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# ESR REVIEW

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ENSURING RIGHTS MAKE REAL CHANGE

**SPECIAL EDITION ON COVID-19**



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# Editorial

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*Welcome to this special edition of ESR Review, the first in a collection of three dedicated to examining different aspects of the Covid-19 pandemic. In the time since the latter broke out in the Chinese city of Wuhan, it has spread worldwide, claiming thousands of lives and disrupting socio-economic activity on a massive scale. States have responded with an array of measures, including civilian lockdowns, but while these measures are necessary to curb the spread of the pandemic, concerns have been raised about their human rights implications.*

*This is all the more so in the case of vulnerable and marginalised groups. In particular, the socio-economic rights of people in disadvantaged communities have been severely affected. Here in South Africa, various legal actions have challenged the constitutionality of measures adopted by the government – a trend that reinforces the tension often found between measures to address public health emergencies and the implications such measures have for human rights.*

*This edition features articles by Patrick Bond and Robert Nanima, an interview with Alicia Yamin, as well as an update and an event. Bond's article examines how challenges surrounding the pandemic and government measures are affecting the lives of vulnerable and marginalised people. The article by Nanima discusses the lessons to be learnt from a High Court decision concerning the right of the child to be joined with his or her parents during the lockdown period. Nanima argues that the decision was correct, and he distinguishes it from other, unsuccessful cases filed during the lockdown.*

*Our interview with Alicia Yamin looks at human rights challenges during the pandemic, among them issues to do with the enjoyment of the right to health by vulnerable and marginalised groups. In particular, it reflects on how inequality continues to hinder disadvantaged people's access to health-care services, including those related to sexual and reproductive health.*

*An update and an event are provided, the update is on a recent report of the UN Special Rapporteur on the right to the highest attainable standard of physical and mental health focusing on mental health, and the event is on a webinar dealing with the impact of Covid-19 on community-based paralegals in Africa.*

*We hope you enjoy this special edition.*

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***Ebenezer Durojaye and Gladys Mirugi-Mukundi***  
**Editors**

## FEATURE

# Covid-19 Attacks the Down-and-Out in South Africa

Patrick Bond

*It is hard to imagine a more worrying place to watch Covid-19 hit a society than Johannesburg, South Africa. This is, after all, the world's most unequal major city, serving as economic headquarters for the world's most unequal country. In spite of a poverty rate (at \$2.80/day) of more than 60 per cent and a national unemployment rate of 40 per cent before the current crisis, the labour movement is considered (by corporate elites) to be the world's third most militant (although its political divisions are profound). The capitalist class in turn is rated (by PwC 2020) as the world's third most crime-prone and corruption-riddled.*



**South African state's response to Covid-19 saw the imposition of harsh – albeit apparently necessary – public health restrictions on movement and social interaction.**

Is a social time-bomb ticking here now? If so, the ruling elites – led by President Cyril Ramaphosa – appear not to be listening, much less worried. On 27 March, the South African state's response to Covid-19 saw the imposition of harsh – albeit apparently necessary – public health restrictions on movement and social interaction. They included a dramatic

economic shutdown limiting business to essential services, health care and pharmacies, and food (but not restaurants, or even seeds to grow vegetables, apparently). Aside from a few categories of workers, everyone else in the country was ordered to stay inside their homes until 16 April and allowed to leave them only for grocery-shopping trips.

Many have praised the state for swift action as a new stage of 'Ramaphoria' infects the chattering classes. However, the state's ability to respond properly to the Covid-19 threat has been fatally weakened since the 1990s through habitual reinjections of neoliberal ideology, resulting in a profound health-care crisis, pathetically slow economic policy reactions, and tokenistic welfare responses – while the security apparatus' brain has apparently weakened too, albeit that its trigger finger is oversensitive.

As necessary as restrictions on movement may be in a society with nearly eight million people living with HIV and where TB is rampant and countless other immune-system threats exist, there is genuine fear that Ramaphosa's 27 March lockdown order cannot prevent a profound calamity. The decimated and divided health system and unreconstructed character of apartheid-era urban slums are plainly apparent even here in the continent's richest city, below which half the world's historic stock of gold was dug up over the last century.

## The disease and the ghettos

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According to Housing and Water Minister Lindiwe Sisulu, South Africa today has 2,000 densely packed townships, inner-city areas and rural villages ‘urgently in need of assistance’ merely for the provision of clean water. No doubt this is an underestimate, but at least poor and working-class people are finally being targeted for urgent water relief. This relief is nevertheless mainly in the form of communal water tanks (only a thousand of which have been delivered), creating potentially dangerous collection points for spreading the virus. (Installation of house taps and flush sanitation is the traditional demand of social movements, in part for reasons of waterborne-disease prevention and gender equity.)

As media commentator Ayabonga Cawe (2020) argues, although it is important for these communities belatedly to ‘tanks as an emergency measure, the real crisis lies in underinvestment in service infrastructure and state capacity’ – it is hence no wonder there are ongoing water protests across the country. Moreover, Cawe (2020) continues, even in short-term crisis management mode, the state’s insensitivity to the needs of the masses is tragic:

‘The confrontations on the first morning of the lockdown between workers, the taxi industry and tavern owners on the one hand, and law enforcement officials on the other, indicate how inadequate the attention, communication and support are that have been extended to those outside the policy scope.’

The lockdown and social-distancing mandates simply won’t work in the overcrowded townships, which under apartheid were traditionally built merely as the urban holding cells of a reserve army of migrant labour.

As an illustration, on 29 March, SkyNews reporter John Sparks witnessed army brutality against residents of the impoverished community of Alexandra, but a few minutes’ drive from Johannesburg’s luxurious financial district of Sandton: “‘The police minister says you could go to jail for being out here,” I said to one man, who was drinking a beer in the street. “I am staying in one room with five others, how can I stay in there all day? They must just come and arrest us,” he replied.’

Nonchalant defiance against the lockdown in areas such as Alexandra could have been prevented with a proper public-education campaign and generous social-support systems, rather than futile episodes of mindless coercion. And to be sure, the urgent ‘de-densification’ of these slums is part of Sisulu’s rhetoric. However, given the history of police brutality in post-apartheid South Africa, one that includes the Marikana massacre, incidents of police and army overkill during the lockdown were inevitable.

The first two such murders were recorded on 29 March, the one arising from police tasing in Cape Town. The other happened in a township southeast of Johannesburg, where according to a journalist, ‘41-year-old Sibusiso Amos was allegedly killed when Metro officers tried to arrest people who were found drinking in a local tavern, thus violating the lockdown rules (Mavuso 2020). It is alleged that Amos and some community members attacked the officers and in retaliation, the police discharged rubber bullets. It is further alleged that the deceased Amos was followed up to the veranda of his home where he was fatally shot’. Several children were also injured.

