



A LEGAL OVERVIEW OF THE IMPACT OF COVID-19 ON JUSTICE AND RIGHTS IN SOUTHERN AFRICA

SALC Policy Brief

No. 1 of 2020 (May 2020)

Tambudzai Gonese, Amanda Shivamba
& Anneke Meerkotter

**SOUTHERN AFRICA
LITIGATION CENTRE**

A Legal Overview of the Impact of COVID-19 on Justice and Rights in Southern Africa

In response to the COVID-19 pandemic, various countries in the Southern African region have put in place restrictions on gatherings, free movement, commerce and expression. Many of these measures limit human rights and result in criminal sanctions for breach. This policy brief looks at these criminalising provisions within the context of the enabling legal and constitutional environment in Lesotho, Malawi, Eswatini, South Africa, Zimbabwe, Botswana and Namibia. Despite their different approaches, the restrictions imposed by all the countries under review have the potential to infringe on fundamental rights.

“State of Emergency” versus “State of Disaster”

Botswana, Lesotho and Namibia have declared states of emergency in terms of their constitutions and enacted regulations under emergency legislation. Malawi, Zimbabwe, Eswatini and South Africa have used existing law in terms of the Disaster Management Act, the Civil Protection Act, and the Public Health Act, to declare states of disaster or public health emergencies. The similarity in terms between a state of emergency, a state of disaster and a public health emergency, has resulted in confusion around the powers these declarations grant the Executive and law enforcement agencies. The choice in whether they evoke a state of emergency or a state of disaster or public health emergency affects the subsequent powers available to the State, and the distinction between these different declarations is essential.

State of disaster in response to COVID-19
State of emergency in response to COVID-19



As can be seen from the haphazard responses by countries, the ambiguity in some laws makes it difficult for public officials to navigate between a state of emergency and a state of disaster or public health emergency. Namibia simultaneously declared a state of emergency in terms of the Constitution and a state of disaster under the Disaster Risk Management Act. COVID-19 has further been declared a formidable disease under public health laws in Malawi, Namibia and Zimbabwe. Botswana initially declared a public health emergency in terms of its Public Health Act before withdrawing the declaration and declaring a state of emergency instead. The then Prime Minister of Lesotho was taken to task by Parliament for declaring a state of emergency instead of using its powers under the Disaster Management Act. Shortly after this criticism, the Minister issued Regulations on COVID-19 purportedly passed in terms of the Public Health Act and the Disaster Management Act.

State of Emergency

A “state of emergency” is provided for in the Constitution, which stipulates the circumstances under which it can be pronounced, and the resultant powers of the Executive. The South African Constitution, for example, authorises a declaration of a state of emergency only through an Act of Parliament when the nation is threatened by war, natural disaster, or to restore peace and order. In terms of section 26 of the Namibian Constitution, the President can declare a state of emergency when there is a natural disaster or emergency “threatening the life of the nation or constitutional order”. The Zimbabwe and Botswana constitutions do not prescribe when a state of emergency may be declared, although there are parameters once it is announced.

A declaration of a state of emergency by a President will usually lapse in 7, 14 or 21 days unless Parliament extends it. This is the case in Botswana, Namibia and Lesotho. Extensions which do not follow the parameters of the Constitution are unlawful. For example, in May 2020, the El Salvador Supreme Court rejected a declaration by the President to extend the state of emergency without seeking the requisite parliamentary approval.

A state of emergency typically allows a State to derogate from certain fundamental rights to take extraordinary measures necessitated by the situation. The International Covenant on Civil and Political Rights does not allow the derogation during a state of emergency of the right to freedom from discrimination, the right to life, the prohibition against torture inhuman or degrading treatment, or non-consensual medical or scientific experiments, the prohibition of slavery or slave trade, imprisonment for contractual obligations, the principle of legality in criminal law and the right to recognition as a person under the law.

General Comment No. 29 of the UN Human Rights Committee guides how to implement public emergency powers:

- The public emergency must be so severe that it threatens the life of the nation;
- The duration of the declaration must be limited to the prevailing situation and should not become a permanent fixture of the legal system;
- The declaration must be expressed clearly; and
- The limitation of rights in a state of emergency should be defined in law and must not adversely affect the substance of the right.

