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Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa

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Summary: *The need to act swiftly in times of emergency gives governments a reason to exercise emergency powers. This is a legally valid and accepted practice in modern democracies. Post-independence African constitutions contained provisions that sought to regulate states of emergency, placing the emphasis on who could make such declarations and what measures could be taken, but paid scant attention to the safeguards that were needed to ensure that the enormous powers that governments were allowed to accrue and exercise in dealing with emergencies were not abused. As a result, these broad powers were regularly used to abuse fundamental human rights and suppress opponents of the government. In the post-1990 wave of constitutional reforms in Africa, some attempts were made to introduce safeguards*

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against the misuse of emergency powers. This article undertakes 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. Indeed, the COVID-19 pandemic has exposed the weaknesses of the constitutional reforms designed to check against the abuse of emergency powers. In most African countries, governments in dealing with the virus decided to act within the legislative framework, which subjects them to few checks rather than rely on the constitutional frameworks which in most cases provide for more elaborate checks. It is clear from the experiences of the past few months that most African constitutions never anticipated an emergency of such magnitude. The article concludes 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.

Keywords: *state of emergency; emergency powers; constitutional control; comparative analysis; COVID-19*

1 Introduction

It is widely acknowledged that states today face a myriad of threats and challenges, sometimes of a complex, unfamiliar and unpredictable nature. This may require the invocation of emergency powers to enable prompt and decisive action. In Africa the use of emergency powers is not a rare occurrence. One of the major causes of the dictatorships that quickly emerged in the post-independence period was the ease with which governments arbitrarily invoked and abused emergency powers to suppress dissent and entrench their power. For example, Egypt was under a continuous state of emergency for 44 years, one that began in the Arab-Israeli war of 1967 and ended only in the revolution that ousted Hosni Mubarak in 2011.¹ Another case is Zambia, which for 27 years remained under a state of emergency until its first multiparty elections brought new incumbents to power in 1991. There are many more examples of such abuses.

¹ During this period the state of emergency was lifted for 18 months in 1980 but was reimposed for another 31 years after Sadat's assassination in 1981. In spite of the January 2011 revolution, in which one of the demands was for an end to emergency rule, it remained in force until 31 May 2012. Since August 2013, however, a state of emergency has again been declared in many parts of Egypt. See further Y. Auf 'The state of emergency in Egypt: An exception or rule?', <http://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/> (accessed 20 July 2020).

The exercise of emergency powers is a recourse of democratic governance when unexpected national crises threaten the existence of the state, but in Africa prior to the 1990s it was the mainstay of most of the autocratic regimes in power. Because the legal framework regulating the conduct of governments during states of emergency was often weak, countries generally experienced high levels of repression and human rights abuses. This was particularly so in emergencies declared after the continent's frequent *coups d'état*, for decades the only means of alternation of power. Most of the independence constitutions that contained provisions regulating states of emergency focused on who could make such declarations and what measures could be taken, but paid scant regard to countermeasures to check the enormous powers governments were allowed to accrue and exercise in dealing with emergencies.

The COVID-19 crisis has reignited the debates on states of emergency, human rights and the rule of law. For the first time, a pandemic has resulted in more than half a million deaths globally.² Indeed, this is an emergency as never before which has challenged almost all aspects of the world economy. Because of the severe risk COVID-19 poses, nations across the world are responding using extraordinary measures. Invariably, the extraordinary measures have severe implications for human rights and the rule of law.

While recourse to extraordinary measures to deal with such emergencies is normal, what is also beyond debate is that these powers should not be abused: Not every threat warrants a declaration of a state of emergency. It therefore is not surprising that in Africa's post-1990 reform processes, constitutional designers grappled with the issue of regulating how and when governments should act when faced with crises that threaten the future and stability of the country. The question, however, is whether these reforms reduced the considerable risks that a declaration of a state of emergency poses to human rights and progress towards a culture of constitutionalism and respect for the rule of law. Indeed, the responses by African states so far have provided yet another opportunity to re-assess the successes or otherwise of these reforms.

In answering the above question, this article reviews modern African constitutions to assess the extent to which they contain provisions that guard against the misuse of emergency powers. It proceeds as follows: Part 2 briefly examines the influences that underlie the

² As of 26 July 2020 the total death toll is 648 612. See <https://www.worldometers.info/coronavirus/> (accessed 26 July 2020).

various approaches that Africa's constitutions have adopted towards states of emergency. Part 3 concerns the different types of state of emergency provided for under these constitutions. The next part is an overview of how effective the different frameworks are. Part 5 assesses current trends with a special focus on the COVID-19 crisis. The article ends with concluding remarks.

The main question the article addresses is whether Africa's post-1990 constitutional reforms have made states of emergency less prone to abuse than in the past.

2 International and regional influences on African approaches to states of emergency

The declaration of a state of emergency is a national matter regulated by the constitution and other pieces of legislation, but it also has an international dimension. This arises from the fact that constitutions and implementing legislation often attempt to balance two equally important yet competing needs. The first is to mitigate the threat that the emergency poses to national security and public order; the second is to ensure that citizens' human rights, the constitutional order and the rule of law are not compromised. Declaring a state of emergency creates a high risk of human rights violations. These can have far-reaching extraterritorial implications, attracting international attention to the state's conduct. It is for this reason that states are not entirely free to design their emergency legislation as they please. As such, there are certain binding and non-binding international and regional instruments that are supposed to provide guidance to states on how to design their emergency laws. In this part we examine these international and regional influences, and subsequently consider their implications.

At the international level, the only important international human rights treaty that provides some indication of the limits to what states can do in dealing with states of emergency is the International Covenant on Civil and Political Rights (ICCPR).³ Article 4(1) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties

³ It is worth pointing out that the first major international human rights instrument, the Universal Declaration of Human Rights of 1945, does not contain a specific provision to deal with states of emergency. The closest it comes to this is the general limitation provision in art 29(2) which provides that human rights can be limited for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Articles 4(2) to (3) of ICCPR provide other restrictions on the imposition of a state of emergency. It suffices to note that article 4(1) makes it clear that two fundamental conditions must be met for a state party to invoke this provision. First, the situation must amount to a public emergency that threatens the life of the nation; and, second, the state must have officially proclaimed a state of emergency. While the objective of article 4 is to provide for the exceptional measures that a state party may take in derogating from its obligations under the treaty, article 4(2) provides a list of rights from which no derogation is allowed.⁴

Three points need to be made about article 4(2). First, the existence of this list does not mean that states can freely derogate from all the other provisions of the treaty once a state of emergency has been declared. In fact, article 4(3) imposes an obligation on a state not only to inform the other state parties – through the United Nations (UN) Secretary-General – of its decision to derogate from certain obligations under the treaty, but also to specify its reasons for doing so.

Second, the inclusion amongst the non-derogable rights of freedom of thought, conscience and religion – which under article 18(3) are subject to restrictions – does not mean that none of these rights is subject to limitations or restrictions. This suggests that the prohibition is absolute unless the relevant provisions recognising the right qualify it in the way that article 18(3) does.

Third, the list of non-derogable rights was not intended to be exhaustive. In fact, the UN Human Rights Committee in its General Comment 29, adopted on 31 August 2001, gives several examples of rights that cannot be made subject to lawful derogation under article

⁴ The list of non-derogable rights consists of arts 6 (right to life); 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment); 8(1)-(2) (prohibition of slavery and servitude); 11 (prohibition of imprisonment for non-fulfilment of a contractual obligation); 15 (prohibition of conviction for an act or omission that was not a crime when it was committed); 16 (right to recognition as a person); and 18 (right to freedom of thought, conscience and religion). The obligations imposed by art 4(1) also apply to states that are parties to the Second Optional Protocol to the Covenant, aimed at abolishing the death penalty, as stated in art 6 of this Protocol.

4.⁵ These include the right to be treated with dignity and humanity; the prohibition of hostage taking, abductions or unacknowledged detentions; the international protection of minorities; the prohibition of deportation, forcible transfer of populations; and propaganda for war or advocacy of national, racial or religious hatred.

These are binding obligations with which all African states (with the exception of the Comoros island, which is not a party to this treaty) have undertaken to comply. It suffices to note that few African states have complied with the obligation to notify the UN Secretary-General immediately of the proclamation of a state of emergency and furnish full information about the measures taken as well as a clear explanation of any derogations to the treaty made during this period.⁶ It will shortly become evident to what extent these commitments are reflected in contemporary constitutions.

ICCPR aside, mention must be made of the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards), which were approved by the International Law Association in Paris in 1984.⁷ Although as soft law they are not binding on states, they reflect a consensus among experts as to the minimum standards that should govern the declaration and administration of states of emergency in response to matters threatening the life of a nation. Building on the work on the topic by many renowned scholars,⁸ the Paris Minimum Standards focus on helping to ensure that in emergency situations states refrain from suspending the basic human rights that are regarded as non-derogable. An analysis of the Minimum Standards confirms the view that article 4(2) of ICCPR was not intended to be an exhaustive list of non-derogable rights.