Even in the cosmopolitan Johannesburg suburb of Melville (supposedly ‘one of the world’s 50 coolest neighbourhoods’, as the municipality brags), the *Financial Times* reported on 29 March that city police invaded the home of lawyer Elisha Kunene, who simply had witnessed and objected to cops burning a homeless person’s possessions: ‘They searched the whole house, pulled everything out of our pockets, they berated us ... It was very definitely a trespass and illegal search.’

## A pandemic of neoliberal violence

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At the same time, it also appears likely that already-high domestic violence and petty crime will rise. One reason is a new onslaught of neoliberal financial violence from the Treasury. On 26 February, Finance Minister Tito Mboweni – who in 2008 was named *Euromoney’s* ‘Central Banker of the Year’ thanks to his *laissez faire* philosophy – cut the health budget by a painful \$250 million, amidst other austerity



## **The economy lost 1 million jobs between December 2008 and March 2010. This time the collapse in GDP will be at least three times larger. SA could lose 3 million jobs**

hits, to please Moody's credit rating agency.

In subsequent weeks there was a massive flight of emerging-market capital to the United States in search of the safety of the dollar. As a result, on 24 March, Mboweni's attempt to sell state securities to the private sector in Treasury's regular auction failed completely. No one was interested. And then on 27 March, Moody's gave Mboweni the dreaded junk rating.

The next day, Treasury was 'trembling in our boots about what might be in the coming weeks and months,' said Mboweni (2020). Then on 29 March, his surreal response to an interviewer seemed to promise further blows to society: 'When I spoke to the president before Moody's announced their decision he said to me, "We now need to move more boldly on the structural reforms programme." I said, "Hallelujah." I've been preaching that agenda for a long time.'

Egged on by the International Monetary Fund – to which, as Mboweni has threatened, he might have turned for loans – his reforms consist mainly of predictable budget austerities, civil service cuts, higher levels of cost recovery, and the privatisation or closure of money-losing parastatal agencies.

But as political economist Duma Gqubule (2020) points out, helpful reforms would consist of the opposite: Keynesian fiscal stimulation, because '[South Africa's] GDP growth is expected to drop by

5-10 percentage points during 2020. By comparison, GDP growth declined by 1.5 points in the wake of the global financial crisis. The economy lost 1-million jobs between December 2008 and March 2010. This time the collapse in GDP will be at least three times larger. SA could lose 3 million jobs.'

In contrast, even under Boris Johnson's right-wing rule, the United Kingdom's Treasury has offered a state-spending stimulus of nearly 19 per cent of GDP to tackle Covid-19. Mboweni's team could come up with only 0.1 per cent.

Not only fiscal but monetary policy remains stuck in neoliberal quicksand. As the Covid-19 catastrophe moved from public health crisis to world economic meltdown during February-March, the South African Reserve Bank (SARB) cut its main interest rate by only 1.5 per cent (from 6.75 percent) in spite of South Africa's suffering the world's third-highest rate among 50 countries regularly issuing state bonds, after Turkey and Pakistan.

Finally, the SARB began to try unorthodox monetary policy by issuing funds on 24 March to purchase Mboweni's securities. It was a version of Quantitative Easing, something which SARB governor Lesetjo Kganyago – who in 2018 began chairing the International Monetary Fund's main policy committee – had sworn nine months ago never to do unless inflation and the main interest rates were both at zero (they are 4.2 and 5.25 per cent, respectively).

The state's social policy response is also illustrative. Many workers and most of the massive unemployed precariat were immediately without income when the full lockdown began on 27 March, the very moment that the state safety-net was fraying. Not only was there no capacity in the collapsing public health system, but there was little availability of suitable Covid-19 testing kits, masks, protective health-worker garb, and intensive care unit beds and hospitals. Only 4,000 ventilators could be located in a country with nearly 60 million residents. The number of cases soared past the thousand mark on 30 March, with thousands more expected.

There is no unemployment insurance or social grant provision for the informal sector. The monthly grant received by 18 million elderly people and children has

shrunk dramatically, measured in US dollars: the vast majority of recipients are mothers who must raise their children with \$24/month, down from \$38/month at the end of apartheid, while the elderly get a state pension of \$103/month. Now, standing in long queues to withdraw those funds represents an added threat.

So, as Covid-19 strikes, the country's extreme inequality has been exacerbated and the state's long-standing delivery shortcomings stand exposed. Even Ramaphosa's close allies in the South African Communist Party (SACP) were moved to confess that 'w]e have been far too timid in driving forward a comprehensive National Health Insurance. We have allowed our public health system to be hugely overstretched long before the arrival of the coronavirus, allowing the bulk of health resources to be enjoyed by the 16 per cent of South Africans with access to private health care.'

The SACP lamented further: 'If we can use decisive state power in the public interest to deal with the coronavirus pandemic, why have we not used state power to shut down massive illegal capital flows out of our country? Why did we not long ago build up a major, buffer sovereign wealth fund by imposing, amongst other things, a windfall tax on Sasol when it was still making super-profits out of its sale of petrol on our local markets? Why have we been so timid with urban land reform, perpetuating apartheid spatial patterns that will now expose millions of South Africans to crowded and potentially highly infectious minibus commutes?'

The answer, say traditional leftists such as those at Johannesburg's Khanya College, is that Ramaphosa's neoliberal regime has no intention whatsoever of doing anything the too-loyal Communists claim they want.

As one indication of service to corporate power, Environment Minister Barbara Creecy stunned anti-pollution activists by **doubling** the allowable SO<sub>2</sub> emissions of big emitters on 30 March, raising it to a level 28 times what China allows. Thousands of deaths a year are already attributed to SO<sub>2</sub> and co-pollutants from Eskom's massive coal-fired power plants, Sasol's gas-to-oil facility, other oil refineries and countless petro-chemical firms. A **Bloomberg** reporter observed that Creecy's generosity comes 'at a time when

there is growing concern about the outbreak of the coronavirus, which is more severe for those who already have respiratory problems' (Burkhardt 2020).

## Social unrest with nowhere to go

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For many people suffering what were already recessionary conditions, the coronavirus seems the least of their concerns. Social protests that erupted at the end of March in Khayelitsha township of Cape Town, central Durban, Soweto and Nelson Mandela Bay's Westville township drew attention to the lack of services that is the more pressing issue for communities – although if these communities succeed, their strength to fight back against the virus will be much greater.

