

EVENT

Second Webinar on Constitutional Resilience and COVID-19 in Africa (30 June 2020)

Paula Knipe

On 30 June 2020, the Dullah Omar Institute (DOI), University of the Western Cape, hosted its second webinar in a series on the constitutional resilience of countries in response to the COVID-19 pandemic. The webinar invited four panelists, from Mauritius, Zimbabwe, Ghana and Switzerland, to discuss the constitutionality of the measures put in place by their respective states in response to the pandemic.

In his opening remarks, Prof Ebenezer Durojaye of the DOI noted that the webinar included coverage of Switzerland and that this would be beneficial to a comparative country analysis that looks beyond the African region. Also, in recent weeks there had been significant developments in South Africa in which courts heard constitutional challenges to some of the COVID-19 response measures. People were testing the judiciary and exercising their democratic rights, which served as a reminder that governments cannot adopt emergency measures without considering their wider implications. Responses had to comply with international and regional standards and find a balance between managing the pandemic effectively and ensuring the protection of human rights.

The first panelist, Tinotenda Chidhawu, is a University of the Western Cape PhD candidate working with the United Nations Developing Programme in Zimbabwe. He said the Zimbabwean government had adopted a two-pronged approach to the pandemic. The first entailed legislative measures that included declaring COVID-19 a national disaster and passing a regulation, entitled The Prevention, Containment and Treatment of COVID-19, which prescribed the national lockdown.

Most of the measures were informed by the Public Health Act of 2018.

The second prong was the administrative approach of establishing the Inter-Ministerial Task Force for COVID-19, which is aimed at responding to issues concerning transportation, law enforcement, and other logistical issues.

COVID-19 has had devastating effects on all sectors of the economy and public life in Zimbabwe. While the Constitution allows for the limitation of rights during a public emergency, and the government referred to the pandemic as such, it only declared COVID-19 a national disaster. Zimbabwe has seen widespread limitation of its human rights and freedoms, including the right to movement, assembly and association, education, labour and media. The country also saw drastic changes to its criminal system. For example, COVID-19-related media publication was criminalised, carrying the punishment of 20 years' imprisonment.

Many government processes came to a halt, with Parliament adjourning and the executive and judiciary becoming inactive save to hear emergency

matters and those related to holding government accountable. The High Court of Zimbabwe heard cases in relation to government provision of personal protective equipment and to excessive use of force by law enforcement officers in implementing the lockdown. Generally, Zimbabwe has been struggling to strike a balance between managing the pandemic and protecting fundamental rights and freedoms.

The second panelist, Amar Roopanand Mahadew, is a Senior Lecturer in the Department of Law at the University of Mauritius. Similar to many countries, Mauritius took measures in response to the COVID-19 pandemic including a lockdown and amendments to its health and sanitation facilities. Mauritius had seen 350 positive cases and ten deaths in a population of 1.3 million people.

Parliament, in its legislative response, created the COVID-19 Miscellaneous Provisions Act of 2020, which amended 57 pieces of legislation. The majority of these amendments were brought in a fair and legal manner, with no objections from opposition parties or civil society. However, one amendment met with contention, this in relation to the Worker's Rights Act of 2019. The amendment saw limitation on employment, salaries and gratuities. As the pandemic had resulted in a complete slowdown of economic activity, particularly in the tourism sector, the country's main industry, many had lost their jobs or been forced to resign without adequate compensation.

Although Mauritius has fared relatively well, the pandemic has exposed a few weaknesses in its Constitution and the accessibility of its legal system. The Worker's Rights Act was subjected to much debate in Parliament, as opposition parties, civil society organisations and the general public voiced their concerns and condemned the actions of the government. Many people wanted clarity on the measures taken but no explanation was given. However, the government eventually compensated those working in the informal sector, medical assistance was made free, and tenant payments were paused.

