



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



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

Court challenges to the lockdown and/or curfews, norms and standards

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Introduction

- What role did courts play during this unprecedented period? What was the role of courts in testing the limits of States' responses to the pandemic?
- Brief comparative overview of COVID-19 related litigation courts were confronted with in the five countries surveyed.
- This presentation will mainly cover the following thematic areas of legal challenges per country surveyed:

Litigating the lockdown

- The “lockdown”: State of Disaster / Curfew / Other
- The COVID-19 rules/measures
- The issue of public participation
- The enforcement of COVID-19 measures

MALAWI

- State's decision to implement a lockdown was challenged on the basis that, amongst others, (a) the lockdown amounted to a substantial derogation of rights and did not accompany the attendant State of Emergency declaration, and (b) the State failed to make provision for social security to its poor citizens during the lockdown. *Kathumba and Others v President of Malawi and Others [2020]*
- Malawi lockdown declared unconstitutional: (a) it fundamentally restricted rights, for which derogation was only permissible under a State of Emergency (b) social security interventions inadequate.

SOUTH AFRICA AND KENYA

- In Kenya and South Africa, the lockdown declarations (State of Disaster *vis a vis* Curfew Orders) were viewed as appropriate and as a legitimate state response to deal with the pandemic, as set out below.
- Kenya and South Africa, Courts took similar approaches.

Legal challenges against the "lockdown"

- **South Africa** - legal grounds for challenging SOD:
- The State's decision to declare a SOD was an 'irrational reaction to the coronavirus and the number of deaths caused thereby.' *De Beer and Others v Minister of COGTA*
- The State's decision to declare a SOD as oppose to a SOE was challenged on the basis that it lacked the constitutional safeguards that are available under a State of Emergency and therefore did not protect citizens against 'unjust and irrational decisions and regulations made by the State.' *Freedom Front Plus v President of RSA*
- Both cases dismissed.

Legal challenges against the "lockdown"

- **Kenya** - legal grounds for challenging Curfew Order:
- Applicants argued the Curfew Order was 'illegal, illegitimate and unproportionate,' 'blanket in scope and indefinite in length.' The curfew Order 'did not demonstrate what legitimate public health or other interest it sort to achieve.'
- State should have declared a State of Emergency under Art. 58 Constitution. *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others*
- Case dismissed

Legal challenges: COVID-19 rules/measures

- Legal challenges to the COVID-19 regulations or rules largely unsuccessful.
- In South Africa, the Courts held that in order to determine the constitutionality of the regulations, the regulations must be rationally related to the purpose for which the power was conferred. In almost all legal challenges to the regulations (with the exception of 2 regulations) the Court determined that the regulations were rational and justified.
- In Kenya, the COVID-19 measures (Public Health Rules) were challenged on the basis that they were vague, discriminatory.
- Views from the Courts were that the COVID-19 measures were reflective of the steps taken the world over in the fight against COVID-19 and that the rules were not irrational.

COVID-19 measures and public consultations

- The lack of public consultation in the promulgation of lockdown rules was one of the procedural fairness arguments challenged in the courts in Kenya and South Africa.
- In both countries, the courts found that given the gravity and exigency of the COVID-19 pandemic, it is reasonable and justifiable that extensive public participation did not take place.

ZAMBIA and MOZAMBIQUE

- Although the information available indicate that there were no legal challenges to COVID-19 measures implemented in Zambia, the rules announced by the President were without any legal backing, which made it difficult for citizens to comply with them.
- In Mozambique, provincial and municipal governments seem to have taken a number of measures beyond what the law mandates and the enforcement and sanctions, especially in the beginning, were not specific and open to abuse.

The enforcement of COVID-19 measures

- The use of force by law enforcement officials in enforcing the COVID-19 rules was a concern in all countries surveyed.
- The Courts in South Africa and Kenya have ruled against the abuse of power of law enforcement agencies.
- In Kenya and South Africa, the absence of law enforcement guidelines and non-adherence to operational procedures during the pandemic appear to be a common problem. *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020)*
- In Zambia there were reports of police brutality and arbitrary detention, despite the COVID-19 standard operating enforcement procedures drafted with help of UN.

Concluding Remarks

- The Courts in Malawi, South Africa and Kenya played a fundamental role in assessing the constitutionality of restrictive measures during this period.
- They fulfilled their role in safeguarding and condemning rights violations by law enforcement agencies in the enforcement of lockdown and, in the case of Malawi, were alive to the socio-economic impact of restrictive measures on the poor in society.
- Reliance on the Courts, stem from a lack of trust in the government's implementation of measures to deal with the pandemic.

Thank you