In Westville, where, out of 40 communal water taps, only 20 were working, one activist told a local reporter (Sizani 2020): 'We are aware that the coronavirus is dangerous, but it is here for a short period, while we have been living under these dangerous conditions since 2000. We are 1 625 households with no electricity. We do deadly illegal connections that have killed more than 20 people. Some of our people were electrocuted, others were killed in shack fires. On wet days, ambulances and the police don't come to our area because it is muddy. We have to push sick people in wheelbarrows.'

Lockdown exceptions have been made for local 'spaza shops' selling basic-needs groceries and consumables. Yet on 24 March, the brutally xenophobic character of that policy was revealed by Small Business Development Minister Khumbudzo Ntshavheni (Qodashe 2020): 'We must indicate that those spaza shops that will be open are strictly those that are owned by South Africans, managed and run by South Africans.' The crucial context here is the series of xenophobic attacks in 2008, 2010, 2015, 2017 and 2019 targeted at regional immigrants, including hundreds of owners of these tiny shops. It was the first time in more than a dozen years that a leading politician was so brazen.

In Nelson Mandela Bay, township protesters defended

immigrant spaza shops from police closure, and also demonstrated (in their hundreds) for long-demanded electricity supplies. And in Soweto, the national power supplier Eskom continued to cut off electricity to thousands of residents of Johannesburg's main township, leading to more protests in late March.

In Cape Town, in spite of announcing a period of relief for water debtors on 20 March, the deputy mayor Ian Neilson would not reconnect water to thousands of poor households, saying that municipal supply had been 'restricted to a running trickle-flow after numerous warning letters [were] sent to pay debt' (ANA Reporter). Protesters from Khayelitsha amped up pressure against Neilson on 25 March.

For workers everywhere in South Africa, the consumer debt load has continued to rise. In late 2019, 41 per cent of the country's 22 million borrowers from the formal credit system – and millions more who borrow informally from '*mashonisa*' loan sharks – were already more than three months in arrears, according to the National Credit Regulator.

## Progressive precedent but an uphill struggle to rebuild the Left

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On a prior occasion, a progressive social movement organising to resist economic oppression associated with a health crisis was exceptionally impressive. During the last pandemic between 1999-2004, the Treatment Action Campaign fought to gain access to AIDS drugs for free (thus saving \$10,000 per patient annually), insisting that they be produced locally on a generic rather than big-pharma-branded basis and delivered to society via the public health system. The result was that over the course of a decade, life expectancy increased from 52 to 64 years.

Such a movement is desperately needed now but impossible to locate, given the adverse conditions. Opposition political parties are unable to mobilise, and in any case have fallen mainly into lockstep behind Ramaphosa. The trade unions are desperately trying to react to terrifying news of one company after



## The divisions between the pro-government Congress of South African Trade Unions and the left-oppositionist South African Federation of Trade Unions remain profound

another either firing workers outright or in a few cases (in retail and airlines especially) declaring bankruptcy. The divisions between the pro-government Congress of South African Trade Unions and the left-oppositionist South African Federation of Trade Unions (SAFTU) remain profound.

In March, efforts emerged from several quarters to forge progressive principles, analyses, strategies, tactics and alliances, of which two were at Khanya College while another came from 113 civil society organisations endorsing an ambitious campaign statement. SAFTU offered tough critiques of Ramaphosa, Mboweni and Kganyago, along with strong demands. On 30 March, scores of professionals, mobilised by the Institute for Economic Justice, made further progressive economic-policy suggestions.

Most of these efforts are being made through online meetings of civil society strategists and allied intellectuals seeking a united front against government's stinginess. But the Durban-based community activist Vanessa Burger is correct to warn that '[m]any NGOs' move to online virtual events because of the coronavirus is further marginalizing groups who don't have the know-how, tools or resources to participate: unlimited free/cheap data,



reliable network connection, electricity (Bond 2020), etc. If this trend becomes permanent and the existing digital access challenges are not addressed, it will become a further source of inequity, division and the widespread exclusion of real grassroots and poor communities' politics.'

Because of the lockdown, the conditions for mass organising don't exist. Lacking linkages to the necessary street-heat that should accompany all the new policy demands, most pro-poor advocacy has been directed at meekly persuading the presidency, Treasury and Reserve Bank to reverse course. But the ruling elites remain profoundly committed to neoliberal ideology, and recourse to the International Monetary Fund and World Bank as indicated in Mboweni's latest suggestion.

In a country in which the 1994 transition to a better society should have been far more decisive, given the activists' death blow against apartheid, ambitions for socio-economic and especially health justice must be rekindled. Many now argue that between the Covid-19, climate and economic crises – to which here we would add patriarchy and residual racism – we are overdue for a socialist transformation everywhere on earth. And political consciousness now requires that we take account of the ecological stresses we have placed on the earth and that have resulted in the Covid-19 pandemic and its spread.

It is a cause of despair, though, that in a country with the most propitious objective conditions for this transformation, the subjective conditions for it are being made all the more miserable by a disease whose economic implications are weakening everyone's ability to resist it.

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## FEATURE

# From Regulations to Courts: An Evaluation of the Inclusive and Exclusive Criteria on Children with Co-Caregivers in the Era of Covid-19

*Robert Doya Nanima*

*At the time of writing, more than 5.2 million persons have been infected by Covid-19, leading to 340,000 deaths, while about 2.2 million people have recovered (WHO 2020). South Africa has reported 23,000 infections and 481 deaths (DoH 2020). On 27 March 2020, South Africa declared a national state of disaster and effected a national lockdown. This greatly affected the provision of services across the entire country, save for the provision of essential services.*

While South Africa should be commended for the use of a tiered system of five levels for easing restrictions during the lockdown, a certain category of people remain substantively affected in the enjoyment of their rights. The child holds a special place in the human rights discourse as he or she is a rights-holder in his or her own right. This was reiterated by the Supreme Court in *S v M*, where it stated that the child is not a mere extension of his or her parents but a person with rights that can be enforced in courts of law. It is important to take cognizance of this position at a time when rights have been significantly restricted to mitigate the spread of Covid-19.

The Constitution of South Africa provides for the limitation of rights where it is reasonable in a free and democratic society. Before the lockdown, however, the courts have, in cases such as *S v Manamela and Another (Director-General of Justice Intervening) (Manamela)*, hastened to find that even if a limitation to a right is rationally connected to the purpose of fighting crime, it may not be recognised if it is not the least restrictive means of achieving that purpose. This position seems to have changed, as highly restrictive measures have been adopted to mitigate the spread of the coronavirus. For

instance, in the *Ex parte application of Karel Willem Van Heerden*, the Mpumalanga High Court had to decide on the possibility of exempting a private individual from the lockdown restriction to go and bury his father. The Court dismissed the application because allowing the application amounted to breaking a decree. It stated, in addition, that despite the care and diligence of the applicant, he would still expose himself to unnecessary risk and possible death. Other applications, such as *Hola Bon Renaissance (HBR)*, were struck out by the Court because they did not have any prospect of success. In the case of *Muhammed Mohammed and others v The President of South Africa and others*, the court held that the limitations on rights imposed by the Regulations are reasonable and justifiable under the Constitution.