The reviewed countries all have constitutional restrictions to limit the extent of government power during a declared state of emergency:

- The declaration or measures should be in terms of an Act of Parliament or should be authorised/endorsed by Parliament. The declaration of emergency by the President, in all cases, has varying degrees of Parliamentary oversight;
- Some restrictions on the derogation of certain rights during an emergency applies; and
- It clarifies the review powers of courts and tribunals, particularly in the case of detention associated with emergency measures.

Despite the guidance offered by constitutional provisions, a state of emergency empowers the Executive to take extraordinary measures in terms of the law to deal with the emergency. The Namibia and Botswana constitutions, for example, under a state of emergency, authorise the President to take any “necessary” regulatory measures to deal with the emergency.

The Malawi High Court, per Nyirenda J, held that the coronavirus is not a natural disaster and accordingly does not justify a declaration of a state of emergency in terms of section 45(3) of the Constitution. In a subsequent case, Ntaba J distinguished a state of disaster from a state of emergency and found that the coronavirus did qualify as a disaster under the Disaster Preparedness and Relief Act. The Court noted that the President had declared a state of disaster and not a state of emergency, and by extension that the permissible derogation of rights under a state of emergency did not apply. The Court held that following a declaration of a disaster, the State must ensure that subsidiary legislation complies with the law.

State of Disaster or Public Health Emergency

A “state of disaster” is usually provided for in terms of ordinary legislation that enables the State to take extraordinary measures to tackle an existing or threatened disaster. Examples include the South African Disaster Management Act and the Zimbabwe Civil Protection Act. In a health-related emergency, public health laws may also provide for extraordinary measures to mitigate or manage the crisis. These laws typically authorise the government to take sterner than usual measures to manage a disaster, which actions may result in the limitation of fundamental rights. However, because this is in terms of the general law, as opposed to emergency provisions, the restrictions are subject to the Constitution’s Bill of Rights.

Some disaster laws require that the President communicates his decision to the National Assembly but do not require parliamentary approval unless specific legislation is passed in response to the disaster (see for example Malawi and Zimbabwe). In Namibia, the President can declare a state of disaster which will remain in force until revoked by the President. In South Africa, this lack of legislated oversight prompted cabinet to claim collective responsibility for decisions taken, even though the powers in the Disaster Management Act are confined to the responsible Minister.

The UN’s Siracusa principles lay out some principles for limitation of rights:

- Restrictions to rights should be in terms of the law;
- In the interests of a legitimate general objective;
- Strictly necessary in a democratic society for purposes of achieving the stated objective;
- Based on scientific evidence; and
- Not arbitrary - both in the drafting and implementation of the law.

Although the Bill of Rights may provide for internal and general limitations to rights, such restrictions are usually required to not only be reasonable and rationally connected to the purpose they seek to achieve, but to also be reasonably justifiable in a democratic society. Where restrictions or limitations are justified as being for or ‘in the public health’, they should only be aimed at disease or injury prevention or provision of care for the sick and injured. They should further be in line with the International Health Regulations of the World Health Organisation (WHO).

The World Health Assembly first adopted the **International Health Regulations** in 1969. All the States in the region ratified the Regulations and subsequently domesticated it in Public Health Acts. The Regulations were aimed at addressing a situation of global risk to disease, as is the case with COVID-19. However, the revised Regulations were only adopted in 2005, and many countries’ Public Health Acts have retained outdated provisions which have proved ineffective in attending to the COVID-19 pandemic and are contrary to human rights norms - Eswatini’s Public Health Act dates to 1969; Lesotho and Malawi similarly have Public Health Acts which were last revised in 1970 and 1992, respectively. Ironically, new public health laws in Botswana (2013), Namibia (2015) and Zimbabwe (2018) retained many of the outdated provisions of earlier Public Health Acts.

