

EVENT

Webinar: Constitutional Resilience and the COVID-19 Pandemic in Africa (13 August 2020)

Paula Knipe

On 13 August 2020 the Dullah Omar Institute (DOI), University of the Western Cape, hosted its third webinar on the constitutional resilience of countries in response to the COVID-19 pandemic. While countries have taken different approaches, with some declaring it a state of emergency, others a national disaster, every country affected has experienced human rights implications. The international community reacted quickly in guiding states on their responses by highlighting that these should comply with international human rights standards. At a domestic level, many countries have also put accountability mechanisms in place to ensure that minimal human rights violations take place. The webinar invited panelists from South Sudan, South Africa, and Australia to present on the constitutionality of the measures put in place by their states in response to the pandemic.

The first panelist, Joseph Akech, is a human rights lawyer and doctoral researcher at the Centre for Human Rights at Pretoria University. He works for Save the Children International as an advocacy and campaign director. South Sudan is the world's newest country, having gained independence in 2011, but has since been ravaged by conflict, with no functioning constitution. Many government institutions have collapsed due to a fragile peace agreement. A number of pre-existing issues also plague the country, including poor public health care, which has affected the country's ability to respond to the pandemic. South Sudan has relied heavily on NGOs and UN agencies for support. Statistics at the time of the webinar indicated that the country had 2,470 positive cases, 47 deaths and 1,252 recoveries, but this was not considered a true reflection of the pandemic due to insufficient testing capacity.

In its COVID-19 response, South Sudan issued a presidential decree to put measures in place, including the establishment of a high-level committee, and employed highly securitised enforcement mechanisms. Parliament, the courts, and other oversight institutions

such as the Human Rights Commission have been inactive as they have no capacity to engage. While there have been incidents of human rights abuses, including arbitrary arrests and beatings by security personnel and a lack of social protection for vulnerable groups, no formal reports have been issued. The measures adopted have been led by the executive, with no accountability mechanisms to monitor its actions. This has resulted in some decisions being challenged by civil society and human rights institutions. COVID-19 has certainly tested South Sudan's constitutional resilience and government institutions, which have proven largely ineffective in managing the pandemic.

The second panelist, Howard Varney, is senior programme adviser at the International Centre for Transitional Justice and a member of the Johannesburg Bar. In May 2020, he contributed to a study for the International Security Sector Advisory Team, a division of the Geneva Centre for Security Sector Governance (DCAF) which conducted a cross-country analysis of COVID-19 measures introduced by 66 selected countries, including 15 African countries.



The measures had vast implications for human rights and daily livelihoods, with concerns raised about the possible decline of constitutional democracy.

While most of the measures were supported by the general population, there were increasing concerns around their scope, legality, proportionality and necessity. The measures had vast implications for human rights and daily livelihoods, with concerns raised about the possible decline of constitutional democracy. Red flags were raised about countries experiencing authoritarian creep, with leaders indicating reluctance to relinquish emergency powers once the crisis subsides.

The study highlighted that countries with strong constitutional resilience are those where constitutions impose checks and balances on their executive, where parliamentary oversight is meaningful, and where the measures were subject to judicial review. The online COVID-19 Civic Tracker showed that measures in 111 countries impacted on freedom of assembly; 33 on freedom of expression; 22 on press freedom; and 28 on access to information. There were 27 incidents involving surveillance; 28 countries restricted the right to privacy; 28 employed contact tracing apps; 15 introduced COVID-19-related censorship; and three countries imposed internet shutdowns despite the pandemic.

Looking at country-specific case studies, Human Rights Watch reported that during the pandemic Ethiopia invoked emergency powers that were used against political opponents. Ghana enacted the Imposition of Restrictions Act of 2020 even though it already had an Emergency Powers Act of 1994 and constitution, with the latter specifically allowing for the declaration of a public health emergency. The duplication of legislation seems redundant, but the new act reserves emergency powers for the president with no oversight, is of general application to any state of emergency, and sets no expiry date for emergency measures. Critics have described it as draconian and open to extreme overreach.