The Paris Minimum Standards do no more than what their name states: to provide minimum standards of a procedural and substantive nature to prevent emergency powers from being abused for ulterior ends to oppress citizens. As pointed out, the objective of the drafters is that these principles should be constitutionally entrenched. However, it does not seem to have been the aim that they be incorporated holus-bolus into a constitution: The incorporation of

5 See CCPR General Comment 29: art 4: Derogation during a state of emergency. CCPR/C/21/Rev.1/Add.11. General Comment 29 (General Comments), <http://www.refworld.org/docid/453883fd1f.html> (accessed 26 July 2020).

6 See F Viljoen *International human rights law in Africa* (2012) 334.

7 See RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79 *American Journal of International Law* 1072-1081.

8 According to Lillich, the Paris Minimum Standards used the work of Judge Buergenthal, Prof Hartman and Prof Higgins, as well as the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and a publication by the International Commission of Jurists; Lillich (n 7).

the basic principles contained in the Minimum Standards should suffice and the full text itself used as an interpretative guide.

At the regional level, unlike other similar treaties such as the European Convention on Human Rights of 1950 and the American Convention on Human Rights of 1969, the African Charter on Human and Peoples' Rights (African Charter) of 1981 contains no provisions that deal specifically with times of emergency – surprisingly so, in view of how detailed many of its provisions are.⁹ The silence of the African Charter on the matter has provoked debates among scholars. For example, Murray argues that derogation from the rights provided under the Charter may be permitted through the use of the claw-back clauses.¹⁰ A different view is expressed by Ouguergouz who, while acknowledging that states may derogate from the provisions of the African Charter, argues that in doing so they may instead rely on the rules relating to the termination and suspension of treaties under international law, generally, and the Vienna Convention on the Law of Treaties, 1969, in particular.¹¹

Some support for this approach is provided by Leandro Despouy, the Special Rapporteur on States of Emergency, who, in a study of several treaties, concludes that at a time of emergency states could invoke the international law principles of force majeure or impossibility of performance to derogate from their treaty obligations.¹² Although there are plausible reasons for the view that in times of national crisis states may derogate from some of their obligations under the African Charter, the silence of the Charter on the matter means that there is no control mechanism for preventing abuses.

Be that as it may, the African Commission on Human and Peoples' Rights (African Commission) has consistently rejected this argument on several occasions when, in response to complaints, states argued that the existence of a crisis justified their disregard of some of their obligations under the African Charter. The African Commission has held that since the African Charter does not allow for derogation,

9 The European Convention on Human Rights deals with this in art 15, which provides for '[d]erogations in time of emergency'. The American Convention on Human Rights contains provisions on '[s]uspension of guarantees' in art 27, which may be invoked in 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'.

10 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 126.

11 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 434.

12 See E/CN.4/Sub.2/1995/20; The 8th annual report of Mr Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (Report of the Special Rapporteur), www.internationalhumanrightsexicon.org/hrdoc/docs/emergencyreport10.doc (accessed 26 July 2020).

states cannot invoke situations of war or other emergencies as justification for derogating from their obligations. For example, in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*¹³ the Commission stated:¹⁴

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of the rights in the African Charter.

In the *Gambian coup* case, which concerned the suspension of the Bill of Rights in the Constitution by a new government formed after a *coup*, the African Commission held that 'the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter'.¹⁵

The Commission's approach, however, has been to treat attempts at derogation as simply another limitation.¹⁶ For example, in *Constitutional Rights Project & Others v Nigeria*,¹⁷ after reiterating its position that the African Charter does not contain or allow for any derogations, it pointed out that derogations may be allowed only if they satisfy the requirements of article 27(2) of the Charter. This means that derogations based on a lawfully-declared state of emergency are allowed to stand only if they are proportionate and necessary to protect the rights of others and maintain collective security, morality or common interest, and do not erode the right in question in a way that renders it illusory.

It thus is clear from the discussion that in periods of severe crisis African countries are not at complete liberty to act as they please within their national territories. This has implications for the way in which they design the legal frameworks for states of emergency, a subject to which we now turn.

3 Types of states of emergency in African constitutional practice

An analysis of how states of emergency are entrenched in modern African constitutions has to be understood against the background of

13 (2000) AHRLR 66 (ACHPR 1995).

14 *Commission Nationale des Droits de l'Homme et des Libertés* (n 13) para 21.

15 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 49.

16 See Viljoen (n 6) 334.

17 (2000) AHRLR 227 (ACHPR 1999). For other cases, see *Media Rights Agenda & Others v Nigeria*, (2000) AHRLR 200 (ACHPR 1998) (*Media Rights case*) para 67; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

what constitutes a state of emergency and the debates surrounding this topic. Equally important is the distinction between a constitutional and legislative approach to dealing with states of emergency.

3.1 The complexity of emergencies

While there is near-universal agreement that states of emergency are exceptional circumstances calling for special measures, emergency situations can take an infinite variety of forms, each generating different effects that require a different response. Distinguishing between forms of emergencies thus is important.

An 'emergency' can be said to refer to any sudden or unexpected grave situation that threatens the existence of a country and its political, social and economic order. It may have an exogenous or endogenous origin.¹⁸ It may result from a pandemic, a natural catastrophe such as flooding or earthquakes, or the outbreak of disease, famine or any other natural cause attributable as an act of God; it may also result from man-made causes, such as war, invasion, revolution and rebellion. The cause may also stem from a combination of natural and man-made forces, such as when an emergency results from a pandemic that might not have occurred but for man-made acts or omissions. For example, cholera or Ebola outbreaks may be regarded as man-made inasmuch as they stem from a failure of governance and lack of management of national resources to address health issues. The controversies surrounding the origin of COVID-19 make it difficult to determine whether it should be regarded as a natural or man-made emergency.¹⁹ However, it generally is classifiable as a natural emergency.

Although the exact definition of emergency situations often depends on the national legislator, as guided by constitutional and international legal instruments the country has ratified, some critical issues must be considered in this regard. As noted, one of these is the dynamic character of emergencies. What may give rise to an emergency today may not necessarily do so in two decades' time if it can be predicted with reasonable certainty and precautions are taken. For example, advances in technology may make it possible to determine when a storm will occur and so enable the government to adequately prepare for it without having to invoke emergency

18 See J Ferejohn & P Pasquino 'The law of exception: A typology of emergency powers' (2004) 2 *International Journal of Constitutional Law* 231.

19 It is generally stated that its immediate source is unknown. See MA Shereen et al 'COVID-19 infection: Origin, transmission, and characteristics of human coronaviruses' (2020) 24 *Journal of Advanced Research* 91.

powers. Similarly, advances in medicine and public health may reduce the potentially devastating effects of pandemics such as COVID-19.

Determining in advance what constitutes an emergency perhaps is one of the most complicated issues with which constitution drafters have to grapple. A definition that is too broad may cause as many problems as one that is too narrow. Broad or vague definitions not only create leeway for over-reaction but can be exploited by opportunistic politicians to suppress their opponents, as happened in most African countries before the 1990s. A narrow definition is equally problematic, with Haiti providing the best example of this. Its Constitution limited the definition of emergency situations to invasion and civil war, thus excluding natural disasters.²⁰ As a result of the restrictive wording, the government had to ignore the applicable constitutional provisions when an earthquake of 7,3 magnitude struck the country and killed more than 230 000 people, including 25 per cent of the civil servants in the capital, Port-au-Prince.

If one considers an emergency as a sudden, unexpected threat, this raises the question of whether international terrorism, which since 9/11 has become a permanent feature of our lives, qualifies as an emergency that warrants the invocation of emergency laws. If this were so, would it not make a state of emergency the norm rather than the exception? From this perspective, it may be argued that a general threat of emergency – much like the general threat of natural disaster (such as that facing a district prone to earthquakes or seasonal storms) – does not justify the declaration of a permanent state of emergency. A similar issue can also arise with regard to the COVID-19 crisis which has made the exercise of emergency powers some type of a ‘new normal’ across the world. Undoubtedly, the situation is novel but that is not a justification for the exercise of emergency powers in perpetuity considering that there are emerging insights on the virus mitigating its potential deleterious effect. It is because of this complex, dynamic nature of ‘emergency situations’ as existential realities that there is debate on what approach to adopt in dealing with states of emergency as politico-judicial realities.

3.2 The legal versus the extra-legal regulatory framework

Before we examine the two main competing approaches, it is worth alluding to the debate over whether a state of emergency should

²⁰ Art 278 of Haiti’s Constitution 1987.

operate within or outside the normal legal order.²¹ In this regard there are two schools of thought. The first, led by Carl Schmidt and many other scholars,²² is to the effect that a state of emergency cannot operate within the legal order. A contrasting opinion is that of scholars led by Hans Kelsen, who contend that although there are fewer statutory constraints in cases of national emergencies, all executive and administrative organs are bound by the constitution since this is the basis of their existence and the source of their emergency powers.²³

Be that as it may, given the unforeseeable – often unavoidable – emergencies that occur at some point in every state, the critical question is how best to deal with these in a manner that ensures that the expanded and extraordinary powers governments assume are not abused at the cost of citizens' fundamental rights. It comes down to finding an appropriate legal framework that balances effective emergency mitigation with respect for democratic principles and the rule of law. Looking at the problem from this perspective and in light of Africa's record of misusing state of emergency powers, there can be little confidence that a state that declares a state of emergency outside of a clearly-established legal framework can be trusted to act in a way that respects the supremacy of the constitution and the rule of law. Thus, in spite of the contention of the Schmittian school of thought, it cannot be gainsaid that there still is a need for a clear and predictable legal regime in Africa. We will now consider this in greater detail.