Parliamentary and Judicial Oversight

The doctrine of separation of powers requires a system of checks and balances between the different arms of the State. The Zimbabwe Constitution, for example, while authorising the delegation of some law-making powers by Parliament to the Executive, imposes limits to the ability of Parliament to delegate its primary law-making functions. Only Parliament should be able to make laws that limit rights. Thus, in Zimbabwe, statutory instruments made by the Executive must be placed before Parliament for scrutiny.

The Malawi High Court has expressed its concern that laws relating to disaster and public health emergencies were drafted before the entrenchment of the Bill of Rights in its Constitution. Justice Kenyatta Nyirenda emphasised that decisions made in response to the pandemic must be authorised in terms of the law. The Court emphasised that the judiciary “were entitled to inquire into the legality of measures taken by the State in response to an emergency or disaster”.

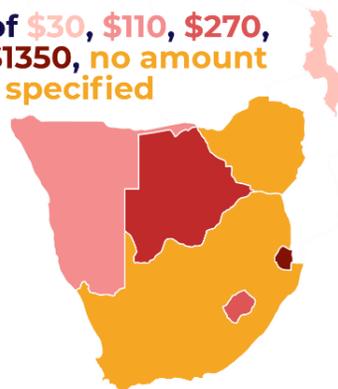
Malawi’s High Court has further taken on the task of assessing the constitutionality of a lockdown pronouncement, raising several legal questions: Could a lockdown be imposed without the attendant declaration of a state of emergency being declared? Was subsidiary legislation valid if it was promulgated and implemented under the Public Health Act but lacked parliamentary oversight?

Criminal Sanctions in Response to COVID-19

Criminal sanctions severely limit the right to liberty and other rights, and Parliament ought to oversee the content, enactment, aim and implementation of criminal penalties. Criminal sanctions have either been imposed through the emergency regulations enabled by the declaration of a state of emergency (e.g. Botswana, Namibia) or in terms of the regulations issued under the Disaster Management Act (e.g. South Africa) or Public Health Act (e.g. Zimbabwe).

The imposition of criminal sanctions appears to be sanctioned by the provisions of these enabling Acts. For example, section 27(2) of South Africa’s Disaster Management Act authorises the Minister of Cooperative Governance, under the declaration of a national state of disaster, to make regulations and directives, and also to require collaborating arms of government to make sector-specific directives to manage the disaster. The Minister is authorised, among other things, to regulate the movement of people and goods and to suspend or limit the sale or transportation of alcohol. These measures should be imposed only when necessary to “assist and protect the public, provide relief, protect property, prevent or deal with disruption or deal with the effects of the disaster”.