In all these cases, the position of children was not at issue. In the subsequent case of *CD and MD*, the court allowed the applicant to travel from Cape Town to Bloemfontein and back to collect his or her children from the grandparents. While the reasoning that informed this position is important, other intricate dimensions that create inclusion and exclusion criteria are instructive to look at as well.

## Child protection in the Regulations

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Following the executive's decision to adopt a lockdown to mitigate the spread of Covid-19, regulations were adopted to be enforced. These were provided for the Disaster Management Act Regulations (Regulations), published in Government Gazette No. 43199. They were passed by the Minister of Cooperative Governance and Traditional Affairs under section 27(2) of the Disaster Management Act 57 of 2002 (DMA 2002). To this end, Regulations 3(b)(i) and (iii) prohibit the movement of persons and goods between provinces and between metropolitan and district areas. The Regulations state that 'every person is confined to his or her place of residence' unless he or she is performing an essential service, attending a funeral or collecting a social grant.

It was evident that this regulation excluded any sort of protection to children who were not staying with both or one of their parents or caregivers. This regulation excluded any sort of protection to children who were not staying with both or one of their parents or caregivers. This exclusion extended where children were with a different person (where movement was necessary) other than their caregiver or parent at the time the Regulations came into force.

This position changed with the amended directions to the Regulations that came into force on 7 April 2020. According to the amended directions, Direction 1(c) allows for the movement of children between co-holders of parental responsibilities. The co-holders of parental responsibilities should have either 1) a court order or 2) a parental responsibilities or parenting plan, registered with the family advocate. These documents have to be certified and in the physical possession of the co-caregiver. This is an indication that for children to be moved between co-holders of parental responsibilities, the latter have to have a court order or a parental responsibilities and rights agreement/parenting plan. In addition, the document has to be certified. As such, the physical possession of any of these duly certified documents remains a condition precedent to the movement of a person (Directions 2020).



**... this regulation excluded any sort of protection to children who were not staying with both or one of their parents or caregivers**

Concerning possible benefits to children, two points were established by the amended directions. First, in the narrow perspective, the amended directions either included or excluded children who were subject to co-parenting arrangements depending on their possession of either a court order or the parenting agreement or plan. Secondly, and in a wide perspective, all children whose parents or caregivers did not need a court order or a parenting plan before the lockdown were automatically excluded.

Two pertinent questions arise from the amended regulations. The first is whether the court order and the agreements have to be in existence before one invokes the application of Direction 1(c). The second is whether the courts would deal with the narrow and wide forms of inclusion and exclusion. Before considering these questions, this article contextualises the case of *CD and MD*.

## Contextualising CD and MD

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This article focuses on the decision in *CD and MD* in particular because, as of 27 May 2020, it was the only case so far that has been decided that deals with the rights of children who are staying with caregivers. This section unpacks the facts and judgment as well as the latter's implications.

## Facts and judgment

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On 6 April 2020, the applicants applied under the Regulations to dispense with the restrictions on the movement of persons to enable them to travel from Cape Town to Bloemfontein and back to collect their children from the grandparents. The children had travelled to visit the grandparents for the school holidays, but could not move from Bloemfontein due to the lockdown. At the time of applying, the regulations of 30 March 2020 were in force. The amended directions were released only a day later.

It is for this reason that the respondent objected to the application on the grounds that the regulations did not provide for the movement of children between caregivers. The facts are silent on whether the application was amended before the judge handed down the decision. Furthermore, while the amended directions provided for the existence of either a court order or parenting agreements, they are silent on whether the latter had to pre-exist them (the amended directions).

The most pertinent fact was that the application was filed a day before the new regulations came into force on 7 April 2020. The key issue identified by the Court was whether the applicants would be allowed to travel to Bloemfontein to collect their children, and if so whether the Court would dispense with the regulations in force on 30 March or subject the application to the amended directions of 7 April 2020.

The Court held that there was no prohibition on the movement of the children because their circumstances were within the exception of amended Direction 1(c). According to the Court, the order from an earlier decree of divorce had arrangements in place for the movement of the children between the applicants. On this basis, the applicants were given an order to travel from Cape Town to Bloemfontein to fetch their children. In regard to the silence of the amended directions on the pre-existence of an order or parenting plan, the Court added insight to a limited extent. It stated that a court order need not be in existence at the time of the lockdown. As a result, co-caregivers are

at liberty to apply for the requisite order to legalise their movements.

The Court also stated that the children would only be allowed to travel from the first applicant's address to the second when the latter was confirmed to have tested negative for the Covid-19 virus. It added that it was common cause that the grandparents were caregivers, as defined in section (1)(i) of the Children's Act, as they cared for the children with the express permission of the parents. While the movement of the children between their caregiver grandparents and parents was prohibited, a court order or parenting plan was instructive. Once the requisite document was concluded, the movement of children would be legalised.

## Implications of the judgment

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First, the use of section 36 of the Constitution has been limited to instances where the applicants want the court to find that the restrictions are irrational and not proportional to the purpose they seek to serve. As indicated by *Van Heerden* and *Hola Bola Renaissance*, this approach has not yielded results. However, where one seeks to satisfy the inclusion criteria in the amended directives, the court may be indulged.

It should be recalled that while the application was brought under the March regulations, the Court decided the matter using the April amended directions. If the Court were to use the March Regulations, it would have to subject the measures by the government to the limitation clause in section 36 of the Constitution. This would entail an evaluation of the nature of the restrictions and the state's rationality in using them. There is no doubt that this would entail the application of the principles in the earlier case of *Home Affairs v NICRO*.

For instance, in the latter, the Court was tasked to establish whether the changes to the Electoral Act curtailed the constitutional right of prisoners to vote, and if so, whether this limitation was not justified by section 36 of the Constitution. While this

case did not deal with the Covid-19 pandemic, it questioned the application of the limitation clause. This would strike a balance between ensuring or disregarding public health initiatives to meet the various needs of the South Africa population.

The Court called for a subjective evaluation of facts that could not be readily proved objectively. It restrained itself from engaging a fact-finding mission that was not supported by evidence. In *CD and MD*, the Court diverted from this approach although the application was filed under the March Regulations.

