

Human Rights in Africa in the Context of Covid-19

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In response to Covid-19, countries across Africa are declaring a state of emergency (these include Botswana, Sierra Leone, Liberia, Botswana, Ethiopia and Senegal, to name a few). Doing so allows the authorities, in times of urgent necessity, to take actions necessary to safeguard national security, maintain law and order, protect citizens' lives and property, keep essential public services working, concentrate relief resources and direct them to the areas of greatest need, and in general to restore normality. While providing a degree of flexibility necessary to respond to the current pandemic, declaring a state of emergency also brings significant risks, particularly those relating to human rights ([Ali Yildiz](#) and [Olga Hałub-Kowalczyk](#)). Emergency powers must, therefore, be monitored scrupulously and on an ongoing basis. Yet, this requires legal certainty and clearly defined parameters regarding what is and is not permissible under a state of emergency. This post argues that the current Covid-19 brings into stark relief a long-standing ambiguity relating to derogations versus claw-back clauses under the African system of human rights. In order to ensure uniformity in how emergency measures are monitored, this will require clarification sooner, rather than later.

Protecting Human Rights in Times of Emergency

Countries under states of emergency can be breeding grounds for human rights infringements ([Ali Yildiz](#) and [Olga Hałub-Kowalczyk](#)). Even when proscribed by law, states of emergency can lead to abuses of power through, for instance, the suppression of internal opposition to 'solidify autocracy' ([Radosveta Vassileva](#)). Despite restrictions placed on how states ought to legally curtail rights, states can act beyond these confines, impinging on the right to privacy, freedom of assembly and free movement, in ways that are overly excessive and disproportionate. In other cases, a de jure state of emergency can become de facto when measures are extended beyond the stipulated timeframe of a declared state of emergency ([Human Rights Watch](#)). This can mean measures enacted to limit rights temporary become the norm. As such, emergency powers, while often necessary to provide states the flexibility required to respond to situations like Covid-19 must be monitored. How though do we ensure that states of emergency do not lead to human rights violations or become the new norm? This question has taken on particular salience in the current context and invoked different responses (see different positions from [Alan Greene](#) and [Kanstantsin Dzehtsiarou](#)). It also poses questions for the African system of human rights.

Derogations or Claw-Back Clauses?

Derogations are one of the measures by which some international human rights instruments seek to prevent the normalisation of emergency powers and with it the potential for human rights abuses. The African Charter on Human and People's Rights, in contrast to other instruments, (see, for example, Art. 4(1) of the International Covenant on Civil and Political Rights), does not include the possibility of derogations. This was confirmed in the case of Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria the African Commission on Human Rights:

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest” (para. 41).

Including derogation clauses and defining what is and is not required to justify resorting to them, enables monitoring and enforcement mechanisms to assess state compliance. For instance, Human Rights Committee, pursuant to art 4(1) of the ICCPR both elaborates on the legal parameters of it (CCPR General Comment No. 29: Article 4) and monitors state activities to ensure that these requirements are met (see Human Rights Committee “Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee: Egypt (1993)). Alan Greene assesses, albeit in reference to derogations under Art. 15 European Convention on Human Rights (ECHR), that if the exigencies of the COVID-19 pandemic require exceptional measures and deviation from some dimensions of the full enjoyment of all human rights, then it is best to introduce those measures through a framework that entails a commitment to legality and to the full restoration of normalcy as soon as possible. For Greene, it would be the failure to use the derogation option that today ‘risks normalising exceptional powers and permanently recalibrating human rights protections downwards’. Derogations he suggests, provide a framework with which to monitor state actions during emergency and to ensure that any deviations from normal obligations are exceptional and do not become the norm (see further posts from Scheinin; Zghibarta; Dzehtsiarou; Istrefi).