Fines of \$30, \$110, \$270, \$410, \$1350, no amount specified



Contravention of Regulations

Imprisonment of 1 month, 3 months, 6 months, 1 year, 2 years



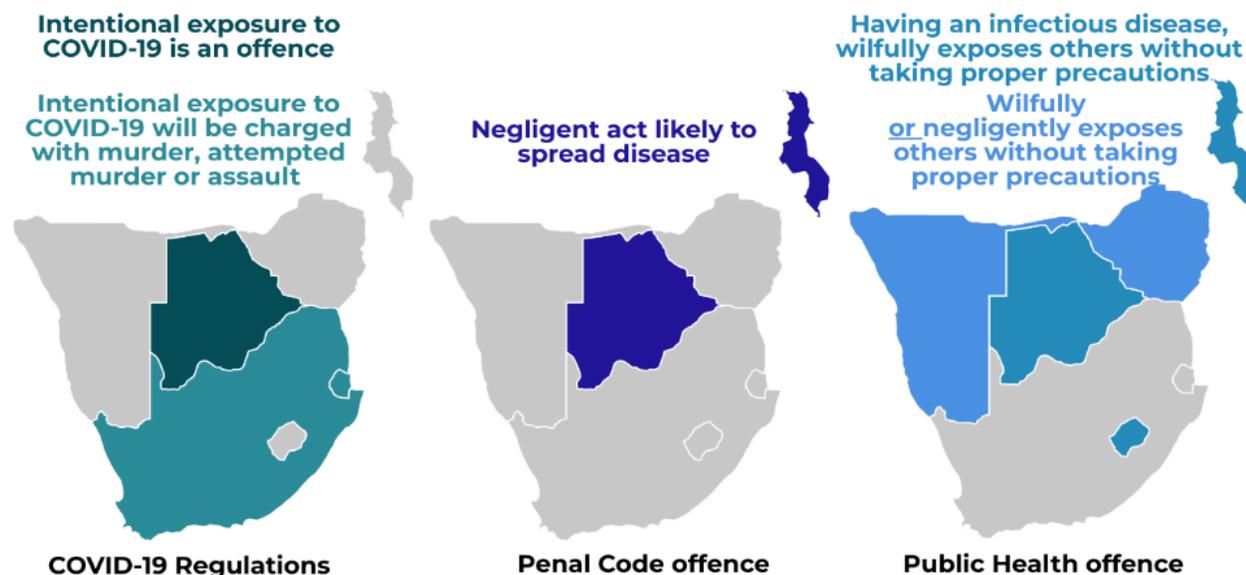
Contravention of Regulations

All the countries have imposed similar restrictions on assembly, by restricting gatherings, as a measure to limit transmission. There are also restrictions on movement, with all the States having imposed lockdowns, initially for at least 21 days, with extensions, as a more stringent means of containing transmission of the virus. Contravention of the regulations leads to arrest and penalties ranging from the payment of fines to imprisonment. There are also penalties for obstruction or restriction of enforcement officers. The sanctions imposed for violating these offences can, however, be disproportionate and would require parliamentary and judicial oversight.

Criminal Exposure

Most public health laws in the region make it an offence, while knowing that one has an infectious disease, to willfully expose oneself without taking proper precautionary measures in a public space, including a vehicle. In some of these laws, for evidentiary purposes, a person is considered to have known that they were infected. This offence and its presumption are problematic in the context of COVID-19 given the severe lack of access to testing and the fact that one can either be asymptomatic or that the symptoms can also be indicative of other illnesses, including the common cold. Proper precautions in the context of the public health messaging around COVID-19 would include sanitation, social distancing and wearing a mask, which places the poor at increased risk of being accused of not having taken appropriate precautions.

Under the South African and Eswatini regulations, anyone who intentionally exposes someone to COVID-19 may be prosecuted for an offence in terms of the criminal law, including assault, attempted murder, or murder. The text of these offences does not supply any guidelines on the elements of the crime and provides no safeguards against overbroad criminalisation and arbitrary application. The provisions criminalising COVID-19 exposure constitute a limitation on rights, particularly the rights to liberty and a fair trial. A new offence relating to COVID-19 may also breach constitutional barriers to delegated legislation.