3.3 The constitutional versus the legislative regulatory model

A review of contemporary practice suggests that there are two main approaches to regulating states of emergency: The one may be termed the legislative emergency powers model; the other, the

21 For an overview of these debates, see A Khakee 'Securing democracy? A comparative analysis of emergency powers in Europe' Geneva Centre for the Democratic Control of Armed Forces (DCAF), Policy Paper 30, https://www.files.ethz.ch/isn/99550/pp30_anna_khakee_emergency_powers.pdf (accessed 26 July 2020) 6-9; and A Zwitter 'Constitutional reform and emergency powers in Egypt and Tunisia' (2015) 7 *Middle East Law and Governance* 257.

22 G Agamben *State of exception* trans K Attell (2005). See also M Tushnet (ed) 'Emergencies and the idea of constitutionalism' in M Tushnet *The constitution in wartime: Beyond alarmism and complacency* (2005) 39.

23 H Kelsen *Introduction to the problems of legal theory: A translation of the first edition of the Reine Rechtslehre or pure theory of law* (1997) 289. Ackermann also seems to be in support of the Kelsenian approach where he advocates an 'emergency constitution' for the US, arguing that this is the best way to minimise the risk of a creeping, ongoing erosion of civil liberties in the name of the 'war against terrorism'. See B Ackermann 'The emergency constitution' (2004) 133 *Yale Law Journal* 1029.

constitutional emergency power model.²⁴ The legislative emergency powers framework rests on the idea that the executive needs an explicit expression of popular support in order to take the extreme measures that are needed to effectively deal with an emergency threatening the existence of the state and its citizens. The democratically-elected legislature provides the legitimacy that the executive needs so as to act in a manner that often interferes with and limits some of the fundamental human rights of citizens.

According to Ferejohn and Pasquino, the advantage of this approach is that it is assumed that legislative intervention will be temporary and prevent emergency laws from 'corrupting the formal system'.²⁵ However, the authors point to Britain and the United States as countries where the Defense Against Terrorism Acts and Patriot Act, respectively, were enacted as temporary measures but in effect have become permanent fixtures.²⁶ In addition to this danger that emergency laws meant to be temporary become embedded in the normal legal system in a permanent manner, there are two other weaknesses in the model.

First, the country may be faced with an emergency of great magnitude yet may have no time to wait for a legislative delegation, which could be slow in coming, particularly so when the legislature is not in session or does not find it politically expedient to act timeously. Matters could be even worse if the legislature is not physically able to meet. For example, to refer again to the Haitian crisis, the Constitution provides that the declaration of a state of emergency requires the countersignature of the Prime Minister and all other government ministers, as well as an immediate determination by Parliament of the scope and desirability of the President's decision. This was a literal impossibility: Many of the ministers and parliamentarians had died in the earthquake.

A second, perhaps more serious, weakness of the legislative emergency powers model is that legislative delegation of powers could all too easily be obtained in circumstances that are not genuine emergencies. The approval of executive proposals by and large is a mere formality in the many African parliaments that are under the increasing control of dominant parties and their party-whip systems. Even in the few countries where the ruling party lacks

24 Further models are suggested by other authors. Eg, O Gross & F Aolain *Law in times of crisis: Emergency powers in theory and practice* (2006) examine three models of emergency regulations, namely, the accommodation model, the law for all seasons, and the extra-legality model.

25 Ferejohn & Pasquino (n 18) 219.

26 As above.

a parliamentary majority, or holds only a small, unpredictable one, illegal financial inducements are used to buy votes to support any proposals the government wants approved.²⁷ For all these reasons, however, the adoption of the legislative emergency powers model in Africa would give *carte blanche* to governmental arbitrariness and be exploited to the full by the continent's unruly presidents.

The second approach is the adoption of the constitutional emergency powers model. This involves the entrenchment in the constitution of the circumstances when emergency powers can be invoked and of who can invoke them. This approach entails a number of inherent control mechanisms to guard against any abuse of these powers. Constitutional emergency powers enjoy a particular status: They are based on the original general will of the people, and thus have considerable democratic legitimacy. The fundamental principle of constitutional supremacy should ensure that the legal framework is not vulnerable to abuse by the executive or arbitrary changes by transient and opportunistic parliamentary majorities for their own selfish political ends. To this extent, the approach provides the best way of mediating the tension between invoking and deploying emergency powers, on the one hand, and protecting democracy, the rule of law and constitutionalism, on the other.

However, as the example of the earthquake in Haiti demonstrates, the effectiveness of this approach to a large degree depends on whether the manner in which the powers are couched actually achieves this balance. Have enough powers been given to the body responsible for dealing with emergencies, usually the executive, and are there sufficient checks to prevent these powers from being abused? Before turning to these issues, it is worth noting that the difference in practice between the legislative and constitutional emergency models often hinges on the extent to which such questions are addressed in substantive detail. A constitutional regulatory system that does nothing more than require parliament to adopt the relevant laws in effect is no different from a legislative emergency model.

Although the constitutions of all African countries contain provisions on states of emergency, many of these constitution did not invoke this power in dealing with the COVID-19 pandemic

27 Eg, on two separate occasions President Yoweri Museveni paid parliamentarians huge bribes to induce them to vote in favour of repealing the term and age limits in the 1995 Ugandan Constitution. See AR Reuss & K Titeca 'Removing the presidential age limit in Uganda: The power of cash and coercion', <https://www.opendemocracy.net/kristof-titeca-anna-reuss/removing-presidential-age-limit-in-uganda-power-of-cash-and-coercion> (accessed 26 July 2020).

but rather chose to go the way of emergency powers contained in ordinary legislation. We will subsequently return to this issue.

4 Constitutional framework for states of emergency

African constitutions differ considerably in the nature, scope and potential effectiveness of the legal framework they provide for dealing with emergencies and in the safeguards they furnish for ensuring that the powers needed to address these situations are not abused. This part of the article begins by examining the constitutional framework and then assesses the extent to which the various approaches provide mechanisms for effectively dealing with emergencies and yet limiting the risk that powers will be abused as they were in the pre-1990 era of one-party rule or military dictatorship.

Four main issues are considered, namely the general constitutional framework for declaring a state of emergency; the nature of the declaration of the state of emergency; the extent to which fundamental human rights are protected during the declaration of a state of emergency; and the control and oversight institutions and mechanisms put in place to protect against any abuses.

While it is admitted that focusing only on constitutional texts may not reflect the full picture in any country, particularly in the civil law-based constitutional traditions in Francophone, Lusophone and Hispanophone Africa where organic laws are common, it has to be reiterated that in the absence of a detailed constitutional framework with adequate checks against abuse of emergency powers, there scarcely is any reason, given Africa's poor record, to believe that such abuse can be avoided through ordinary legislation. This is especially true for the approach of African countries towards COVID-19, many of which countries are principally using emergency powers contained in ordinary legislation. Conversely, entrenchment in a constitution, in and of itself, is no guarantee against abuse of emergency powers. What is crucial is the scope of such entrenchment. This is what we now discuss.

4.1 An overview of the constitutional framework

Barring the Sahrawi Democratic Republic, of which the fairly short Constitution contains no provisions dealing with declarations of a state of emergency, all the other 55 African states have adopted the constitutionally-entrenched model of regulating emergency situations. As noted, what distinguishes the constitutionally-regulated emergency model from the legislative regulatory approach

is the constitution's depth of articulation of the nature and scope of the framework for intervening in emergencies and safeguarding rights. From this perspective, an analysis of the relevant provisions in the various constitutions reveals three main patterns, namely, the minimalist, moderate and elaborate constitutional regulatory approaches.

In the minimalist category are 27 countries²⁸ of which their constitutions, while containing provisions that regulate declarations of a state of emergency, provide little detail defining the nature, scope and limitations on the exceptional powers that are conferred on the executive. In other words, there are inadequate safeguards to prevent the abuse of these powers. For example, article 115 of the Burundi Constitution empowers the President to take 'all measures required' to deal with an emergency. All the President is required to do is to consult *ex post facto* certain persons or institutions, such as the bureaus of the National Assembly and the Senate, and 'inform' the nation by way of a message. Similarly, under article 9 of the 1996 Cameroonian Constitution, the President may declare a state of emergency where the 'circumstances so warrant' and exercise such extraordinary powers as may be conferred upon him by law; he is required only to 'inform the nation of his decision by message'. Article 131(6) of the Somali Constitution grants the President special powers that include the powers to violate the Constitution where such 'violation is absolutely necessary for the purposes of dealing with the emergency situation'.

In constitutions of this type, constraints on the exercise of emergency powers depend on the goodwill of the presidents. These powers, in other words, are absolute and were the lifeblood of Africa's pre-1990 dictators.