The omission of a derogation clause could mean that during the Covid-19 pandemic, the Charter will be ignored, and will not exercise a restraining influence as states opt to deviate from existing obligations in order to respond to the pandemic. Conversely, the omission of a derogation clause could mean that the integrity of the entire African Charter remains applicable in all situations, including under a state of emergency declared in response to Covid-19. Derogation clauses, for some, are not measures by which states can protect human rights. Rather, they are viewed as States’ license to violate human rights as they “officially condone a deviation from pre-existing treaty commitments precisely when those commitments are most at risk of being undermined” (Hafner-Burton M et al). It is also unclear how this approach is compatible with

derogation clauses under state constitutions (various constitutions permit states to derogate from human rights obligations (See, as examples, Constitution of Nigeria (1999), sec 45(2); Constitution of Cape Verde (1992), art 26; 31; Constitution of Mozambique (2004), art 72; Constitution of Rwanda (2003), art 137; Constitution of Uganda (1995), art 44).

In response, while omitting a general right to derogate, the African Charter does contain numerous so-called clawbacks clauses. These clauses permit, in normal circumstances, breach of an obligation for a specified number of public reasons. For instance, under article 6 of the African Charter, liberty and security of the person and freedom from arbitrary arrest are to be protected “except for reasons and conditions previously laid down by law.’ Article 8 (freedom of conscience and religion) must be guaranteed “subject to law and order”, while freedom of assembly under article 11 must be protected “subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others.”

There has been concern expressed regarding the considerable margin of discretion left to individual states to enact legislation which will prescribe the conditions when individual civil and political rights may be suspended (Shaw 2007). For Cees Flinterman and Cathernine Henderson, claw-back clauses permit already unwilling states to engage in wanton and routine breach of the Charter obligations using the reasons of public utility or been criticized as offering governments extensive ability to infringe on certain individual rights.

To address these concerns, the African Commission on Human Rights has sought to limit the possibility of resorting to domestic legal systems as a response to blatant rights violation (see Jawara v The Gambia and Communication 275/03 – Article 19 / Eritrea). For instance, in Media Rights Agenda and Constitutional Rights Project v. Nigeria the Commission ruled that:

To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter (para. 66).

This approach supports the view of Kanstantsin Dzehtsiarou who, in light of the response of European states, argues that limitations such as these are especially crucial in case of emergency to hold on to human rights. They help to keep the authorities accountable and within certain limits because the crisis legislation giving new extensive powers to the executive branch can have long-lasting disproportionate effects on our lives, our freedoms and our societies. They provide a means, in the context of Africa, by which both Commission and the Court are directly engaged in monitoring the approaches adopted by African states in response to Covid-19.

Nevertheless, these developments notwithstanding, there are also problems associated with this approach. There is no end to limitations as proscribed in the African clawback clauses. While derogations can have the effect of monitoring the temporary failure to adhere to human rights obligations, clawback clauses include no such restriction. Limitation is usually a permanent restriction that partly takes away particular rights whereas derogation is a temporary suspension that completely eliminates certain rights in exceptional times. Including a derogation clause within the Charter could bring the African instrument directly in line with state constitutions. Of course, an argument ought to be made that it is state constitutions that must conform to international law. But here, international law as laid down by the ICCPR, which permits derogations on one hand, and the African Charter, which does not on the other, are themselves incompatible.

No Time for Uncertainty

As with Greene and Dzehtsiarou debate on the derogation question in the context of the ECHR, there are competing arguments, each with significant merit, regarding the best way to approach human rights and states of emergency in Africa. Yet, the interesting nature of these debates also masks a level of ambiguity that can have significant consequences on human rights during the ongoing pandemic. Are states to follow their constitutions? International law? Regional law? Does the omission of a derogation clause enable states to forum shop? What role for African monitoring mechanisms when, in direct contradiction of the Charter, states derogate pursuant to their constitutions? It is likely that both the Commission and the African Court on Human and Peoples' Rights will be called upon to rule on these matters in the context of Covid-19 responses in the future. However, this post argues that the current Covid-19 crisis brings into stark relief a long-standing discourse on the role of derogations and claw-back clauses on the continent and now, more now than ever, clarity on this long-standing debate is needed.

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