly restrictive lockdown measures without socio-economic safety nets also disproportionately affected ordinary workers and the right of access to livelihoods".³¹

The recommendations below, draw from lessons that can be taken from court pronouncements thus far on the enforcements of COVID-19 induced states of disaster and states of emergency across the continent.

Adherence to minimum standards of human rights - Human rights compliant law-enforcement and policing must be encouraged. Minimum standards set at international and regional levels, and under national constitutions, ought to shape the responses of governments. Any deviation from these must be to improve on those minimum standards. This includes striking the right balance between public health response and protection of rights, both individual and collective. As put by WHO Director-General, Dr. Tedros Adhanom Ghebreyesus: "all countries must strike a fine balance between protecting health, minimising economic and social disruption, and respecting human rights."³²

³¹ Africa Judges and Jurists Forum, Report on COVID-19 and State Compliance with Human Rights Standards in SADC, December 2020, <https://africajurists.org/wp-content/uploads/2021/08/COVID-19-and-Human-Rights-Report-01.pdf>.

³² WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

Constitutional compliant limitation of rights – Fundamental rights that are non-derogable must be treated as such. Undue limitations on all other rights should not be allowed in regulations. All regulations and directions must comply not only with national constitutions, but with the African Charter on Human and Peoples' Rights and the International Bill of Rights. The COVID-19 pandemic should not be used as justification for suspension of constitutions and constitutional protections.

Guiding documents in understanding and interpreting rights and standards in the African Charter on Human and Peoples' Rights - The ACHPR must develop clear guidelines that nations can use in considering regulations that have a potential to limit rights, to ensure compliance of national approaches to the African Charter on Human and Peoples' Rights, and all AU human rights and governance instruments.

Strengthen the African Governance Architecture (AGA) platform - The AGA platform must be strengthened as an AU structures interface platform, and AGA-civil society engagements must be strengthened, to help workshop COVID-19 response measures that are pro-human rights, and that advance the goals and aspirations of the African Union and Member States.

Open access to courts and justice - African countries must maintain open access to courts and access to justice during the enforcement of the declarations of state of disaster and state of emergency. This is also to ensure timely determination of legality of measures taken. These measures should include having courts open and operational – including encouraging the use of virtual courts and revision of court rules to allow for greater flexibility in the handling of court process and proceedings, while at the same time ensuring efficiency, effectiveness and fair hearings. Access to legal aid must be promoted.

Compliance with court orders – The ACHPR must impress upon states to comply with pronouncements of national courts, which is important for rule of law and deepening the culture of constitutionalism.

Consistency in enforcement of COVID-19 regulations – States must be encouraged to maintain and ensure consistency in the implementation and enforcement of restrictive measures such as curfews, lockdowns, and other movement and gathering restrictions. There should be equal treatment and equal sanction against violations of rights in a country, and this should not be dependent on the identity of the alleged violator of COVID-19 regulations. It is a fundamental principle of rule of law that there must be certainty and predictability, as opposed to arbitrariness.

Review and reform of disaster risk management laws and frameworks - Most countries were caught with the COVID-19 pandemic with outdated and inadequate disaster management frameworks. There is need to align the disaster management laws with international best practices that look at disaster prevention in a holistic manner. Disaster management laws must also be aligned to national constitutions. Disaster management frameworks must address the disproportionate impact of disasters such as COVID-19 which impose related restrictions on vulnerable groups. COVID-19 presents an opportunity to develop regional standards that Member States can replicate on disaster management in general, and public health emergencies in particular.

Guidelines on parameters for states of disaster and states of emergency - The ACHPR must develop general guidelines on lawful parameters for the declaration and enforcement of states of disaster, states of emergencies, curfews and other related restrictions, to guide Member States in reforming disaster management laws and frameworks. This should include necessary safeguards and checks and balances in the roles the executive and the legislative body should play.

Consultation and public participation - States should be encouraged to ensure the widest and most extensive widest consultation and engagement in the design of response mechanism, both as a measure to be response to context, and to attain greater buy-in and COVID-19 response measures.

Social security and safety nets – Socio-economic rights must be given practical expression in disaster response. States must have mechanisms to provide socio-economic cushion to the most vulnerable and those in need when restrictive measures are put in place. Every state must develop a workable strategy on social security and safety nets.

Digital communication of official, legal and regulatory information – Member States must be encouraged to invest in the strengthening and expansion of government communications services, particularly the digitisation and free access to government gazettes and official journals, as the only source of authoritative government and legal information. Furthermore, governments in Africa should invest in the updating, consolidation, simplification and translation of legislation to make it more accessible for Africans, particularly vulnerable members of our societies.

-ENDS-

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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.

About the Democratic Governance and Rights Unit and Laws.Africa

The Democratic Governance and Rights Unit (DGRU) (<http://www.dgru.uct.ac.za/>) is one of Africa's leading research centres specialising in the area of judicial governance. Based in the Department of Public law in the Law Faculty at the University of Cape Town, the DGRU's main focus is on supporting judicial governance and providing free access to legal resources in Africa, and has established itself as one of the leading think-tanks on African judiciaries. The DGRU was established in order for the faculty, and UCT more generally, to have a greater influence on democracy and human rights in South Africa and the greater Southern Africa region. Its work aspires to support the Sustainable Development Goal 16 through strengthening judicial institutions and the rule of law and promoting human rights. The DGRU is a member of the Global Judicial Integrity Network and of the global Free Access to Law Movement. The DGRU has a vision of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law.

Laws.Africa's mission is to support Africa and its people in our common aspirations for an Africa of good governance, democracy, respect for human rights, justice and the rule of law. Laws.Africa improves the availability of African legal information. They disseminate digital, high-quality and accurate African law to partners and audiences in Africa and the world, in support of the rule of law and development. As a member of the global Free Access to Law Movement (FALM), Laws.Africa monitors and address the significant deficit of reliable primary legal materials from sub-Saharan Africa in areas such as human rights, the environment, commerce and technology. Laws' Africa's core work focuses on digitising and publishing African government gazettes, updated legislation and case law.



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