By contrast, the provisions in the constitutions of the 10 countries in the moderate category attempt to provide a slightly more detailed framework to regulate declarations of a state of emergency.²⁹ There

28 See arts 58, 59 and 106 of the Burkina Faso Constitution of 1991; art 61 of the Djibouti Constitution of 1992; art 92 of the Somaliland Constitution of 2001; art 29 of the Burundi Constitution of 2005; art 9 of the Cameroon Constitution of 1996; art 12(3) of the Comoros Constitution of 2001; art 154 of the Egyptian Constitution of 2014; arts 48 and 74 of the Côte d'Ivoire Constitution of 2000; art 29 of the Guinea Bissau Constitution of 1984; art 18 of the São Tomé Constitution 1990; art 61 of the Madagascar Constitution 2010; art 131 of the Somalia Constitution of 2012; arts 189-191 of the South Sudan Constitution of 2011; arts 210-212 of the Constitution of Sudan of 2005; art 110 of the Ugandan Constitution of 1995; secs 36-37 of the Swaziland Constitution of 2005; and secs 30-31 of the Zambian Constitution of 2016.

29 See art 27 of the Eritrean Constitution of 19 of 1997; sec 305 of the 1999 Nigerian Constitution of 1999; sec 27 of the Botswana Constitution of 1966;

are, however, flaws of one type or another that may undermine the effectiveness of these provisions, particularly in the hands of unscrupulous leaders wishing to use a state of emergency as a pretext to suppress legitimate opposition to their rule. For example, this may result from the vague manner in which the constitution defines a state of emergency and its failure to indicate the extent to which fundamental rights may be limited.³⁰

In the last category, 14 countries³¹ have constitutional provisions that provide a fairly elaborate framework for regulating the exercise of emergency powers. What distinguishes the countries in this category from the others is that they have a basic framework as to what constitutes an emergency, what action can be taken, what the limits of these actions are, and what mechanisms are in place for checking against abuse. Nevertheless, the extent to which these measures could be effective in checking governmental excesses varies from country to country, depending on the nature of the declaration of the state of emergency – an issue examined below.

4.2 The nature of the declaration of the state of emergency

Declaring a state of emergency entrains a number of questions. Who declares it? Under what circumstances? What are the mechanisms for making the declaration? What is the duration of a state of emergency?

The question of who declares a state of emergency is inextricably linked to the type of emergency in question. We are using the expression ‘state of emergency’, yet while this seems to be almost inveterate, our review of African constitutions shows that a variety of other terms and expressions are employed to refer to the type of crisis that may warrant the declaration of a state of emergency. These

arts 293, 294 and 296-299 of the Cape Verde Constitution of 1992; art 30 of the Constitution of the Central African Republic of 2016; arts 87, 88 and 124 of the Chadian Constitution of 1996; arts 59 and 74 of the Moroccan Constitution of 2011; sec 94 of the Tanzanian Constitution of 1997, arts 85-88 of the Liberian Constitution of 1984; and art 26 of the Namibian Constitution of 1990.

30 See, eg, sec 17 of the Botswana Constitution of 1966 and sec 305(3)(b) of the 1999 Nigerian Constitution.

31 See arts 58, 119 and 204 of the Angolan Constitution of 2010; secs 34-36 of the Gambian Constitution of 1996; sec 23 of the Lesotho Constitution of 1993; arts 61, 85, 114, 119, 145, 148 and 156 of the DRC Constitution of 2005; sec 18 of the Mauritius Constitution of 2009; sec 37 of the South African Constitution of 1996; sec 45 of the Malawian Constitution of 1994; arts 72, 161, 166 and 283-290 of the Mozambican Constitution of 2004; sec 113 of the Zimbabwe Constitution of 2013; art 58 of the Kenyan Constitution of 2010; art 93 of the Ethiopian Constitution of 1995; art 31 of the Ghanaian Constitution of 1992; arts 41-43 of the Seychelles Constitution of 1993; and secs 29 and 171 of the Sierra Leone Constitution of 1991.

include 'state of urgency';³² 'state of siege';³³ 'martial law';³⁴ 'state of public emergency';³⁵ 'state of war';³⁶ 'state of constitutional need';³⁷ 'state of exception';³⁸ 'state of alert';³⁹ 'state of alarm';⁴⁰ 'state of necessity';⁴¹ and 'state of readiness'.⁴² Some constitutions use a combination of such expressions; for example, 'state of urgency and state of siege'⁴³ and 'state of siege and state of emergency'.⁴⁴

Do these differences in terminology matter? A few constitutions make practical distinctions between the terms and expressions, especially where they are used in combination. At first glance the distinctions appear to indicate different types of intervention based on the gravity of the crisis that warrants intervention, or on who may make the relevant declarations, or both. A number of constitutions seem to make this distinction on the basis of the gravity of the crisis.

Two examples will suffice. The first is the Cameroonian Constitution which in article 9(1) authorises the President to declare a *state of emergency* 'where the circumstances so warrant'; by contrast, article 9(2) authorises him to declare a *state of siege* 'in the event of a serious threat to the nation's territorial integrity or its existence, its independence or institutions'. The second example is the Constitution of Mozambique which provides for both a state of siege and state of emergency. Article 283, with the heading 'choice of declaration', prescribes that

[w]hen the circumstances giving rise to the declaration are of a less serious nature, a declaration of emergency shall be chosen, provided that the principle of proportionality shall be respected in all cases, and the duration and extent of the measures used shall be limited to

32 Eg, see art 58 of the Burkina Faso Constitution of 1991.

33 Eg, see art 74 of the 2011 Constitution of Morocco of 2011.

34 Eg, see art 61 of the Djibouti Constitution of 1992; art 29 of the Constitution of Guinea Bissau of 1984; and art 61 of the Constitution of Madagascar of 2010 (which also refers to state of necessity and state of urgency).

35 Eg, see sec 17 of the Botswana Constitution of 1966; secs 27 and 35 of the Constitution of The Gambia of 1996; art 30 of the Constitution of Zambia of 2016; and sec 113 of the Constitution of Zimbabwe of 2013.

36 Eg, see arts 119 and 204 of the Angolan Constitution of 2010.

37 Eg, see art 204 of the 2010 Angolan Constitution of 2010.

38 Eg, see art 115 of the Constitution of Burundi of 2005.

39 Eg, see art 30 of the Constitution of Central African Republic of 2016.

40 Eg, see art 41 of the Constitution of Equatorial Guinea of 1982 (which also refers to state of exception and state of siege).

41 Eg, see art 61 of the Constitution of Madagascar of 2010 (which also refers to state of necessity and state of urgency).

42 Eg, see art 29 of the Constitution of Gabon of 1991 (which also refers to state of siege, state of alert and state of urgency).

43 Eg, see arts 87 and 88 of the Constitution of Chad of 1996; arts 105-107 of the Constitution of Algeria of 2013 (this is in addition to referring to 'state of emergency'); and art 94 of the Constitution of Togo of 1992.

44 Eg, see art 9 of the 1996 Constitution of Cameroon; arts 293 and 294 of the Constitution of Cape Verde of 1992; arts 282 and 283 of the Constitution of Mozambique of 2004; and art 94 of the Constitution of Tanzania of 1997.

what is strictly necessary for the prompt restoration of constitutional normality.⁴⁵

Only the Gabonese Constitution makes a formal distinction based on both the level of the threat and the person who is authorised to intervene. In this respect, article 25 authorises the President to declare a state of emergency or state of siege, while article 29(a) reserves declarations of a state of readiness and state of alert to the Prime Minister.

A careful analysis of the wordings of these provisions suggests that the terminology 'state of emergency' adequately covers all the different situations contemplated. In the absence of any further clearer guide, it is doubtful whether, for example, the criteria of 'where circumstances warrant' or circumstances of 'a less serious nature' provide an objective standard for determining if a particular crisis warrants one type of a declaration rather than the other. It may be concluded that the apparent differences are purely of a semantic nature and that the decision to declare the one type of emergency and not the other is a matter of political judgment rather than a legal one guided by the gravity of the crisis.

The clarity with which the different constitutions define the circumstances that warrant the declaration of a state of emergency as well as the processes for making these declarations informed our

45 Other examples are the Algerian Constitution which in art 105 authorises the President, after consultation with specified institutions, to declare a state of urgency or a state of siege in 'case of compelling necessity'. By contrast, art 107 authorises him, after similar consultations, to declare by decree a state of emergency 'whenever the country is threatened by an imminent danger to its institutions, its independence or its territorial integrity'. The Constitution of Cape Verde authorises the President in art 293 to declare a state of siege 'in case of actual or imminent aggression against the national territory by foreign forces or serious threat or disturbance of the constitutional order', but a state of emergency under art 294 in case of 'public calamity or disturbance of the constitutional order the seriousness of which does not warrant the declaration of the state of siege'. Art 131 of the Constitution of the Republic of Congo of 2002 provides for the declaration of a state of urgency 'when an imminent peril appears, resulting from grave threats to the public order or in the case of events presenting, by their nature and their gravity, the character of public calamity or of national disaster', and a state of siege 'when an imminent peril appears, resulting from, either a characterised foreign threat, or from an armed insurrection, or from grave acts occurring during the state of emergency'. Under art 26(1) of the Namibian Constitution of 1990, a state of national defence or public emergency may be declared when there is a threat to the 'life of the nation or the constitutional order', while under art 26(7) martial law is to be declared when there is a state of national defence involving another country or when civil war prevails. Finally, art 137 of the Rwandan Constitution of 2003 authorises the President to declare a state of siege 'in the event of effective or imminent aggression by a foreign state, [or a] serious threat or danger to the constitutional order', and a state of emergency 'when the country faces a public or constitutional crisis whose gravity does not warrant the declaration of a state of siege'.

classification of African constitutions into minimalist, moderate and elaborate categories. Several observations may be made about the general pattern that emerged.

