



Africa Criminal Justice Reform
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Criminal justice, human rights and COVID-19 measures: A comparative study of measures taken in five African countries

Legal Frameworks applicable during COVID-19

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Introduction

- The COVID-19 pandemic adversely impacted the world-over and governments, including those in Africa, responded by imposing various degrees of restrictions to curb the spread of the virus and save lives.
- The overarching aim is to consider the legal frameworks of each country and assess the level of restrictions and the rights implications.

Procedure

for declaring or imposing restrictions

- Constitutions of each of the five countries contain provisions with reference to exceptional circumstances in the form of States of Emergency (SoEs), States of Disaster (SoDs) and/or States of Calamity (SoCs).
- All five countries also have statutory provisions dealing with exceptional situations.
- Initial response to COVID-19 of some countries was to declare an SoE/SoD/SoC.
- But this was not universal.
- In some countries = SoE or SoD would repress human rights and severely cripple the socio-economic situation of already impoverished populations.

- **KENYA:** government relied on two legislative provisions: Public Order Act and Public Health Act to create a Curfew Order and Health Rules.
- **ZAMBIA:** government invoked provisions of the Public Health Act to create COVID-19 Health Rules.
- **MALAWI:** At the onset of the pandemic, the Malawi government declared a State of Disaster and lockdown to restrict population movement as a measure of curbing the spread of the virus. Decision overturned in the High Court because the government had not put in place measures to cushion the effects of the intended lockdown.
- **MOZAMBIQUE:** government declared a State of Emergency as provided for in the Constitution. Declaration thrice extended (in April, May and June 2020). Since 7 September 2020, Mozambique in a State of Public Calamity (*calamidade pública*). A calamity is considered to be an abnormal event caused by a major disaster causing damage, loss and compromises the response-capacity of the State.
- **SOUTH AFRICA:** a State of Disaster was declared in March 2020 in terms of the Disaster Management Act, which is the authority for all disaster management in the country. SoD has been extended monthly. A 5-level risk adjusted alert system for lockdown levels is in place to date.

Role of legislatures

in establishing and complying with COVID-19 restriction procedures

- The legislatures in the five countries played different roles in the formulation and declaration of COVID-19 related measures.
- **MOZAMBIQUE:** Parliament developed and promulgated COVID-19 related law, but the Council of Ministers issued decrees to add details and specificity to these laws.
- **SOUTH AFRICA:** In March 2020, the South African government suspended the work of Parliament as a precautionary measure. The legislature resumed activities virtually in mid-April and prioritised the various government departments' COVID-19 response measures.
- **KENYA:** In March 2020 the Kenyan Senate passed a resolution establishing the *Ad-Hoc Committee on the COVID-19 Situation in Kenya*. The Committee's mandate was to oversee actions and measures taken by the national and county governments.
- **ZAMBIA:** National Assembly was indefinitely suspended in March 2020, and upon resumption in June 2020, was again adjourned for a period of time. Political commentators have argued that the suspension of Parliament by the ruling Patriotic Front Party was a pretext to avoid the defeat of the Constitutional Amendment Bill in Parliament which would have provided the President with powers to amend the electoral layout and take control of the central bank monetary policy ahead of the August 2021 elections.

Procedure & Structures in-charge

for the extension of restrictions

- Countries co-ordinated their response to the COVID-19 pandemic differently.
- While some countries established formal structures to drive their response, in other countries, there was little clarity on the co-ordinating authority in charge of effecting regulations.
- **ZAMBIA:** Health regulations issued by the Minister of Health through provisions of the Public Health Act, BUT the Executive (President) also drove the imposition of restrictions through a series of announcements. Legal backing? August 2021, a change of government. September 2021 (NEW) President appointed a COVID-19 Advisor.
- **KENYA:** Two main bodies drove the imposition of restrictions: National Security Council and the National Emergency Response Committee (NERC). The former is a Constitutional body, the latter was formed by an Executive Decree.
- **MOZAMBIQUE:** Council of Ministers was established and authorised to specify the measures for the SoE and SoC.
- **MALAWI:** a Special Cabinet Committee was established by the President. However, due to growing criticism over its handling of the pandemic, the Committee was dissolved by the President and replaced with a 21-member Presidential Task Force.
- **SOUTH AFRICA:** the National Coronavirus Command Council (NCCC) is the authority charged with making and changing COVID-19 related restrictions.
- **CHALLENGES:** ① Functions NOT always clear. ② Certain decisions are not always open to public scrutiny. ③ Centralisation of control, ④ Suspensions of parliaments in some countries ⑤ The issuance of far-reaching control measures undermined general principles of an open and accountable democracy. ⑥ Changes in the composition of co-ordinating structures over the last 18-months.