Secondly, it can be inferred from the language of the Court that it opted to evaluate the subjective facts before it against the objective principles of the law. It weighed an exercise of discretion to either allow or deny the orders sought by an applicant, based on various reasons. In this case, the Court evaluated the best interests of the children in the circumstances. The factual finding that the co-caregivers had other underlying medical conditions and were strained informed the grant of the order to travel. One may question why the Court used a law that was not in existence at the time the facts unfolded. This can be inferred from the Court's reliance on the best interests of the children in the subsequent paragraph.

Thirdly, the best-interests principle plays a crucial role in matters concerning children (Tostensen et al. 2011). It should be noted that the Court used the best-interests principle as a 'gap-filling' tool in ensuring the wellbeing of the children (Tostensen et al. 2011). This principle may be used to resolve conflicts and the competing rights of children, and it enables courts to balance legal technicalities and arrive at a good decision for a child (Alston 1994).

With this principle in mind, the decision in *CD and MD* casts light on the exclusion/inclusion procedure. It should be recalled that, first, in the short run, an excluded co-caregiver had an opportunity to obtain an order to move and help a child. This is in line with the Committee on the Rights of the Child's General Comment 14 that recognises the application of the best interests' principle in informing the enjoyment of a substantive right, interpreting legal principles and rules of procedure (CRC, 2013). It



## **If the Court were to use the March Regulations, it would have to subject the measures by the government to the limitation clause in section 36 of the Constitution**

should also be noted that section 28 of the South African Constitution states that the best interests of the child should be of paramount importance in every matter concerning him or her. The use of this principle enabled the possible engagement of excluded caregivers in the narrow and wide perspective. However, the Court's silence on the conclusion of parental plans leaves a question as to whether they can be made and registered to legalise movements.

Fourthly, a look at the applicant's use of digital means to satisfy the Court as to the merits of the application shows that the Court can operate in the digital age. As such, the modes of operation of court processes need to be addressed. The case shows that counsel for the applicants satisfied the Court that the caregivers were not suited to continuing to look after the children due to their pre-existing conditions. Also, the record showed that Counsel for the Applicants used video-conferencing to ensure that the co-caregivers were heard through online video systems. This represents the new normal in conducting business in courts. Conversations with attorneys indicate that courts are embracing the use of CCTV and other online platforms to hear applications and urgent matters.

## Conclusion

Two questions were raised above – first, in regard to whether the court order and the agreements have to be in existence before one invokes the application of direction 1(c), and, secondly, in regard to how the Court would deal with the different inclusive and exclusion criteria at both the narrow and wider level. According to the Court, an order need not pre-exist the regulations or amended directions. The effect of this flexibility in the possible application for the order by co-caregivers helps to narrow the gap between excluded and included children. The Court's decision was silent on the pre-existence of parenting plans duly registered with a family law advocate. This calls for an academic debate on whether a family advocate may conclude this agreement.

An evaluation of the decision shows that the effect of the lockdown regulations on children requires that the applicant has a court order or a parenting plan. The other children who do not benefit include those with no existing family plans. The dangers of Covid-19 need to be balanced against the best interests of vulnerable children.

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# INTERVIEW

## Making Human Rights Relevant to Social Struggles during Covid-19: An Interview with Alicia Yamin



*Alicia Yamin lectures at Harvard Law School and is a Senior Fellow at the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics. She is also an Adjunct Lecturer at the Harvard TH Chan School of Public Health and a Senior Advisor on Human Rights to the global health organisation, Partners in Health.*

**Covid-19 is causing harm around the world, with states having adopted measures in response. Would you consider these measures effective and consistent with respect for human rights?**

I am currently running a global symposium at Harvard Law School looking at the rule of law in global responses to Covid-19 and different country analyses. This crisis has challenged the traditional understanding and organisation of democratic institutions in ways we have rarely seen. Most of the legal measures instituted have been done through decree, federal order or states of exception or emergency, triggered under constitutions or legislation.

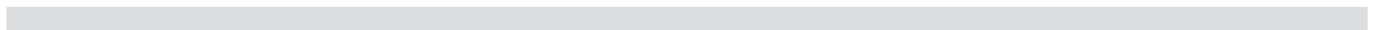
Due to the virus emerging with such rapidity, with dire health implications, there has definitely been a shift in response from normative, legislative oversight and judicial backstopping to a much more concentrated executive power, which was already a trend we were seeing before the pandemic – and we have yet to see the [full] extent of this.

Public health (and economic) measures are notoriously utilitarian and blunt, and so the effects on different



**... social determinants and inequalities have largely influenced who contracts the disease**

populations are not often taken into account. This has been evident in the US, where the virus is not striking everybody equally, but instead social determinants and inequalities have largely influenced who contracts the disease, as well as the effects of the governmental responses of lockdown. It is also evident elsewhere. For example, not everybody is able to maintain a livelihood during lockdown. Migrant workers, prisoners, people in institutions, women who have been exposed to greater increases of domestic violence, and persons with disabilities, are marginalised groups experiencing vulnerabilities during this pandemic.



## **The effects of Covid-19 on the health-care sector would seem to differ between developed and developing countries. How would you relate this to inequalities in access to health care and related services?**

It is proving to be more complicated than 'developed versus developing countries'. Generally, countries with more resources and health-system capacity are going to fare better, with the capacity for additional mitigation of economic and, in turn, other health effects such as childhood nutrition and starvation.

However, this pandemic has highlighted [how disastrous the response has been in] countries where health systems are privatised or designed around a specialised system of hospital care, with little investment in public health, including the US ... [I]n countries with much lower income contexts, such as Kerala in India or Cuba, we have seen much greater containment measures, where the use of tried and true basic testing and contact tracing measures and community-based primary care strategies, with a backdrop of social equality and social protection, have fared better.

This pandemic has reaffirmed that the way you organise your public health system is really important for addressing pandemics and in times of normalcy. The US has proven that although it is the richest country in the world, it has done an absolutely miserable job in managing this crisis. Therefore, it is not just about having resources but how these resources are deployed and organised.

## **How would you assess the impact of Covid-19 on the enjoyment of sexual and reproductive health and the rights of vulnerable and marginalised groups?**

The impacts have been absolutely terrible across the board. There has been a 'shadow pandemic' of domestic violence, which was entirely predictable. All the work that has been done in trying to get domestic violence recognised and treated as torture, cruel and

degrading treatment, along with General Comment No. 35 from [the] Committee on Convention on the Elimination of all forms of Discrimination Against Women (CEDAW Committee), noting that it has risen to the level of *jus cogens*, has essentially been belied by the treatment during this pandemic.