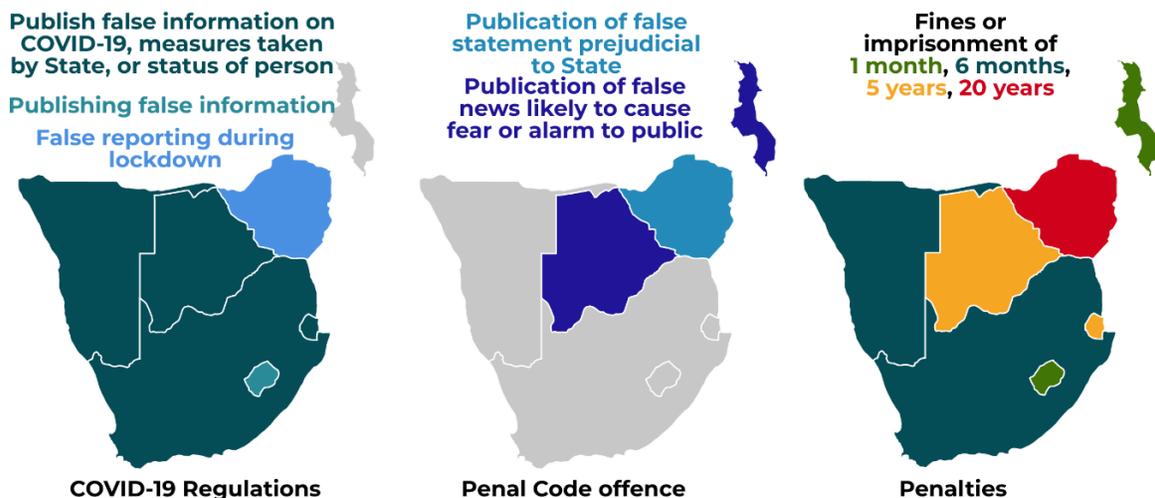


Criminal exposure to COVID-19

While States might justifiably want to curtail reckless behaviour amidst the uncertainties and fears brought by the virus, it is necessary to tread carefully. It has been shown, regarding the effects of HIV criminalisation, that such offences, in addition to potentially breaching rights, may harm the public health response, driving people underground due to fear of arrest after a positive test.

UNAIDS has issued a [statement](#), based on previous experiences with the HIV response, cautioning against criminalisation and urging a rights-based approach to public health. HIV Justice Worldwide has [warned](#) that criminalisation is not an evidence-based response to public health issues.

Expression and Publication Offences



Publishing false information

There are several concerns with restricting freedom of expression through the imposition of criminal sanctions. The ICCPR supports the protection of freedom of expression, which includes the right to “seek, receive and impart information”. Allowable restrictions to the right must be provided by law and be necessary for respect of the rights of others, national security, public order, public health or morals. In terms of [General Comment No. 34](#), the UN Human Rights Committee issued guidelines to States to avoid excessively punitive measures limiting freedom of expression. The Committee states that the use of the criminal law should only be considered in the most severe cases, and that imprisonment is not a suitable penalty. All the countries under review have constitutional protection of the right to freedom of expression, although it can be limited when necessary, in line with the provisions of the ICCPR. In terms of the [Siracusa principles](#), the limitation must be for a legitimate aim and proportionate to the purpose. States should not use more restrictive means than necessary to achieve the objective. Undue restrictions on the exercise of free expression are likely to stifle the flow of valuable information and make it difficult to hold public officials accountable.

Zimbabwe’s COVID-19 Regulations stipulate:

“For the avoidance of doubt any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State’s enforcement of the national lockdown, shall be liable for prosecution under section 31 of the Criminal Law Code (Publishing or communicating false statements prejudicial to the State) and liable to the penalty there provided, that is to say a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.”

This type of offence appears to be less about protecting public health than safeguarding the State against scrutiny of its management of the COVID-19 pandemic, with a very harsh sentence as deterrent. It has a chilling effect on freedom of expression and public accountability by the State. In a bizarre twist, the offence (section 31(a)(iii) of the Criminal Code) has been declared unconstitutional by the Constitutional Court of Zimbabwe in the case of *Chimakure & Others v Attorney General*. The Court held that the offence was overbroad, that the penalty was disproportionate, and that the offence had a chilling effect on the exercise of freedom of expression. Despite this, there have been prosecutions based on the impugned section. In Zimbabwe, the often-used offence under the Criminal Code of insulting the President has also been used in relation to COVID-19. For example, in April 2020 a Chipinge Councillor appeared in Court for insulting the President after he allegedly circulated a message on WhatsApp criticising the President for not providing support to people during the pandemic. The Harare High Court has issued an interim order preventing police from harassing and arresting journalists during the lockdown simply because their press cards expired. It was further directed that the order be communicated to police stations within 12 hours of such order.

COVID-19 and Police Brutality

Several countries have put in place measures that allow people to go out only for essential purposes and have put security forces in charge of keeping people off the streets. Concerns are growing that police forces around the world are using grueling and humiliating punishments to enforce a quarantine on the poorest and most vulnerable groups, including those who live hand-to-mouth and risk starving if they do defy lockdowns to seek work. In addition to an increase in police brutality during lockdowns, Transparency International has pointed out that there is likely to be an increase in bribery and corruption, which tend to thrive during times of crisis, when institutions and oversight mechanisms are weak and public trust is low. It is the responsibility of the Executive to give clear guidance to the police and military on the need to respect human rights during any lockdown, including the right to dignity of all persons.