First, African constitutions vary considerably in the manner in which they regulate the process for declaring a state of emergency and its duration. These differences are particularly significant when it comes to the role that other institutions, mainly the legislature, play in the process. In nearly all the countries the President declares the state of emergency. While there are many exceptions to this,⁴⁶ it is worth noting that the 1992 Constitution of Cape Verde is silent on who actually is responsible for declaring a state of emergency.

Second, the process of making the declaration is important, as it determines the extent to which those charged with doing so cannot simply act on a whim. From this perspective, two patterns emerge. The first is where the President alone decides when a state of emergency is to be declared and his only obligation is to inform the nation by way of a 'message'.⁴⁷ There also are many other constitutions that authorise the President alone to declare a state of emergency but impose on him a duty to obtain parliamentary approval within a period that ranges in some constitutions from 24 hours to 14 days.⁴⁸ In many of these instances, the constitution requires the President to submit to parliament all the evidence that justifies the invocation of the extraordinary measures that go with the declaration of a state of emergency. The effect of this is that the prior declaration made by the President is effective subject to it being confirmed or revoked by parliament.

A more common pattern is the requirement that the President, or whoever is authorised to make a declaration of a state of emergency,

46 The exceptions to these are Swaziland where, under sec 36(1) of the 2005 Constitution, the King makes the declaration. In the other two African kingdoms, Lesotho (see sec 23(1)) and Morocco (see art 74 of the 2011 Constitution), the Prime Ministers make the declarations. The other exception is Ethiopia where, under art 93(2)(a) of the Ethiopian Constitution the state of emergency is declared by the Council of Ministers.

47 See art 9 of the 1996 Constitution of Cameroon. Art 41 of the 1982 Constitution of Equatorial Guinea is to a similar effect, by only requiring the President to inform the Chamber of Representatives, and the vague wording of art 131 of the 2002 Constitution of the DRC which can be interpreted to have a similar effect, that is, that the President is free to act solo.

48 See, eg, sec 17(1) of the 1966 Constitution of Botswana; sec 34(2) of the 1996 Constitution of The Gambia; sec 18(2) of the 1968 Constitution of Mauritius; art 92 of the Somaliland Constitution of 2001; art 94 of the 1992 Constitution of Togo; secs 305(1) and (2) of the 1999 Constitution of Nigeria; sec 45(3) (b) of the 1994 Constitution of Malawi; art 285(1) of the 2004 Constitution of Mozambique; and sec 113(2) of the 2013 Constitution of Zimbabwe.

does so only after consultation,⁴⁹ deliberation⁵⁰ or obtaining the opinion⁵¹ or advice⁵² of others. Those that are required to be involved in the process include the cabinet, the presidents of the national assembly and senate, the bureaus of the national assembly and senate, or the president of the constitutional court. The significance of this approach is that it compels the President to involve others in the decision-making process even if, at the end of the day, he is not under any obligation to take account of their views in the final decision he makes.

A far more effective process is provided by some constitutions which require that there is prior approval of the President's plans before a declaration of a state of emergency becomes effective. An example is article 210(1) of the Sudanese Constitution of 2005, which requires the President to act only after obtaining the consent of his Vice-President.⁵³ As mentioned, while this is a more effective way of guarding against presidential abuse of emergency powers, its practical effect depends, however, on the constitution's providing sufficient mechanisms to ensure that the President can be compelled to act in accordance with its provisions. Interventions, whether prior to or after the formal declaration of emergency by presidents, are useful only to the extent that they provide some possibility for an independent – or, at worse, 'other' – voice to ascertain that the conditions stipulated for making such a declaration are met. Unfortunately, the all-pervasive dominant parties combined with the party-whip system often limits the prospects of African parliaments raising any serious criticism of the merits of the declaration of emergency.

A third pertinent issue is the duration of the state of emergency. Most constitutions provide for a duration of seven to 21 days (subject to ratification), but more generally for periods of two, three or six months, with extensions being possible. Although there is a risk in most cases of extensions *ad infinitum*, the real danger is posed by

49 See, eg, arts 105 and 107 of the 2013 Constitution of Algeria; art 80 of the 2014 Constitution of Tunisia; art 199 of the 2010 Constitution of Angola; art 115 of the 2005 Constitution of Burundi; art 85 of the 2005 Constitution of the DRC; art 94(1) of the 1997 Constitution of Tanzania; art 154 of the 2014 Constitution of Egypt; arts 85-86 of the 1984 Constitution of Liberia; arts 49-50 of the 2009 Constitution of Mauritania; and art 26 of the 1990 Constitution of Namibia.

50 See art 51 of the 1991 Constitution of Burkina Faso; art 87 of the 1996 Constitution of Chad; and art 48 of the 2000 Constitution of Côte d'Ivoire.

51 See art 30 of the 2016 Constitution of Central African Republic; art 61 of the 2010 Constitution of Madagascar; art 90 of the 2010 Constitution of Guinea; and art 67 of the 2010 Constitution of Niger.

52 See art 31(1) of the 1992 Constitution of Ghana.

53 Other examples of such prior approval are to be found in art 27(2) of the 1997 Constitution of Eritrea and art 80(g) of the 1990 Constitution of São Tomé and Príncipe.

those constitutions that are either silent⁵⁴ or vague on how long a state of emergency can be declared.⁵⁵

As noted, Egypt is among those countries that for many decades have been under a state of emergency. Given the vague wording of article 154 of its 2014 Constitution, the state of emergency that was declared in April 2017, when the bombing of two churches led to the death of more than 45 people, has been extended several times.⁵⁶ Generally, few constitutions ensure that each extension of a declaration of a state of emergency is supported by a fresh declaration and is subject to the same approval conditions as the first declaration. In other words, most extensions are a formality justified by the circumstances prevailing at the time of the first declaration, rather than by those prevailing when the extension is sought.

Overall, the circumstances in which states of emergency may be declared under modern African constitutions do not adequately shield the process from abuse. Much depends on the next two issues discussed, namely, the measures provided to guard against the abuse of fundamental human rights, and the ability of oversight institutions to ensure that constitutional safeguards are respected.

4.3 The extent to which human rights are protected

Perhaps the most serious problem posed by declarations of states of emergency is the risk of violations of fundamental human rights, especially the non-derogable rights. In this regard, African constitutions fall into three categories.

The first consists of those countries constitutions of which do not mention the issue of human rights protection at all,⁵⁷ or do so

⁵⁴ See, eg, art 12(3) of the Comoros Constitution of 2010.

⁵⁵ See, eg, art 105 of the Constitution of Algeria of 2013 and art 9 of the 1996 Cameroonian Constitution.

⁵⁶ See 'Egypt to extend state of emergency for three months: Official gazette' *Reuters* 14 April 2018, <https://www.reuters.com/article/us-egypt-security-emergency/egypt-to-extend-state-of-emergency-for-three-months-official-gazette-idUSKBN1HK2ZO> (accessed 1 June 2020).

⁵⁷ Examples include art 9 of the 1996 Constitution of Cameroon; arts 104-107 of the Algerian Constitution of 2013; art 61 of the Djibouti Constitution of 1992; art 92 of the Somaliland Constitution of 2001; art 94 of the 1992 Constitution of Togo; art 80 of the Tunisian Constitution of 2014; sec 305 of the 1999 Constitution of Nigeria; art 74 of the 2011 Constitution of Morocco; sec 18 of the 1966 Constitution of Botswana; art 115 of the Burundi Constitution of 2005; arts 42-44 of the 2016 Constitution of the Central African Republic; arts 87-88 of the Chadian Constitution of 1996; art 12(3) of the 2001 Constitution of the Comoros; arts 48, 71-72 of the 2000 Constitution of Côte d'Ivoire; arts 25, 31-32 of the Constitution of Tanzania of 1977; art 154 of the 2014 Constitution of Egypt; art 18 of the 1990 São Tomé and Príncipe Constitution; art 61 of

in obscure terms,⁵⁸ or stipulate that this and other matters will be laid down in subsequent legislation.⁵⁹ The most extreme example seemingly is article 131(6) of the 2012 Somali Constitution. It is formulated in vague terms that allow the rights recognised and protected under the Constitution to be violated if the 'violation is absolutely necessary for the purposes of dealing with the emergency situation'. Considering the fact that not every disturbance qualifies as an emergency, authorising presidents – who are prone to abusing power – to determine subjectively what is 'absolutely necessary' leaves the door completely open for misuse of the extraordinary powers that go with declarations of states of emergency.