We are witnessing women literally being locked up with their torturers and abusers, as well as children. Women are also largely reliant on the health system, [and] contraception has become more difficult to access, as well as antenatal and delivery care. There has also been a huge spike of cases, in the economic north, where women are being refused support partners during delivery, and where women have been induced to give birth and get out of the hospital quickly, or induced to have an emergency caesarean and then kicked out of hospital – this is extreme obstetric violence and abuse. There has also been the shameless use of this pandemic to legally restrict or de facto restrict access to abortion.

The LGBTQIA communities have also fared badly; sexual reassignment surgery has been delayed, and this population is also likely to be let go from jobs, are the last ones who will receive mental and health support services if they are needed under these conditions, and they are also facing increasing violence.

HIV and AIDS treatment across Sub-Saharan Africa has also been set back years by this pandemic, including [treatment of] sex workers and the LGBTQIA populations who rely on these public programmes.

## **Efforts are ongoing to find a vaccine for Covid-19. How do we ensure that this process adheres to ethical human rights standards and, more importantly, how do we ensure these vaccines are not out of reach of poor countries in Africa?**

The consensus view of ethicists is that the first people to get a safe and effective vaccine should be those who are most vulnerable, such as people with underlying medical conditions, including HIV and AIDS, cancer, etc. They have the most clinical benefit to gain. Second, the consensus view among moral



philosophers and human rights lawyers is that the vaccine must be treated as a public good, and so it cannot be held hostage to intellectual property rules or private profits. It cannot be used in a politicised way by the Trump administration in the US.

In this respect, [the] distribution of an eventual vaccine would also need to take in account the lack of resources and vulnerabilities, in sub-Saharan Africa and other [regions], where it's not just [a case of] paying for a vaccine, but also for establishing or strengthening supply chains.

### **As the world continues to tackle Covid-19, are there lessons we can learn from the way Ebola and HIV/AIDS were addressed in Africa?**

The first lesson is that you have to work with the people who are being directly affected. It is not just a matter of bringing in experts from an international body who tell people what to do. It requires conversations with the people in communities, them voicing their concerns and trying to deliberate with them [as to] what is the best way forward. I've seen this over 30 years of maternal health struggles – the reality is that health systems are really bad at talking to people instead of at them.

The second lesson is that people are different and have different needs, and there is no space for one-size-fits-all strategies. The third lesson is the critical role of contact tracing. Partners in Health, who have been extremely active in the Ebola outbreak and the HIV and AIDS pandemic in Africa, [are] now in charge of contact tracing for Covid-19 in the state of Massachusetts, where I live now. Recognising the standard that everything is usually done right in the north and should be imposed in the south is a misconception – lessons are now being learnt from sub-Saharan Africa and being applied in the US.

However, there is one thing that should *not* be learned from the HIV and AIDS pandemic. While we learned a lot about the stigmatisation of populations and non-discrimination, it also led to the adoption of targeted and vertical approaches in health systems.



## **The consensus view of ethicists is that the first people to get a safe and effective vaccine should be those who are most vulnerable**

I would hate to see health systems in Africa now investing in ventilators and expanding intensive care units: this not going to increase public health equity. Public health measures like getting on top of this early [are] what [are] going to increase public health equity, and preparedness for pandemics generally. In the US, there are hospital conglomerates with tons of equipment and specialists – but not public health systems – and this has been one of the biggest problems.

### **Over the years your work has focused on a rights-based approach to health and addressing inequalities in access to health care. Do you think there have been positive developments in this regard in the last decade?**

It will be easier to answer this subsequently with Question 10. The reason I wrote *When Misfortune Becomes Injustice* stems from when I was in law school. All of us who have dedicated ourselves to economic and social rights (and in my case, health rights in particular) had three main goals.

The first goal was to show that economic and social rights, including health, were real legal rights which could be enforced by courts. While courts do not always issue judgments in ways which enhance equity

and public learning, significant progress has been made in this regard. The second issue was that it was not immediately apparent what these rights mean, including the right to health, regulations, policies and constitutional design. For example, the right to health is not simply the right to be healthy, to medical care, [but is about] what it means for a state to level the playing field – there has also been progress in this realm, although there is still a limited perspective when it comes to human rights-based approaches.

The third goal was to show that the realisation of economic and social rights could actually lead to more egalitarian social orders, which are genuinely better, fairer and inclusive. In this regard, it is when misfortune becomes injustice – a quote from an opinion by Justice A Sachs – ... that we have largely failed. While we have achieved real significant change at a normative level and in people's lives, we have failed in achieving the larger objective. The focus was on expanding the social contract to different kinds of people, including marginalised and vulnerable populations. However, at the same time the rules of global economic governance were becoming increasingly intrusive. Neo-liberalism was sweeping across the world, there was the privatisation of basic social services, taxation regimes were changing dramatically, there was the financialisation of economies, and intellectual property acted a mass transfer from the global south to the global north.

South Africa is a good example of how, toward the end of apartheid, the country was under-borrowed, and the World Bank and International Monetary Fund were eager to get a cut and encouraged South Africa to borrow money. In the initial stage of post-apartheid [South Africa], there was this idea that there can be redistribution through growth, and while this was a reasonable aspiration, this did not work in South Africa. Politics became increasingly dysfunctional to the point when it was kleptocratic and performative. By the time Jacob Zuma was president, the executive branch largely had impunity from domestic accountability and South Africa is not alone.

There has been a toxic synergy between pushed adjustment policies and opportunities of international financial institutions from cronyism and consolidation of executive power. This has led to

certain people getting extremely rich and other people [having] been left out. You cannot have a democracy where that kind of inequality exists, in South Africa or anywhere. Extreme income and wealth inequality is just as toxic as violations of civil and political rights such as racial discrimination. When the people who are making the policies don't need to live by any of the effects – in health, education, security – this cannot coexist with meaningful democracy. And then, enter Covid-19 against this background.

### **What would you suggest to the international community, especially governments of developing countries, as regards preparedness for addressing pandemics like this in the future?**

We need to invest more in multilateral institutions, including the World Health Organization. There were many pandemic-preparedness assessment scenarios, including critiques after the Ebola outbreak, of which most were not implemented. The International Health Regulations were significantly rewritten after SARS and needs to be rewritten again. However, we are seeing how fragile the post-World War II reality is. The fact that Trump can independently decide to withdraw funding to the World Trade Organisation and World Health Organization because he feels it is unfair to China, has highlighted how easy it is to shift power within these institutions.

Therefore, while we need to invest in these institutions, we should also ensure they are rebuilt better and more justly. These multilateral institutions have been run by the donor countries and now private philanthropic capitalists like Bill Gates, who are even less accountable. It is not fair, especially for Africa, which loses so much more in outflows than it receives in aid. This system needs to be restructured, and this pandemic has brought this to the surface.

