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Editorial introduction to special focus: Assessing the implications of COVID-19 pandemic regulations for human rights and the rule of law in Eastern and Southern Africa

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As in the case of most countries in the world, African countries rapidly responded to the threats posed by the COVID-19 virus. Many countries, with South Africa in the lead, introduced drastic measures designed to bring the pandemic under control. This comes at a particularly difficult time for Africa which is faced with increasing threats of an authoritarian resurgence.¹ The suspension of laws and the introduction of several measures necessary to deal with the spread of the virus necessarily concentrates power in the hands of politicians and other officials. Many autocratic regimes can seize this opportunity to grab more power for themselves, to silence their critics and to undermine the rule of law, feeling secure in the knowledge that the world is too occupied with attempts to fend off the ravages caused by the virus to take notice.

There thus is enormous potential for democracy to be threatened and for human rights and the rule of law to be undermined. Powers,

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1 See further CM Fombad 'Reversing the surging tide towards authoritarian democracy in Africa' in CM Fombad & N Steytler (eds) *Democracy, elections and constitutionalism in Africa* (forthcoming, 2021).

such as those given to the security forces to monitor and enforce the restrictions requiring everyone to 'stay at home' during the period of lockdown, are not always fully understood or obeyed. The potential for conflict between citizens and the security forces is real. Law enforcement officials not only have guns and the authority of the state to use force when necessary, but allegedly have used these powers in an abusive manner that has resulted in the loss of lives in several African countries such as Kenya, Nigeria and South Africa.

Because of the very nature of the pandemic, the traditional checks that normally ensure that emergency powers are not abused have not been able to function properly. Many countries have had to adopt emergency measures regarding the functioning of their judicial systems that allow their courts to remain operational only to a limited extent. The strict requirement of social distancing and restrictions on the number of persons who can meet has meant that parliaments all over the continent have not been able to meet except, in a few countries, virtually. They therefore have not been able to exercise the oversight powers that are needed to ensure that the executive and other government officials do not abuse the extraordinary powers that have been conferred on them to deal with the pandemic.

The 'stay at home' restrictions have had deleterious consequences for the poor, the low-income earners and the millions who rely on informal activities to eke a living for themselves. The prolonged periods of lockdown have added many more to the millions of people on the continent who are never sure of where the next meal would come from. This has created not only high social stress but the risk of a high unemployment rate and the collapse of many African economies.

Given the fact that the virus will not disappear overnight, there are reasons to begin probing on what lessons can be learnt from this experience in order to prepare for the future. The risk that these emergency powers could be used in a manner that will undermine the gains made in the last three decades to recognise and protect human rights, promote constitutionalism and respect for the rule of law is real.

Although there is some willingness to endure many of the sacrifices needed to enable the government to deal with the enormous challenges posed by the pandemic, the risks that these measures pose to Africa's fragile democracies and the rule of law cannot be ignored lightly. In fact, states of emergency have for many years been used in many African countries as a pretext for repressive and authoritarian rule and practices. There thus is a well-founded fear that some of

the excesses that we see today during the implementation of these emergency measures may endure and become a new way of life.

For example, in South Africa one of the extreme measures taken to deal with the bubonic plague of 1899 to 1901 was the forceful ejection of all blacks from the city of Cape Town to the country's first black township, KwaNdabeni.² When the plague was over, life never returned to normal as a new social order, based on racial segregation, had been installed. In Togo a law has recently been enacted that allows the President to rule by decree until parliament revokes these powers.³ Given that his party controls parliament, are we sure that this law will be revoked? In Zimbabwe peddlers of 'falsehoods' or 'fake news', which often means those who make embarrassing disclosures or criticise the government, face 20 years' imprisonment.⁴ In many countries the huge sums set aside as relief cash or for food parcels have been diverted by the ruling elites or selectively distributed to areas that support the government. The serious economic deprivation that is likely to result from the measures being taken to control the spread of the virus, particularly the prolonged periods of lockdown, will leave people poorer, sicker and more angry.

It is becoming clear each day that the struggle to deal with this deadly microbe will be a marathon and not a sprint. Bill Gates wrote: 'When historians write the book on the COVID-19 pandemic, what we've lived through so far will probably take up only the first third or so. The bulk of the story will be what happens next.' He added: 'In a few weeks' time, many hope, things will return to the way they were in December. Unfortunately, that won't happen.'⁵ Gates rightly points out that what happens next is of critical importance because life will never be the same again. How can we ensure that the limited gains in democracy, constitutionalism and respect for the rule of law will remain intact in the post-COVID-19 era? How can we ensure that

2 See C Oliver-Ewans 'The implications of the abolition of influx control legislation in the Western Cape', https://open.uct.ac.za/bitstream/handle/11427/22412/thesis_hum_1992_oliver_ewans_ceridwen.pdf?sequence=1&isAllowed=y (accessed 10 September 2020).

3 See F Nabourema 'Dictators love lockdown', <https://africanarguments.org/2020/04/21/dictatorships-love-lockdown-coronavirus-togo/> (accessed 10 September 2020).