In the second category are those countries of which the constitutions list the rights that may be curtailed during a state of emergency. The scope of this list of derogable rights varies from one country to another, and in most cases hardly meets the minimum standards laid down in the Paris Minimum Standards.⁶⁰ For example, many of the common rights to which derogations are allowed include those that are non-derogable under international human rights treaties, such as the prohibition of torture and cruel, inhumane or degrading punishment or treatment; the prohibition of slavery and servitude; conforming with the principles of legality of offences and penalties; the right to defence; the right to a remedy; the prohibition of imprisonment for debt; and freedom of thought, of conscience and religion.⁶¹ Another important feature of the states in this category is the rather restricted list they often contain of rights that may not be limited or suspended.⁶²

the Madagascar Constitution of 2010; arts 25-26, 29a and 50 of the 1991 Constitution of Gabon; art 90 of the Constitution of Guinea of 2010; arts 49-51 of the 1992 Constitution of Mali; arts 85-88 of the 1986 Constitution of Liberia; arts 39, 71-72 of the 2009 Constitution of Mauritania; arts 67-68 and 105 of the 2010 Constitution of Niger; art 131 of the 2002 Constitution of the DRC; arts 108, 136-138 of the Rwandan Constitution of 2003; art 69 of the 2001 Constitution of Senegal; art 101 of the 1990 Constitution of Benin; and secs 30-31 of the Zambian Constitution of 1991 (which was left unchanged by the substantial amendment of the Constitution in 2016).

58 See, eg, art 297 of the Cape Verde Constitution of 1999; art 29 of the 1984 Constitution of Guinea Bissau; and secs 29(6) and (18) of the Sierra Leone Constitution of 1991.

59 See, eg, art 42(3) of the Constitution of Equatorial Guinea of 1982.

60 See sec (B)(2) of the Paris Minimum Standards which states that derogatory measures shall be subject to five general conditions which include principles of notification, proportionality, compliance with obligations under international law, non-discrimination and the recognition of non-derogable rights.

61 See art 61 of the Constitution of DRC of 2005; art 27(5)(a) of the Eritrean Constitution of 1997; secs 35 and 36 of the Constitution of The Gambia of 1997 (noting that sec 36 contains elaborate provisions to protect persons detained during a state of emergency); sec 21 of the 1993 Constitution of Lesotho; sec 18 of the 1968 Constitution of Mauritius; and arts 72 and 287 of the 2004 Constitution of Mozambique.

62 See, eg, art 93(4)(c) of the 1995 Constitution of Ethiopia; art 32 of the 1992 Constitution of Ghana (which focuses on the protection of persons detained

The last category consists of countries of which the constitutions contain a list of non-derogable rights. There are again wide variations in content. An example of a country with elaborate provisions that not only protect fundamental human rights but also require the government to comply with its international commitments is South Africa.⁶³ In terms of section 37(4) and 37(5) of the 1996 Constitution, any legislation enacted due to the declaration of a state of emergency may derogate from the Bill of Rights only under certain specified conditions, which include that the derogation is strictly required by the emergency; and that the legislation is consistent with the country's obligations under international law applicable to states of emergency. Finally, the legislation may not indemnify the state, or any person, in respect of any unlawful act; and may not permit any derogation from section 37; and any derogation from the rights in column 1 of the table of non-derogable rights.⁶⁴

In addition, subsection (6) contains elaborate provisions regarding the conditions to be observed when a person is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency.

Constitutionally restricting derogations from human rights, especially those that international human rights instruments regard as non-derogable, is one thing; their effective enforcement is another. As we shall see, this depends largely on the operation of the oversight institutions and mechanisms put in place to monitor and control the exercise of emergency powers.

4.4 Judicial and legislative control and other oversight mechanisms during states of emergency

Ensuring fundamental human rights, constitutionalism and respect for the rule of law under a state of emergency is always challenging.

under emergency laws); art 190 of the 2011 Transitional Constitution of South Sudan; art 211(a) of the 2005 Constitution of Sudan; secs 36(8), 37 and 38 of the 2015 Constitution of Swaziland; and art 47 of the 1995 Ugandan Constitution.

- 63 A similar approach is adopted in secs 45(1) and (4) of the 1994 Constitution of Malawi; secs 86(3) and 87(4) of the 2013 Zimbabwean Constitution; arts 58(1), (3) and (5) which, besides listing rights not to be derogated from, introduces the principle of proportionality in any action being taken. Others include arts 58(6) and (7) of the 2010 Kenyan Constitution; art 24(3) of the 1990 Constitution of Namibia; and art 43 of the Seychelles Constitution of 1993.
- 64 The table of non-derogable rights includes the following: sec 9 on the right to equality; sec 10 on human dignity; sec 11 on the right to life; sec 12 dealing with freedom and security of the person (for some aspects of this right only); sec 13 on freedom from slavery, servitude and forced labour; sec 28 on the rights of children (but only covering certain aspects of this); and the right of arrested, detained and accused persons (with respect to certain aspects of this only).

There may well be many provisions in the constitution to achieve this purpose, but the critical question is whether the government can be compelled to comply with these safeguards. In checking against governmental arbitrariness, the primary oversight institutions are the legislature and the judiciary, an inevitable part of the checks and balances associated with the separation of powers in all African constitutions. Furthermore, many of these constitutions provide for some specialised bodies to operate during periods of emergency to monitor and prevent any governmental excesses.

4.4.1 Legislative oversight

As mentioned, African constitutions vary considerably in the extent of the powers they confer on parliaments to intervene either before or after the declaration of a state of emergency. It was also noted that the effectiveness of parliamentary intervention, whether to authorise, ratify or approve the extension of a state of emergency, is limited by two factors: first, the executive's dominance of parliament and, second, party caucusing and the whip system, which make parliamentary approval of executive declarations virtually a foregone conclusion. Despite these obstacles, a number of constitutions introduce innovative measures to enhance parliamentary control of executive conduct under a state of emergency.

One way of monitoring and countering the executive exercise of emergency powers is provided by those constitutions that prescribe that the President or a minister must submit monthly reports to parliament during the period of a state of emergency that exceeds one month. These reports are required to indicate the number, names and addresses of persons restricted or detained under the emergency laws, the number of cases that have been reviewed by a special tribunal set to review the cases of detainees, and the number of cases in which the authority that ordered the restrictions or detention acted in accordance with the decisions of the tribunal appointed to review the cases of detainees.⁶⁵ These reports ensure transparency and accountability.

There are also other constraints designed to limit actions that may be taken by the executive during the period of a state of emergency. Examples include the prohibition of any amendments of the

⁶⁵ See, eg, sec 36(b) of the Constitution of the The Gambia of 1996; art 32(3)-(4) of the 1992 Constitution of Ghana; sec 36(11) of the Swaziland Constitution of 2005; and arts 49 and 110(6) of the 1996 Ugandan Constitution.

constitution;⁶⁶ the prohibition of the dissolution of parliament;⁶⁷ and the prohibition of the holding of elections during this period. These are commendable measures to prevent leaders from misusing a state of emergency to perpetuate their rule by altering the constitution or dissolving a parliament where the majority does not support the state of emergency. Similarly, emergency periods are hardly ever conducive to free and fair elections. The impact of these restrictions hinges on the existence of a judiciary with the powers and will to discharge its functions independently and impartially without fear, favour or prejudice.

4.4.2 *The judicial role*

Any framework for regulating periods of emergency is of limited use if it does not provide for the intervention of an independent and impartial judiciary to ensure that the constitution and the rule of law are respected during the crisis. The efficacy of judicial intervention will depend on the role assigned to the judiciary in the constitution, noting that there is no reason to assume that the judiciary enjoys the same powers in normal times as it does in emergencies. In fact, judicial intervention may be contemplated in one or more of four scenarios.

First, some constitutions provide that before or after declaring a state of emergency, one of the institutions to be consulted or whose advice may be sought is the constitutional court or its president.⁶⁸ The involvement of the judiciary in such an important decision is understandable, given the assumption that its members are people whose independence and impartiality in dealing with issues of

66 See, eg, art 294 of the 2004 Mozambique Constitution; art 26 of the 1991 Constitution of Gabon; and art 87(a) of the 1986 Constitution of Liberia.

67 See art 296(1) of the 1992 Constitution of Cape Verde; art 88 of the 1996 Constitution of Chad; art 12(3) of the 2001 Constitution of the Comoros; art 154 of the 2014 Constitution of Egypt; art 26 of the 1991 Constitution of Gabon; art 87(a) of the 1986 Constitution of Liberia; art 50 of the 1992 Constitution of Mali; and art 138 of the 2003 Constitution of Rwanda. By contrast, see arts 190(b)-(c) of the 2011 Transitional Constitution of South Sudan and art 211(a) of the 2005 Constitution of Sudan, both of which, in similar language, authorise the President to do the exact opposite, namely, to dissolve or suspend any of the state organs or suspend such powers as may be conferred upon the state under their constitutions.

68 See, eg, art 115 of the 2005 Constitution of Burundi; art 43 of the 2016 Constitution of the Central African Republic; art 87 of the 1996 Constitution of Chad; art 12(3) of the Constitution of the Comoros of 2001; art 48 of the 2000 Constitution of Côte d'Ivoire; art 61 of the 2010 Constitution of Madagascar; art 26 of the 1991 Constitution of Gabon; art 90 of the 2010 Constitution of Guinea; art 50 of the 1992 Constitution of Mali; art 39 of the 2009 Constitution of Mauritania; art 67 of the 2010 Constitution of Niger; and also art 80 of the 2014 Constitution of Tunisia (which is worded slightly differently as it requires, *inter alia*, that the President informs the president of the Constitutional Court).

constitutional justice are widely accepted and respected. However, for these same reasons, the involvement of the judiciary in what may turn out to be a political decision may imperil the reputation of the judiciary.