Looking at South Africa, its nationwide lockdown saw the mobilisation of thousands of troops to support police enforcement of lockdown measures, with multiple complaints of brutality against security forces. This led to a landmark judgment from the High Court that ordered the government to draw up a code of conduct for all security forces setting guidelines for their interaction with civilians during the state of disaster. There was also a great deal of criticism of massive centralisation of power in the Command Council. Some argued that this power is unconstitutional and has usurped the powers of cabinet and Parliament.

In Uganda, the government invoked the Public Health Act to direct its response. This included some highly restrictive measures such as a ban on the use of privately owned vehicles. The measures were enforced by the army and police, along with an armed paramilitary group. The media reported widespread violations and abuse by security forces, including the arrest of homeless people and targeting of the LGBTQIA+ community.

The study concluded that, as matters and scientific findings were changing quickly, the measures put in place should be adjusted accordingly. Courts and other oversight bodies should be permitted to operate even if virtually. There should also be closer collaboration with citizens and authorities, and a strong and courageous civil society to monitor the pandemic and its consequences.



Courts and other oversight bodies should be permitted to operate even if virtually.

The third panelist, Dr Adetoun Adebajo, is a researcher and consultant in Australia. Australia's COVID-19 figures stood at 361 deaths and 22,226 cases. The country adopted a similar response to many countries by enforcing measures such as social distancing, self-isolation, quarantining and lockdown. There were conflicting opinions about whether they were necessary, as they encroached on fundamental human rights. The Australian Biosecurity Act informed most the measures taken, as it recognises pandemics and its provisions are broad enough to apply to extreme situations.

Most Australians complied with the measures, but there were a few legal challenges, notably ones protesting at the lockdown. There was contention too regarding border closures. The pandemic also impacted on many vulnerable groups, particularly the immigrants and backpackers who visit Australia every year to assist the agricultural sector. When a global pandemic was declared, immigrants were told to leave the country, a decision that drew a major backlash from the public. The government then aided the situation and put safety measures in place to support them. Similarly, international students were instructed to leave if they were unable to support themselves. This decision was also contested, with the government eventually providing some palliatives to cushion the effects of the pandemic.

The Black Lives Matter Movement (BLM) also highlighted the clash between constitutionality and COVID-19. Conflicting court orders were issued, with one decision stating that protests are allowed and another prohibiting them as contrary to the interests of public health. There were also protests at the treatment of refugees, who were heavily fined and some arrested even though protesters practised social distancing and were in a convoys of cars.

The webinar concluded with a discussion led by Prof Derek Powell and Prof Ebenezer Durojaye of the DOI. The panelists discussed the magnitude of the global phenomenon of unprecedented mass population control. It is necessary to consider the application of constitutionalism in a normal and emergency environment and subsequently where the tension

occurs. Consideration should be given to how rights are adjusted and blended with constitutionalism for the wellbeing of the masses. Emergency contexts provide the opportunity to test constitutions, as they bring to light how well the general population understands constitutionalism and the extent of government roles and powers.

The pandemic has also underlined the extreme importance of oversight mechanisms and the need for vigilance. There is legitimate concern about creeping authoritarianism. Definite signs have emerged of governments being opportunistic in taking advantage of the pandemic, with many acting beyond the confines of their legal system. Research shows that this has occurred mainly in countries already rife with social problems and characterised by flawed democracies.

The panelists discussed the relationship between the pandemic and science and technology, which have informed the responses of many countries and been used to justify some of the extreme measures taken. This has been called the rise of a surveillant state. There must be a careful and intentional balancing act between using technological resources for mutual benefit without allowing fundamental human rights to be disproportionately affected. There is also a need for countries to be creative in the responses. This was highlighted in Australia, where the government successfully tested and traced sewerage systems to monitor the spread of COVID-19.

The panelists also weighed in on the nature and effectiveness of the measures taken, particularly palliative measures taken by governments to cushion the effects of the pandemic. Many countries have seen corruption in the use of emergency funds, which has meant that people needing the most support wind up receiving less. There are many lessons to be learnt to better prepare for future pandemics.

Paula Knipe is a researcher with the Socio-Economic Rights Project (SERP) of the Dullah Omar Institute at the Faculty of Law, University of the Western Cape.