

## EVENT

# First Webinar on Constitutional Resilience and COVID-19 in Africa (12 June 2020)

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*On 12 June 2020, the Dullah Omar Institute (DOI), University of the Western Cape, hosted the first of its webinars in a series on the constitutional resilience of countries in response to COVID-19. While countries have taken different approaches to the pandemic, with some declaring states of emergency and others, national disasters, every country affected has experienced human rights complications. The international community reacted quickly to guide states by highlighting that their responses should comply with international human rights standards; at a domestic level, many countries also put accountability mechanisms in place to minimise human rights violations.*

Against this backdrop, the webinar invited four panelists, from Kenya, Malawi, Zambia and Nigeria, to discuss the constitutionality of the measures their respective states have adopted in response to the pandemic.

In his opening remarks, Prof Ebenezer Durojaye of the DOI said that while this is not the first-ever global pandemic, its impact is unprecedented. Even so, in times of crisis a balance needs to be struck between response measures and the protection of human rights. Bearing in mind that most constitutions have a limitation clause on the enjoyment of human rights, it is crucial that any limitations are in line with international criteria. Notably, in the Siracusa Principles of the International Covenant on Civil and Political Rights of 1966 (Siracusa Principles), the Human Rights Committee set out the steps to be taken by a state which is deliberately imposing a limitation on human rights.

This series of webinars aims to generate discussion on state responses to COVID-19 and, as part of this, examines the role of the judiciary and the legislature, which act as the highest form of checks and balances in keeping the state accountable. The series also

investigates how states can ensure that the regulations they pass are in line with public policy and the extent to which individuals can challenge these regulations. To this end, and for the sake of comparative analysis, the series intends to consider case studies across jurisdictions as the pandemic unfolds.

The first panelist, Dr Enoch Chilemba, is a Lecturer in Law at the University of Malawi, Deputy Head of the Department, and Coordinator of the Disability Rights Clinic. Malawi was facing a peculiar situation at the time, given that presidential elections were due to be held in 2020 and many suspected that the government was politicising the pandemic and using it to delay the elections. At that point, the country had conducted 6,708 COVID-19 tests, with 481 positive cases.

The Malawian Constitution allows for the derogation of rights during public disasters or war; however, it does not permit it during a state of emergency. All decisions in response to the pandemic were being made by a task force predominantly comprising members of the executive, a factor that exacerbated an already fraught political climate.

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the Disaster Preparedness and Management Act and the Public Health Act. The District Assembly and City Council also passed a number of regulations, along with the government's creating the Public Health Coronavirus Prevention, Containment and Management Rules of 2020. While all these measures were made through regulations and/or subsidiary legislation, none were enforced by enacting a particular law, as the Constitution requires, and as such the court overruled every one of them.

Christopher Phiri, the second speaker, is an Advocate of the High Court of Zambia. He explained that while Zambia's Constitution enshrines a Bill of Rights which provides for a state of emergency, the COVID-19 pandemic was not declared as such. The measures taken were based not on the Constitution but rather the Public Health Act, the sole aim being to stop the spread of COVID-19. These were not sweeping measures but applicable only to certain vulnerable people in high-risk areas. The measures nevertheless caused much concern and unrest. Zambia too finds itself in a challenging political climate, as its next election is planned to take place in 2021 and concern has been growing that the measure to limit public gatherings is aimed at preventing meetings and rallies by opposition parties.

As for Zambia's oversight bodies, among them its

National Assembly and judiciary, there has been little activity from them. The National Assembly was the first governmental body to adjourn indefinitely in response to the pandemic, and at the time of the webinar had not issued statements on any of the measures put in place by the executive. The judiciary had also been largely inactive, as it too had suspended operations barring for matters classified as 'urgent', albeit that there were no specific criteria for determining which matters fell into this category. This has exposed the state's unpreparedness for the pandemic, particularly so in the case of the oversight institutions mentioned above, which have become virtually redundant for the time being.