As we shall see, the practice of involving constitutional courts in such matters is prevalent in Francophone Africa, where it is these same courts that have exclusive jurisdiction to adjudicate constitutional controversies. How will the constitutional court decide the matter if the President's decision to declare a state of emergency is challenged before it, after it had previously been consulted and/or expressed an opinion that was taken into account by the President before making his decision? It therefore is desirable to keep the courts, particularly the constitutional courts before which litigation on the legality of any declaration of a state of emergency might go, out of the decision-making processes embarked upon by the President.

The second instance for judicial intervention may come about in its normal role as a guardian and enforcer of the constitution. However, this is a normal role only to the extent that the jurisdiction of courts is not excluded from disputes concerning the legality of the declaration of emergency specifically or disputes concerning the constitutionality of action taken during the state of emergency. Seen from this perspective, two observations may be made about current trends in Africa.

The first is that some constitutions, using rather obscure language, appear to exclude the jurisdiction of courts from adjudicating any disputes concerning the legality of a declaration of a state of emergency or even violations of the constitution that take place during this period. For example, section 29(4) of the 1991 Sierra Leonean Constitution, in referring to proclamations issued by the President on a state of emergency, states that 'all measures taken thereunder shall be deemed valid and lawful and shall not be enquired into by any court or tribunal'. This seems clear enough. However, section 29(17) of the same Constitution allows any person who is detained under any emergency legislation to request an 'independent and impartial tribunal established by law' to review the 'necessity or expediency of continuing his detention'. The confusion and inconsistency appears to be deliberate.⁶⁹

⁶⁹ This is so because sec 29(18) of the same Constitution declares: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of a state of public emergency of measures that are reasonably justifiable for the purpose of dealing with the

Another equally puzzling example, alluded to earlier, is article 131(6) of the 2012 Somalian Constitution, which allows for the violation of the Constitution during a state of emergency provided this is ‘absolutely necessary for the purposes of dealing with the emergency situation’. Judicial review of any action taken during the crisis is excluded as article 131(7) states that only the ‘validity of a declaration of a state of emergency and the procedures involved in making the declaration, may be challenged in court’. It therefore means that in both countries fundamental human rights may be violated with impunity during a state of emergency.

A second observation is that, prior to the 1990s, individuals in Francophone and Lusophone Africa were excluded from challenging violations of the constitution before the constitutional courts or councils (the exception being disputes about electoral matters). This in effect meant that there were no avenues, save for those provided in administrative law, for challenging constitutional violations during a state of emergency.⁷⁰ Although the global expansion of judicial review since the 1990s has seen the extension of individual access to constitutional courts and councils, there are still many jurisdictions where no such access is available.⁷¹ For example, article 80 of the Tunisian Constitution of 2014, which deals with states of emergency, provides that ‘the President of the Assembly of the Representatives of the People or thirty of the members thereof shall be entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional’. The implication is that, unless other remedies are provided for by ordinary laws or in the emergency laws, individuals whose fundamental human rights have been violated during a state of emergency cannot approach the constitutional courts or councils in these jurisdictions.

By contrast, Anglophone African constitutions usually allow individuals in such situations to approach either the ordinary courts

situation that exists immediately before and during that period of a state of public emergency.’

70 See generally CM Fombad ‘An overview of contemporary models of constitutional review in Africa’ in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 17.

71 See, eg, the Burkina Faso Constitution of 1991; the Cameroon Constitution of 1996; the Côte d’Ivoire Constitution of 2000; the Djibouti Constitution of 1992; the Guinean Constitution of 2010; the Madagascan Constitution of 2010; the Moroccan Constitution of 2011; the Rwandan Constitution of 2003; the 2001 Constitution of the Republic of Congo; the São Tomé and Príncipe Constitution of 1990; the Senegalese Constitution of 2010; the Togolese Constitution of 1992; and the Cape Verdean Constitution of 1992.

or courts within the hierarchy of courts that are vested with a specific mandate to deal with violations of the constitution.⁷²

A third instance of judicial intervention is where the constitutional provisions regulating the state of emergency provide a special process for settling disputes related to the exercise of emergency powers.⁷³ Section 37(3) of the 1996 South African Constitution illustrates the importance of this approach, prescribing that

[a]ny competent court may decide on the validity of –

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

Also adopting this approach are section 113(7) of the 2013 Zimbabwean Constitution and article 58(5) of the 2010 Kenyan Constitution, the sole difference being that the powers to deal with these disputes are exclusively vested in the Constitutional Court of the former and the Supreme Court of the latter. The advantage of the approach is that the scope of judicial intervention is broadly defined to enable the legality of the declaration of a state of emergency, the implementing regulation, and any action taken during this period, to be subject to judicial review for conformity with the constitution. Overall, the varying ways in which modern African states monitor and control executive action during states of emergency have significant implications for constitutionalism and the rule of law, a subject examined below.

5 Some implications of current trends in Africa: COVID-19 in perspective

African countries have frequently invoked emergency powers to deal with crises, in most cases doing so in an abusive manner. The constitutional reforms of the last three decades which were reviewed above were designed to guard against such abuses in a new era, one marked by constitutions which, for the first time, sought to establish

⁷² Eg, art 33(1) of the 1992 Constitution of Ghana states: 'Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.'

⁷³ See, eg, sec 45(6) of the 1994 Constitution of Malawi, which provides that 'the High Court shall be competent to hear applications challenging the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration'.

a culture of constitutionalism, human rights and respect for the rule of law. We briefly examine the recent trend in Africa.

5.1 Constitutional emergency powers and the challenge of the rule of law

Before examining the trend with the invocation of states of emergency under modern African constitutions, it is important to consider the meaning of the rule of law in states of emergency considering the tension between both concepts. One school of thought, again led by Carl Schmitt, is that the rule of law and states of emergency are irreconcilable and that emergency powers cannot operate within the confines of the rule of law.⁷⁴ Another view, an arguably better one, is that states of emergency are an acceptable derogation from the rule of law and can thus operate within its confines.⁷⁵ Indeed, according to Dyzenhaus, 'there is a substantive conception of the rule of law that is appropriate at all times', whether under a state of emergency or a normal constitutional order.⁷⁶ Therefore, 'even if democratic government must yield to an emergency, actors ought to take care to preserve the formal structure that makes it appear as though democratic constitutionalism is operating'.⁷⁷ In essence, therefore, the rule of law is essential in states of emergency so as to prevent tyranny while managing emergencies.

Frequent resort to emergency rule is not peculiar to Africa.⁷⁸ The trend, in many cases, on the continent, however, shows that the rule of law was simply disregarded. It is a basic principle of a state of emergency that it should be merely conservative, that is, for the purpose restoring the legal order. However, we have earlier mentioned examples of states of emergency that continued for more than 40 years.

While scholarship on emergency powers categorises emergencies as violent situations, natural disasters and economic crises, states of emergency have so far been declared in Africa with regard to violent situations and natural disasters. In fact, most emergencies

74 See C Schmitt *The concept of the political* trans G Schwab (2007).

75 Scholars such as Rossiter hold this view; see CL Rossiter *Constitutional dictatorship: Crisis government in modern democracies* (1948) 314.

76 D Dyzenhaus 'Schmitt v Dicey: Are states of emergency inside or outside the legal order?' (2006) 27 *Cardozo Law Review* 2038.

77 See Ferojohn & Pasquinom (n 18) 209.

78 According to Bjørnskov and Voigt, between 1985 and 2014 approximately 137 countries at least once resorted to states of emergency. See C Bjørnskov & S Voigt 'The architecture of emergency constitutions' (2018) 16 *International Journal of Constitutional Law* 101.

in the last two decades have been the result of violent situations (internal crises) that supposedly threatened the existence of the nation. This is no surprise. Civil unrest is a regular occurrence and for a wide variety of reasons, such as the marginalisation of minorities,⁷⁹ ethnic or religious conflict, and post-electoral violence caused by 'sit-tight' leaders wishing to retain power at all costs.⁸⁰ In some of these instances, emergency powers were used mischievously to consolidate power and suppress agitation for regime change. This is the case with quite a number of emergencies, among which are those in Cameroon,⁸¹ Ethiopia⁸² and The Gambia.⁸³ Yet another trend in Africa is the recourse to constitutional emergency powers for 'perceived' and not actual emergencies. States of emergency have been declared to purportedly prevent an emergency. For example, a state of emergency was declared in Ethiopia to respond to the resignation of the Prime Minister and to facilitate a peaceful transition of power.⁸⁴ It was also declared in Egypt as a result of an anticipated breakdown of order due to the bombing of churches.⁸⁵ As a general principle, states of emergency should only be declared to prevent an emergency. The threat should be imminent and the state of emergency should be necessary to restore order. Indeed, according to Fatovic, 'perceived emergencies' are a threat to the