- Task of co-ordinating structures: Deciding whether to extend, reduce or remove COVID-19 restrictions.
- **NB:** These decisions are taken based on expert knowledge and scientific information.
- **SOUTH AFRICA:** 'Risk adjusted strategy' based on a five-level 'COVID-19 Alert System.' Guided by several variables such as: the level of infections and rate of transmission; the capacity of health facilities; the extent of the implementation of public health interventions, and the economic and social impact of continued restrictions.
- **KENYA:** Did not make use of an alert-level system. Instead, it appears that high infection rates determined the extension and removal of curfew hours and movement restrictions in certain counties. E.g. 2020 Easter weekend movement restrictions on 4 counties.
- **MALAWI:** Not clear on which basis decisions to extend or limit restrictions were made. Court ruling on intended lockdown 'Government has not put measures to cushion impact of a lockdown on citizens'. January 2021, reports that incoming President was considering establishing an SoE after an increase in COVID-19 cases, a rise in hospitalisations, and the passing on of two Cabinet Ministers. However, no such declaration was made.
- **MOZAMBIQUE:** Changes to restrictions were made on a monthly basis. Presidential decrees are drafted by the President and submitted to Parliament for ratification.
- **ZAMBIA:** Changes to measures communicated through a series of non-gazetted Presidential announcements.

Extent

of Stakeholder Consultation

- Evidence of stakeholder consultation between government and civil society, medical professionals, the general public, academics, and the private sector.
- However, not enough information available in the public domain to **confirm the extent** of such engagements.
- **KENYA:** Series of consultations between the different arms of government and civil society. Ad-hoc Senate Committee received submissions from the general public and civil society organisations regarding the decisions taken by the government. Social Media: #EngageWithTheIG
- **SOUTH AFRICA:** Stakeholder consultation in the days leading up to the declaration of a State of Disaster. Since then, President makes reference to consultations during 'family meetings' when announcing lockdown level changes.
- **MOZAMBIQUE:** Unlikely that any stakeholder consultations took place prior to the SoE declaration. However, some changes in the enforcement of SoE provisions occurred following pressure from external stakeholders.
- **MALAWI:** Limited information available on stakeholder consultation, but it is presumed.
- **ZAMBIA:** Information suggests that Cabinet Ministers consulted amongst themselves on a number of occasions to approve decisions related to COVID-19. Civil society organisations have resisted measures proposed by the government. Why?

Pandemic-specific Law

- All 5 countries have some form of emergency measure provisions available speaking to ‘emergencies’ and ‘disasters’, they do not necessarily make use of the term ‘pandemic’.
- **3** countries already have Constitutional and Legislative provisions covering ‘pandemics’.
- **2** countries have now included pandemic-related terminology and developed pandemic-specific laws to guide possible future pandemics.
- **MOZAMBIQUE:** Parliament has recently tabled and enacted the Disaster Risk Management and Reduction Law (*Lei de Gestão e Redução do Risco de Desastres*). It amends Law no. 15/2014 and introduces the term 'pandemic' to the legislative framework to make it as comprehensive as possible and respond to any type of disaster that may eventually occur in the country.
- **KENYA:** Pandemic Response and Management Bill - Legal framework for coordinating and managing responses, activities and temporary measures and relief during future pandemics.
- From a preliminary reading of the Bill, there are several justifiable provisions. BUT some provisions may be a case of over-reach and vagueness, posing a risk to fundamental rights and freedoms for an indefinite and unspecified duration. Senate has passed the Bill with amendments and the Bill was referred to the National Assembly for debate; if successful, it will be forwarded to the President for approval and enacted as an Act.

Conclusion

- The unprecedented nature of the pandemic has been a **stress-test** for constitutional and legislative emergency provisions.
- While the governments' promptness and willingness to respond to the pandemic is commendable, it is difficult to overlook the uncertainties brought about by the **vagueness in law and regulations**, as well as the ease with which democratic protections were rolled back.
- Fear and a high risk of precedence for future decisions.
- Irrespective of the context of possible future pandemics, that the **upholding, promotion and advancement** of human rights should always be a central focus of governments' response towards its citizens.

Thank you