4 See 'Autocrats see opportunity in disaster' *The Economist*, <https://www.economist.com/leaders/2020/04/23/autocrats-see-opportunity-in-disaster> (accessed 10 September 2020).

5 See 'The world after COVID-19: Bill Gates on how to fight future pandemics' *The Economist* 23 April 2020, https://www.economist.com/by-invitation/2020/04/23/bill-gates-on-how-to-fight-future-pandemics?utm_campaign=the-economist-today&utm_medium=newsletter&utm_source=salesforce-marketing-cloud&utm_term=2020-04-23&utm_content=article-link-5 (accessed 10 September 2020) (my emphasis).

the temporary measures do not become permanent? How can we ensure that the emergency powers are not abused? How can we use this crisis to correct some of the errors of the past? How can we use this as an opportunity for innovation and creativity?

These were some of the questions dealt with by an online seminar on the theme 'Assessing the implications of COVID-19 pandemic regulations on human rights and the rule of law in Eastern and Southern Africa', organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria, South Africa, in partnership with the Konrad Adenauer Stiftung's Rule of Law for Sub-Saharan Africa, in Nairobi, Kenya, which took place on 13 and 14 August 2020. The ten articles in this section are selected from the papers that were presented during this two-day seminar. They cover three main areas. The first provides an overview of emergency powers generally; the second group of papers examine the way in which four countries in Eastern and Southern Africa (Eswatini, Kenya, Lesotho and South Africa) are dealing with the crisis; and the last set of papers look at how certain specific issues are being addressed in South Africa, South Sudan and Uganda.

The first article by Fombad and Abdulrauf has as title 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa'. According to the authors, post-independence African constitutions contained provisions that conferred broad powers on governments during states of emergency. As a result, these powers were regularly used to abuse fundamental human rights and suppress opponents of the government. The authors point out that during the post-1990 wave of constitutional reforms in Africa, some attempts were made to introduce safeguards against the misuse of emergency powers. The article undertook a comparative assessment of the extent to which these reforms have reduced the risk that the exercise of emergency powers poses to human rights and progress towards constitutionalism and respect for the rule of law, especially in times of global pandemics such as COVID-19. According to the authors, the COVID-19 pandemic has exposed the weaknesses of the constitutional reforms designed to check against the abuse of emergency powers. The authors conclude by arguing that one of the major lessons of the COVID-19 pandemic is that there is a need to review the constitutional and regulatory framework for the exercise of emergency powers to better prepare for future pandemics.

The second category of papers that focus on the experiences of countries start with Shongwe's article, 'Eswatini's legislative response to COVID-19: Whither human rights'. As in many other

African countries, the author points out that instead of invoking the constitutional state of emergency powers, the government relied on the Disaster Management Act. Based on this Act, wide-ranging powers were assumed by the government and government officials with few oversight measures to ensure that these powers are not abused. Shongwe concludes that the measures and regulations introduced by the government have had an unprecedented negative effect on the lives and livelihoods of Eswatini.

Kenya's response is analysed by Kabira and Kibugi in 'Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19'. In their article the two authors point out that the COVID-19 pandemic for once put Kenya's transformative constitution to the test. They argue that the Constitution was supposed to provide a transformative agenda that will pave the way for the consolidation of the rule of law, democracy, human rights and governance. However, they are of the view that the government's response to the COVID-19 pandemic has exposed the inherent contradictions embodied in the Constitution. They nevertheless conclude that the Constitution effectively operates as a double-edged sword: a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other.

In 'Implications of Lesotho's COVID-19 response framework on the rule of law' Shale discusses the situation in Lesotho. Unlike that in many other countries, Lesotho's COVID-19 response was proactive. The country started by declaring a state of emergency but relied mainly on the Disaster Management Act. In spite of this, the author points out that the government acted in disregard of many of the basic rule of law principles. As a result of this, the author concludes that the existing legal and institutional frameworks for dealing with such emergencies need to be strengthened to prevent many of the abuses that are taking place, especially the misuse of public funds through corruption.

Van Staden examines the situation in South Africa in 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa'. According to him, the COVID-19 pandemic in South Africa has seen the reach of state power expand at the expense of constitutional rights. The author considers the constitutionality of the country's COVID-19 lockdown rules against the backdrop of the constitutional rights limitation regime within the broader theoretical framework of constitutionalism and the rule of law. He contends that the endorsement by the courts of many of the lockdown rules in the country has made a mockery of the rule of law. He concludes that the South African government, with the partial

endorsement by the courts, has strayed beyond the bounds of the Constitution and engaged in unjustified violations of constitutional rights.

The last category of five papers look at the impact of the pandemic on specific rights. The first article in this group is that of Nkatha and Mwenifumbo on 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi'. According to the authors, Malawi's response to the COVID-19 pandemic has seen the adoption of two pieces of legislation and the judiciary intervening to strike down proposed lockdown measures and the constant change in the institutional arrangements meant to spearhead the country's response. A key problem has been the struggle to balance the saving of lives with preserving livelihoods. The authors highlight some of the challenges that Malawi's response generated for the preservation of livelihoods and the human rights implications of the key measures adopted.