It should not be responded to with the 'normal' human rights approach, which often does little to assist on the ground. The formalistic approach of calling on human rights institutions in Geneva means little at grassroots level. I believe we need to make human rights relevant to social struggles – we need

to make this about re-democratisation, much more than [about] the highly legalistic approaches we have become accustomed to. And that's what I say in the book.

### **Do you think courts can play an important role in addressing some of the challenges posed by Covid-19?**

Courts have largely played an ancillary role thus far. At times they have invalidated police arrests or fining people, but they have been largely reticent about invalidating restrictive orders. One place where courts have played an important role is in Brazil, where President Bolsonaro has stated that Covid-19 is a 'little flu', [which] has resulted in them having one of the highest numbers of deaths. He has tried to clamp down on the restrictions that states and municipalities have imposed in their territories, and the Supreme Federal Tribunal has said that would be unconstitutional.

This pandemic has also highlighted the stresses of our democratic institutions and all of the tools of deliberation and reason that we relied on. It is imperative that how we come out on the other end is not only aimed at the least amount of lives and livelihoods lost, but [at having] the semblance of the rule of law intact and democracy hopefully renewed. If not, it is going to be a pretty bleak dystopia that awaits us [at] the other end of this horrific pandemic.

### **Can you tell us more about your recent book, *When Misfortune Becomes Injustice*, and what the motivation for it was?**

The motivation behind the book was mentioned earlier, but the title [comes from] ... an opinion piece by Justice A Sachs, stating that 'it is precisely the function of constitutional protection to convert misfortune to be endured and justice to be remedied'. It is relevant now because in many ways illness and sickness [are] conceived of as misfortune, but there is a lot of structural injustice adding to who

gets to live, who gets to die, who gets to keep a job, or house, etc.

### **What is your opinion on how we can ensure that the emergency measures states are taking now are not abused after the pandemic and are in line with human rights standards?**

Some emergency measures expire after 30 days, 90 days, or some limited period and require legislative action to extend or modify. Others shockingly still require sunset clauses to be put into them to ensure we don't see temporary states of exception become permanent. I do believe some restrictions, such as lockdowns, will end at different rates in different contexts, and freedom of movement will be largely restored. But take, for example, the surveillance and use of technology for tracing – is this going to be removed after the pandemic? The abuse of such technology should be a big concern for human rights lawyers and activists because it can so easily be abused.

It is also interesting how different countries have imposed measures. In South Africa the selling of alcohol and tobacco has been completely prohibited, even with the big black market and opportunity for police corruption and extortion. In the US it would be absolutely impossible. Alcohol and tobacco are considered essential commodities during the pandemic. However, where are the lines drawn? Some kind of exercise is permitted, such as golf, others not. What is considered arbitrary? What are the justifications? The pandemic also challenges us to balance different kinds of evidence.

This is a huge challenge for democracy and the way we have thought about human rights and the right to health. Too often human rights experts have developed the right to health as though it were a modular exercise untethered from all of those necessary trade-off considerations and [an] understanding that these rights are enjoyed in social contexts. It is important to stay vigilant about the connections between population health, health systems and democracy – now and in the post-pandemic future.

## EVENT

# Webinar on the Impact of Covid-19 on the Work of Community-Based Paralegals in Africa

*Robert Doya Nanima*

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*The Dullah Omar Institute and the African Centre of Excellence on Access to Justice convened a webinar on the impact of Covid-19 on the work of community-based paralegals (CPBs) in Africa. It engaged seven expert panelists from South Africa, Tanzania, Rwanda, Kenya and Nigeria.*

*The first part of the conversation was directed by four panelists: Dr Annette Mbogoh, the Executive Director of Kituo cha Sheria, from Nairobi, Kenya; Ms Amina Hanga, the Executive Secretary of Isa Wali Empowerment Initiative, from Kano, Nigeria; Mr Fred Patrick, a lead paralegal with Justice & Empowerment Initiatives, from Lagos, Nigeria; and Mr Zweli Hlatshwayo, the president of Community Advice Offices South Africa. The second part of the conversation looked at some of the innovations used to mitigate the challenges. The participants heard from Mr Jean Paul Ibambe of the Legal Aid Forum of Rwanda; Mr Adam Oxford of the Hague Institute for Innovation of Law (HiiL) Justice Accelerator's southern African office; and Mr Said Chitung of the Legal Services Facility in Dar es Salaam, Tanzania.*

*The host, Dr Robert Nanima, opened the session with an overview of the situation of CBPs. He said that as of 25 May 2020, there were more than 5.2 million infections, 340,000 deaths and 2.2 million recoveries worldwide. Restrictions imposed by countries affected the work of service providers, including CPBs.*

## Impact of Covid-19

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Dr Annette Mbogoh, Executive Director of Kituo cha Sheria, shared her experiences of the Kenyan context in a presentation about the work of Kituo cha Sheria, a non-governmental organisation that seeks to empower the poor and marginalised and enhance equity and access to justice. She highlighted eight emerging issues that CBPs had identified. These included an increase in forced evictions of poor

communities, rendering them homeless at a time when being at home meant safety, and an increase in sexual and gender-based violence cases, as families were forced to stay at home. Other issues were police brutality, arbitrary arrests and extrajudicial killings in the implementation of the curfew.

There were also reports of unfair or unlawful termination of employment following the pandemic, of an increase in infections in informal settlements

in Nairobi and Mombasa, and of stigmatisation of infected persons. In addition, there was an increase in property-related crime such as theft. Dr Mbogoh noted that there was a lack of transparency and accountability by state agencies in the use of Covid-19 allocated funds and projects.

She said Covid-19 impacted on the work of paralegals in various ways. First, from a national perspective, the National Legal Aid Service (NLAS) was closed. This greatly affected policy and technical support relating to paralegal work. This was evident in the halted finalisation of accreditation rules for paralegals, and the suspension of activities of the sensitisation of paralegals. Secondly, at the grassroots level, the CBPs were not able to conduct their sensitisation forums in public gatherings in view of the ban on such gatherings. Furthermore, some of the paralegals' offices were closed due to the restrictions and safety measures. Also, since the CBPs are volunteers, they need sources of income, but due to the pandemic, their streams of income had decreased, leaving them with having to find ways of providing for their families – something which was significantly affecting their work.

Ms Amina Hanga, the Executive Secretary of Isa Wali Empowerment Initiative, shared her experiences from Nigeria. She said the Isa Wali Empowerment Initiative seeks to provide access to justice by using a community-driven approach in targeting beneficiaries who are vulnerable, indigent and marginalised. The organisation was involved in the training of paralegals, whose services include basic legal aid services, advocacy, referrals and follow-up support, awareness-raising, mediation, counselling and legal aid education.