Despite these disputes, Mauritius is one of the few countries which has not heard a COVID-19-related case. It does not have a constitutional court but a Supreme Court with the jurisdiction to interpret the



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Constitution – the latter does not include economic, social or cultural rights, which is major reason that it was difficult to challenge amendments to the Worker's Rights Act. Other barriers in this regard are that there is no mechanism for strategic impact litigation or class action and that regional and international complaint mechanisms are absent in Mauritian legal culture.

The third panelist, Dr Daniel Mekonnen, is an independent consultant from Switzerland. He is also a Fellow of the African Service Centre at Leiden University and serves as Chairperson of the Law Society. Pandemics by nature are fertile ground for human rights violations and the abuse of governmental power. Therefore, every country affected is experiencing constitutional challenges as it tries to respond to this unprecedented disruption. While Switzerland has one of the world's longest histories of a resilient constitutional order, COVID-19 has given rise to a number of other critical legal issues. In particular, there were regulatory uncertainties about the emergency powers of the executive (Federal Council) during the period of confinement in which parliament was in a prolonged hibernation.

At the time of the webinar, there had been 31,714 cases, 29,000 recoveries, and 1,962 deaths in a population of 8.5 million people. The Federal Council relied on the Swiss Constitution and the Epidemics Act of 2012 to implement emergency measures in terms of a national crisis and promulgated an ordinance

to prescribe its response. There were multiple amendments to the ordinance, with contention regarding its implementation due to unprecedented restrictions on public life in general and human rights in particular.

At least two attempts had been made by private individuals at the level of the Federal Administrative Tribunal to challenge the constitutionality of the ordinance, but they were unsuccessful on procedural grounds. There was no parliamentary oversight, as Parliament had adjourned on 15 March 2020. However, the Federal Council is permitted to put emergency measures in place for up to six months – in case of measures lasting longer than six months, it requires approval from Parliament.

Another concern to emerge in the pandemic is the use of science and technology in tracing, monitoring and storing data, with controversy surrounding the issue of privacy. The government has since noted that any COVID-19-related data must meet strict encryption requirements and not be stored regularly.

The fourth and final panelist, Dr Bright Nkrumah, is involved in the Climate Change Adaptation Programme at the Global Change Institute at the University of Witwatersrand. He explained that Ghana responded to the pandemic by drafting the Impositions of Restrictions Act 2020. This was opposed by minority parties in Parliament and civil society due to the number of issues it raised. The first issue concerned duplication of legislation, as Ghana's Constitution gives the President power to declare a state of emergency, as does the Emergency Powers Act of 1994. As such, there was no need to draft new legislation, which many believed was a waste of state resources and intended to overreach previous accountability mechanisms, given that existing legislation uses vague language and makes no specific mention either of COVID-19 or the length of the lockdown and when it would be lifted.

As in other countries, the issue of privacy also came to the fore. Previous legislation did not give the President the power to monitor individual activities but instead the mandate to limit movement. However, the new Act gives the President the power to conduct surveillance and intercept individual and group communications, power which could be grossly



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abused. The new Act also permits a person to be detained for up to a period of four years without any limitation. This has led to conflict between the executive and legislature, with little room open for debate. While governments should be given the authority to contain COVID-19 through the use of extraordinary measures, it is imperative that this power is not abused for personal or political gain.

Prof Derek Powell of the DOI gave the closing remarks. COVID-19 is an unprecedented phenomenon, he said: there has never been a natural occurrence that has seen a simultaneous response from states with such impact on the global population. This presents a unique opportunity for comparative analysis organised around a common framework. Three themes seem especially salient: first, the constitutional organisation of governments; secondly, the emergency powers of a normal constitutional government, with due consideration of legal basis, proportionality, legality, validity and rationality; and thirdly, the effect of technologies in areas such as surveillance, privacy and dignity, which has transformed the way in which governments operate and enabled them to reach across conventional boundaries. It is necessary to interrogate what this means for constitutionalism in the future.

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