In 'Assessing the implications of digital contact tracing for COVID-19 on human rights and the rule of law in South Africa' Lim deals with one of the emerging issues that has been underscored by the virus. He argues that the establishment of centralised and aggregated databases and applications enabling mass digital surveillance, despite their public health merits in the containment of the COVID-19 pandemic, can lead to the erosion of South Africa's constitutional human rights frameworks, including equality, privacy, human dignity, as well as freedom of speech, association and movement, and security of the person. He therefore recommends that any proposed digital contact tracing frameworks in their design, development and adoption must pass the legal muster and adhere to human rights prescripts relating to user-centric transparency and confidentiality, personal information, data privacy and protection.

In 'COVID-19 and the inclusion of learners with disabilities in basic education in South Africa: A critical analysis' Kamga examines the plight of one of the groups of disabled persons affected by the pandemic. The author points out that by imposing a complete lockdown in the country, the South African government introduced numerous measures to counter the negative impact these will have on ordinary citizens. The article points out that there were no attempts in these measures to accommodate the needs of learners with disabilities, a fact aggravated by limited number of special schools for these vulnerable groups of learners. The author concludes that one of the main lessons to be learned from this pandemic is that

there is a need to rethink how emergency education planning can be inclusive of children or learners with disabilities in the future.

Another article dealing with the plight of vulnerable groups is that of Akech entitled 'Exacerbated inequalities: Implications of COVID-19 on socio-economic rights of women and children in South Sudan'. In his article the author points out that the measures adopted by the Transitional Government of National Unity (TGoNU) in South Sudan to fight the COVID-19 pandemic are succeeding in flattening the curve. However, since no supportive social protection measures were put in place to cushion the impact on low-income households, particularly women and children, it has aggravated the problems of poverty in the country. The author recommends a number of measures to be put in place to strengthen democratic governance and the rule of law as catalysts for a well-managed emergency response that will protect vulnerable groups when dealing with such disasters in the future.

The last article is that of Nkuubi, 'When guns govern hospitals: Examining the implications of a militarised public health pandemic response on democratisation in Uganda'. According to the author, the conduct, power, authority and prominent position accorded to the Uganda Peoples' Defence Forces (UPDF) in the management of COVID-19 and the enforcement of the prevention measures have perpetuated a trend towards the militarisation of politics in the country. In his opinion, the pandemic has merely provided an opportunity to intensify the deliberate build-up and normalisation of the infiltration of the military in what hitherto have been spheres of operation normally reserved for ordinary civil servants. Unlike other jurisdictions where the military has been deployed because of their superior capability to adapt and provide extra and immediate professional services to support civilian authorities, in Uganda this deployment is seen by the author as part of President Yoweri Museveni's strategy to tighten his grip on power with the backing of the military. The article concludes that in such situations there is a need for accountability through parliamentary oversight in the deployment of the military.

All ten articles provide us with a glimpse of the impact of the different measures governments in some countries in Eastern and Southern Africa on human rights and the rule of law in their frantic efforts to control the spread of COVID-19. All indications are that the virus will not disappear as suddenly as it appeared. Perhaps even more importantly, there is a need to realise that now is also the time to prepare for the next pandemic. From the important lessons highlighted in the different articles, there are four that cut across all

the articles. First, in spite of the post-1990 reforms designed to ensure that emergency powers are not exercised in an arbitrary manner that threaten human rights, the rule of law and constitutionalism, the COVID-19 pandemic has revealed that these reforms did not go far enough. As a result of the weak legal framework, African governments found it more expedient to rely on and invoke legislative emergency powers which entails limited oversight rather than the constitutional emergency powers that usually go with elaborate oversight mechanisms. A more robust legal framework that can respond promptly, effectively and efficiently to emergencies, such as COVID-19, backed by strong oversight mechanisms is critical. This may not prevent all the abuses but could limit and reduce the incidents of repression and human rights violations that have taken place during the attempts to prevent the spread of this virus. Second, a clearly-defined legal framework for taking corrective measures to counteract the negative impact of emergency restrictions, especially on the poor and vulnerable members of society, must be an integral part of any reforms designed to prepare for future pandemics. Third, special mechanisms to expeditiously deal with abuses of emergency powers, particularly human rights abuses and corruption, are imperative if the threats to constitutionalism, the rule of law and human rights abuses under the pretext of dealing with an emergency are to be countered. In the final analysis, there is an urgent need to ensure that all mechanisms of oversight and accountability, particularly the media, civil society, national and international human rights monitoring bodies, are never weakened or compromised under the excuse of an emergency, as has been the case now with the COVID-19 pandemic. Finally, since history shows that measures introduced to deal with emergencies often outlive the phenomenon that triggered them, before the dust settles after COVID-19 has been brought under some control, there is an urgent need at both national, sub-regional and regional levels to review the experience and draw the relevant lessons. This probably is the best way to prepare for future emergencies.