Ms Hanga said Covid-19 had led to an increase in poverty, a rise in domestic violence, forced marriages, and the closure of schools. Domestic violence was evident in physical, verbal, emotional and economic deprivation of the victims. In regard to CBPs, they were concerned about being infected by the communities they serve; however, due to the lockdown, they were unable to raise awareness in communities due to a ban on public gatherings. She also reiterated that the reduction of paralegals was due to the lockdown restrictions that reduced their mobility.

The CBPs also had limited access to correctional facilities and police stations. In some areas, they feared reprisals of harassment from law enforcement officers. There were a few designated courts that were operating and were handling only criminal cases. The greatest challenge was the non-classification of legal services as essential services. Due to the restriction on various CPB programmes, financial support from donors had been greatly affected.

Mr Fred Patrick of Justice & Empowerment Initiatives from Lagos provided insights from an urban-poor perspective. He stated that CBPs offered services at the grassroots in their communities. His organisation's work was led by the residents in informal settlements, who were able to overcome language, literacy and affordability barriers. At the core of their work, the CBPs provide free legal services to their clients in appreciation and exploration of their rights.

He highlighted various Covid-19 impacts on the work of CBPs. The CBPs were not able to attend to clients because of the fear of contracting the virus. Indeed, some CBPs were scared of attending to clients in their communities. This fear led to an inability to carry out effective mediation. In instances where mediation was carried out, the supervising attorneys were not available to attend.

There were reports of the long detention of clients and subsequent extortion by the police. Some of the notable examples were in effected police arrest and detention. These detentions placed the left the clients susceptible to exploitation by the police. Those who did not succumb to the extortion spent longer times in police detention. Like the preceding speakers, Mr Patrick said there was an increase in sexual gender-based violence cases. Victims were not able to go to the police, a situation that exacerbated the problem. He also said that all court cases had been halted, especially so criminal cases where the accused were on bail. Community education by CBPs had been greatly affected by the ban on public gatherings.

Mr Zweli Hlatshwayo of Community Advice Offices South Africa reiterated that CBPs are community workers and thus where there is no access to communities, there is little to do. He said the main challenges had to do with mobility. This continued to hamper the work of CBPs as people were unable

to consult them due to the regulations. Another challenge was the failure to access protective equipment. A further issue was police brutality and human rights abuses by the army. In addition, the CBPs have been able to collaborate with the South African Human Rights Commission to ensure the continued provision of legal advice across 108 identified offices. The Community Advise Offices have continued to train CBPs in the monitoring of human rights in strategic places like hospitals.

## Innovations to mitigate these challenges

Mr Jean Paul of the Legal Aid Forum in Rwanda described several innovations that were being used to deal with the challenges facing CBPs. The first lay in the use of information and communications technology (ICT) to provide legal aid to the Rwandan population by means of the '845 platform'. A person who needs the service dials 845 on a mobile phone, and from there on chooses from six categories: gender-based violence and childrens' rights; succession and family; land and expropriation; procedural law; jurisdiction of courts; and *abunzi* law and labour laws.

Mr Paul said the 845 platforms had enjoyed success. First, Rwanda's Legal Aid Forum continued to perform legal education using an interactive voice response (IVR) system, with 79,033 calls having been logged during the lockdown. Secondly, the use of unstructured supplementary service data (USSD) showed that the content was read 32,857 times. Thirdly, the use of callbacks enabled call-centre operators working from home to provide legal advice to 2,078 people.

The second innovation was the use of the Legal Aid Forum's toll-free line using the 1022 platform. From 16 March to 4 May 2020, this toll-free line continued to be used to provide legal advice and assistance to those in need. It was recorded that 207 persons, including those with Covid-19 issues, were given legal advice on matters such as labour law, divorce, and issues of land and succession.

The fourth innovation was that, through a mobile data collection platform (SurveyCTO), the Legal

Aid Forum was able to receive monthly reports even during the lockdown. It was confirmed that at least 30 paralegals' representatives had used tablets to send their monthly reports. It was noted that despite the lockdown, the Legal Aid Forum continued to perform its daily activities. This was due to the strategic ICT tools that enabled remote accessibility.

Mr Adams Oxford of HiiL said his organisation worked in various countries and that its innovations supported the work of CBPs. For instance, the 'Rainbow' initiative in South Africa had helped 20,000 women in 2019, and it was suggested that this tool could be used by women in abusive relationships during the Covid-19 restrictions. The organisation also helped to support employees and employers through the signing of basic employment contracts.

Mrs Oxford noted from his experiences in southern Africa that more often than not there was no budget for innovation, yet an increase in budgeting for the justice sector did not necessarily equate to higher performance in access to justice. He said his organisation emphasised the need to engage with policy-makers on how justice is financed, and argued for the use of alternatives like performance-based budgeting. He said that although innovators had a big job ahead of them, there was a need to focus on what works and to open conversations with investors willing to pay for people-centred justice. ICT, he said, remains the way forward.

Mr Said Chitung of the Legal Services Facility discussed innovations under way in Tanzania. He said these lay in CBPs' use of community and national media such as radio and TV. Social media was also being used to deliver legal education to communities; other examples were toll-free interventions, the use of bulk SMS, and conventional media like posters and flyers. For instance, when the CBPs had to engage with the public in crowded areas such as markets, they used face-to-face legal education, with due regard to social distancing, as well as public address systems. They also collaborated with government departments, such as the Ministry of Health, to continue the provision of legal education. Another innovation was in the use of online courts to adjudicate matters.

# UPDATE

## Report of the UN Special Rapporteur on the Right to Health Focusing On a Rights-Based Approach to Mental Health

*Paula Knipe*

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*During the 44th Session of the Human Rights Council, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health presented a report on a rights-based approach to mental health. The report clarifies the elements required to ensure a rights-based approach to advancing the right to mental health globally.*

*While it welcomes global efforts to advance different elements of mental health, including promotion, prevention, treatment, rehabilitation and recovery, the report expresses concern about gaps in addressing human rights violations in the context of mental health. According to the Special Rapporteur, this development ‘reinforces a vicious cycle of discrimination, disempowerment, coercion, social exclusion and injustice’.*

*To address these challenges, the Special Rapporteur recommends a holistic approach to the understanding of mental health, including distress treatment and support, rather than only a biomedical approach. The report advocates for global, regional and national approaches, grounded in human rights, that reflect the lived experiences of those left ‘furthest behind by harmful socio-political systems, institutions and practices’.*

**The report is available at <https://undocs.org/A/HRC/44/48>.**

## Contact

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