In early April 2020, **Botswana** declared a six-month state of emergency due to COVID-19 and passed the Emergency Powers COVID-19 Regulations. Soon after the declaration, reports emerged of people being assaulted by the police for allegedly breaching lockdown regulations. The government issued a statement on 11 April 2020, condemning the assault of citizens and calling on law enforcement agencies to uphold the rule of law and respect for human rights. The Botswana Network on Ethics, Law and HIV/AIDS (BONELA) issued a statement condemning brutality by law enforcement agencies.

On 24 March 2020, the President of **South Africa** declared a three-week nationwide lockdown in response to COVID-19. The lockdown was subsequently extended with regulations being updated regularly. The President implored police and security forces to act with compassion for citizens and to empathize with people's fear of the virus and its potential impact on their lives and livelihoods. There have been reports of people who were assaulted and died at the hands of security forces.

On 15 May 2020, the South Africa High Court made declaratory orders on the necessity of law enforcement agencies upholding the law during the lockdown. The Court ordered that all police and military personnel be informed of their duty to report acts of torture or cruel, inhuman and degrading treatment which come to their attention. The judgment was particularly critical of South Africa's ability to enforce the Convention Against Torture and perform investigations required by the Convention. The Court held that there was no existing mechanism capable of conducting prompt, impartial and effective investigations of lockdown brutality and ordered the Ministers of Police and Defense to establish such a mechanism urgently.

On 27 March 2020, the President of **Zimbabwe** issued a directive for a 21-day lockdown to control the spread of COVID-19. President Mnangagwa has since extended the lockdown, with security forces ordered to enforce the lockdown. According to reports by the Zimbabwe Human Rights NGO Forum and reports by Heal Zimbabwe, there have been several assaults against some civilians by security force members for not complying with the regulations. In May 2020, a traditional leader and residents, represented by Zimbabwe Lawyers for Human Rights, filed a civil claim for damages in the Gweru High Court resulting from the violation of their rights and police brutality of law enforcement agents during the lockdown period.

On 1 April 2020, **Malawi**'s Minister of Health issued regulations which prescribe what must happen if, and when a lockdown takes effect. At a subsequent press conference the acting Inspector General of the Malawi Police Service gave mixed instructions on how police must enforce a lockdown. He stated that police would use considerable force while making sure not to infringe on human rights.

In March 2020, **Lesotho** Lawyers for Human Rights (LLHR) filed a court application against the Lesotho Defense Force and the Lesotho Mounted Police Service. The applicants sought a court order declaring that the state of emergency did not authorise these law enforcement agencies to assault or torture people who might be in breach of the regulations.

The prohibition against torture and cruel, inhuman, and degrading treatment are protected both under international law and countries' constitutions. Article 4 of the **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** provides that police officers shall "as far as possible, apply non-violent means before resorting to the use of force and firearms". Article 7 calls for proportionality in the amount of force used when required, for the adoption of reporting requirements when force or firearms are used, and for governments to ensure that "arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law".

On 16 March 2020, the UN human rights experts released a statement urging countries to ensure their responses to the pandemic are proportionate, necessary and non-discriminatory. They further urged States to avoid overreach of security measures in their response to the coronavirus outbreak and reminded States that emergency powers should not be used to quash dissent.

At a regional level, the African Commission on Human and Peoples' Rights has called on State Parties to the African Charter on Human and Peoples' Rights to take measures to ensure that police forces respect the dignity of individuals when discharging their duties. On 23 April 2020, the African Commission released a press statement urging States to take appropriate measures to give effect to the rights, responsibilities and freedoms enshrined in the Charter including through taking steps necessary for preventing threats to the life, safety and health of people.

Conclusion

Governments must ensure that when enforcing laws and developing other measures aimed at curbing the virus, they act lawfully and do not subject citizens to abuse and degradation. In many countries, a vast array of regulations has been passed in a short space of time and the criminal sanctions imposed through these regulations are significant. Accessible and understandable information about these laws are critical – both for law enforcement officials who enforce the laws, and for broader society who is expected to abide by them. It is important that we protect the separation of powers between the Executive, Parliament and judiciary, to ensure rights and justice for marginalised groups during this crisis.