The third speaker, Olubayo Oluduro, is a Professor of Law and Director of the Linkages International Programmes Office at Adekunle Ajasin University, Akungbaakoko, Ondo State, Nigeria. The first positive COVID-19 case in Nigeria was reported on 27 February 2020, and was also the first confirmed case in Africa. The President reacted under the Quarantine Act of 2004 and issued the Covid Regulations of 2020. At the time of the webinar, there were a total of 14,554 confirmed cases, 4,494 recoveries and 387 deaths. The government deployed national forces, including the police and army, to enforce its measures. It also established the High-Power Presidential Task Force to coordinate the government's response to the pandemic and advise committees on the socio-economic and other implications of the pandemic.

The Constitution of Nigeria, 1999 (as amended), provides for the derogation of human rights if it is in the interests of public safety, public order or public health. However, some measures have been put in place without consideration of their effects on human rights, most notably the right to life. The National Human Rights Report documents that 18 people were killed when law enforcement officers were permitted to use fatal force against citizens when enforcing COVID-19 response measures.

Concerns have also been raised about disregard for the right to a fair hearing, as many have been arrested and detained unlawfully, in addition to which there have been multiple cases of discrimination across Nigeria. The judiciary has exercised little oversight, as it suspended its operations except for matters considered 'urgent or essential'. The Chief Justice

issued a directive that virtual hearings may proceed and that the Federal High Court should appoint three judges across Nigeria's six geopolitical zones to hear matters of necessity.

Looking at their long-term implications, all the measures taken in Nigeria were introduced in the National Assembly under the Control of Infectious Diseases 2020 Bill, which seeks to replace the Quarantine Act. The Bill was met with many concerns, as it grants overwhelming power to elected executives. Section 14 of the Bill gives the Director-General power to place a citizen under surveillance on mere suspicion, while section 15 allows the Minister of Health to declare any premises an isolation area, which gives power to expropriate private property. The Bill also allows the Director-General and other executives to be unaccountable, and permits law enforcement officers to arrest people without a warrant in so far as they suspect that a person has committed an offence under the Bill. Better constitutional and oversight measures should be put in place to prepare for future pandemics.

The fourth speaker, Joe Kilzono, is a lecturer at Strathmore University, Nairobi, Kenya. The Kenyan government responded in line with the new Constitution. The government issued various directives and created an Emergency Covid Fund to cushion the economic effects of the pandemic. Kenya's two tiers of government, the national government and county government, have separate functions, including some within the health sector, and as such were both supported in order to respond effectively to COVID-19. The government has held daily briefings on the spread of the virus and the measures it has in place. It has also generally respected the media by allowing them to report accurately and objectively on the COVID-19 pandemic.

Nevertheless, there have been notable concerns about human rights abuses. For instance, quarantine facilities have been used as punishment facilities; there have also been reports of violations of the right to life and freedom from torture, with 15 incidents having been reported of excessive use of force by police officers.

In regard to oversight mechanisms, Parliament recognises that it is a central pillar in a democratic



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society and has continued to convene and monitor the executive; to cushion the economic effects of the pandemic, it passed the Tax Law Amendment of 2020 Bill. The judiciary has been less active, given that the National Council of the Administration of Justice scaled down court operations and only limited online court sessions were taking place. Like many African countries, Kenya has struggled to follow constitutional principles during the COVID-19 pandemic. This could negatively affect efforts to promote constitutionalism in Kenya in that such efforts are likely to be weakened by some of the response measures, resulting in long-lasting effects that extend into the future beyond the pandemic.

Prof Derek Powell of the DOI gave the closing remarks. He noted that these conversations add significant value to our understanding of the effects of COVID-19. The pandemic presents an unprecedented opportunity to examine how constitutional states fare in managing an international public health emergency. It also intersects with other global phenomena, such as mass displacement of people, climate change, poverty, the rise of authoritarian regimes, and increasing structural inequalities. The situation is complex, with a range of issues beginning to crystallise as symptoms of crisis.

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