- 79 Eg, the marginalisation of Anglophone people in the north and south-west regions of Cameroon leading to a declaration of a state of emergency. See International Crisis Group 'Cameroon's worsening Anglophone crisis calls for strong measures', <https://www.crisisgroup.org/africa/central-africa/cameroon/130-cameroon-worsening-anglophone-crisis-calls-strong-measures> (accessed 26 July 2020). See also the marginalisation of the people of Oromia regional state in Ethiopia, causing uprisings leading to a consistent declaration of state of emergency. This is considered in detail later.
- 80 Eg, the post-election violence in Zimbabwe of 2008, leading to the death of more than 100 people, was a result largely of former President Robert Mugabe's refusal to concede defeat after the run-off presidential elections. See C McGreal 'This is no election. This is brutal war' *The Guardian* 22 June 2008, <https://www.theguardian.com/world/2008/jun/22/zimbabwe1> (accessed 26 July 2020). Another example is the 2007-2008 post-election violence in Kenya, a result of widespread rigging by the government of President Mwai Kibaki. See MK Juma 'African mediation of the Kenyan post-2007 election crisis' (2009) 27 *Journal of Contemporary African Studies* (2009) 407.
- 81 See C Fombad 'Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?' (2004) 48 *Journal of African Law* 62.
- 82 See P Schemm 'Under a new state of emergency, Ethiopia is on the brink of crisis, again' *The Washington Post* 3 March 2018, https://www.washingtonpost.com/world/africa/under-a-new-state-of-emergency-ethiopia-is-on-the-brink-of-crisis-again/2018/03/03/5a887156-1d8f-11e8-98f5-ceecfa8741b6_story.html?noredirect=on&utm_term=.bc3ffb9cd66a (accessed 26 July 2020).
- 83 'The Gambia's President declares state of emergency' *BBC News* 17 January 2017, <https://www.bbc.com/news/world-africa-38652939> (accessed 26 July 2020).
- 84 'Ethiopia declares national state of emergency' *BBC News* 16 February 2018, <http://www.bbc.com/news/world-africa-43091248> (accessed 26 July 2020).
- 85 'Egypt to extend state of emergency for three months: Official gazette' *Reuters* 14 April 2018, <https://www.reuters.com/article/us-egypt-security-emergency/egypt-to-extend-state-of-emergency-for-three-months-official-gazette-idUSKBN1HK2ZO> (accessed 26 July 2020).

rule of law as they serve as a pretext for governments to ignore or circumvent checks that ordinarily prevent the abuse of power.⁸⁶

Emergency declarations have also recently been made due to terrorism and Islamic insurgency, as happened in Cameroon, Chad, Egypt, Nigeria and Somalia. In some of these countries, the military were given sweeping powers to bring the situation under control. In this case also, the rule of law was severely threatened in that it helps in the expansion of the executive's powers to confront 'perceived' threats to national security.⁸⁷

In other instances, states of emergency were declared in response to natural disasters, such as extreme drought in Malawi,⁸⁸ severe flooding in Namibia,⁸⁹ and the outbreak of the Ebola virus in parts of West Africa, in this case the worst-hit countries being Liberia⁹⁰ and Sierra Leone.⁹¹ The latter two cases involved the suppression of

86 C Fatovic 'Emergencies and the rule of law' in *Oxford Research Encyclopaedia of Politics* (2020), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-93?print=pdf> (accessed 26 July 2020)

87 As above.

88 See 'Malawi declares state of emergency over drought' *Aljazeera News* 14 April 2016, <https://www.aljazeera.com/news/2016/04/malawi-declares-state-emergency-drought-160413144707560.html> (accessed 26 July 2020). In this case, approximately 2,8 million Malawians face food insecurity owing to extreme drought.

89 The then President of Namibia declared a state of emergency in the northern parts of the country following heavy flooding which displaced more than 10 000 people and washed away roads. See 'State of emergency declared in Namibia' *News 24*, <https://www.news24.com/Africa/News/State-of-emergency-declared-in-Namibia-20110329> (accessed 26 July 2020).

90 Invoking art 86(a)(b) of the Constitution of Liberia of 1984, former President Ellen Johnson Sirleaf declared a state of emergency throughout the Republic of Liberia, with effect from 6 August 2014 for a period of 90 days, as a result of the widespread Ebola virus. The declaration included measures curtailing the rights of the people, including the closure of schools, markets and other public places, quarantining communities, and the imposition of a curfew. See 'President Sirleaf declares 90-day state of emergency, as government steps up the fight against the spread of the Ebola virus disease' *Executive Mansion* 6 August 2014, https://www.emansion.gov.lr/2press.php?news_id=3053&related=7&pg=sp (accessed 26 July 2020). The state of emergency ended in November following a national broadcast in which former President Sirleaf cited progress in the fight against the deadly virus. See C MacDougall 'Liberia President, citing Ebola gains, ends state of emergency' *The New York Times* 13 November 2014, <https://www.nytimes.com/2014/11/14/world/africa/president-ellen-johnson-sirleaf-ends-state-of-emergency.html> (accessed 26 July 2020).

91 In an address to the nation on 30 July 2014 on the outbreak of Ebola, President Ernest Bai Koroma invoked emergency powers under sec 29(5) of the Constitution of Sierra Leone 1991. See 'President Koroma declares state of emergency in Sierra Leone' *Cocorioko: The Voice of the People* 31 July 2014, <http://cocorioko.net/president-koroma-declares-state-of-emergency-in-sierra-leone/> (accessed 26 July 2020). Pursuant to the powers under the section, the Public Emergency Regulations 2014 were promulgated defining the exact scope of the powers and the nature of derogation of rights that was to take place during the emergency. There were, however, allegations that President Koroma was taking advantage of the emergency powers to suppress political opponents. This led to the common slogan, 'End the state of emergency laws now'. See 'Calls for an end to state of emergency in Sierra Leone' *Sierra Leone Telegraph* 26

certain human rights in order to contain the spread of the virus, a pandemic that could be classifiable as a natural disaster threatening the existence of the countries concerned. The COVID-19 pandemic is also classifiable as a natural disaster. However, many African governments did not make use of their constitutional state of emergency provisions.

5.2 Legislative emergency powers, COVID-19 and the 'new normal'

As mentioned, in dealing with COVID-19, the trend is that most governments did not declare a state of emergency based on their constitutions but rather had recourse to their emergency powers in ordinary legislation. The two possible explanations for this are, first, that in spite of the deleterious effect of the pandemic, it did not constitute a sufficient 'emergency' to warrant the invocation of the constitutional provision and, second, that curtailing the virus could be effectively done through ordinary legislation. Therefore, most governments resorted to their public health or infectious diseases legislation to declare a 'state of disaster' which gives the President (or other public official such as the Minister for Health) powers towards containing the spread of the virus. The use of ordinary legislation in managing the crisis has generated intense legal debates.⁹² Questions particularly have arisen regarding the extent to which the constitutional safeguards can be applicable in this regard.

While this approach has the advantage of providing a speedier and more flexible response needed in dealing with the virus, it has severe implications for human rights and the rule of law. In the first place, the scrutiny and checks that are typically associated with the constitutional emergency model are lacking. Thus, this is a convenient means of unabatedly perpetuating human rights abuses as numerous cases show. For example, there were several reported cases of deaths resulting from police violence in implementing emergency regulations. Another implication of this approach is to help the executive further consolidate power. This is now becoming the new normal in dealing with emergencies and, according to critics, leading to the erosion of the rule of law and the values it is supposed to uphold.⁹³ Furthermore, most African countries relied on public health legislations that obviously were obsolete to provide

April 2015, <http://www.thesierraleonetelegraph.com/calls-for-an-end-to-state-of-emergency-in-sierra-leone-grows/> (accessed 26 July 2020).

92 G Joelle 'States of emergency' *VerfBlog* 26 May 2020, <https://verfassungsblog.de/states-of-emergency/> (accessed 26 July 2020).

93 Fatovic (n 86).

a legal basis for the emergency powers. In some cases, such as the case in Nigeria⁹⁴ and Egypt,⁹⁵ these legislations were hurriedly amended or new ones enacted without the requisite public scrutiny or due process. In many countries such as Ghana, the newly-enacted legislation placed restrictions on constitutionally-guaranteed fundamental rights.⁹⁶ These new pieces of legislation also delegated legislative powers to the executive without appropriate checks. In some cases, the laws give 'unelected executives' such as the Minister for Health sweeping powers as is the case in Nigeria.⁹⁷ It is worth mentioning that the newly-introduced legislations/regulations were also extremely punitive causing the parliament in countries such as Kenya, on that basis, to decline approval.⁹⁸ More disturbing is the fact that most of these legislations have no sunset clause making them a near permanent feature considering that the pandemic is not time-bound. In all, the use of the ordinary legislative framework anticipates that since powers are granted by ordinary legislative processes, the process remains in place to check abuses. However, the foregoing shows that African leaders cannot be trusted with such potentially unbridled powers. While it is easier to check the use of these powers in advanced democracies, it is not so with African countries.

6 Conclusion

The preceding discussion shows that, in spite of wide-ranging constitutional reform since the 1990s, most declarations of states of emergency in Africa have been used to address what are essentially political crises through repressive measures that often violate

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- 94 L Abdulrauf 'Nigeria's emergency (legal) response to COVID-19: A worthy sacrifice for public health?' *VerfBlog* 18 May 2020, <https://verfassungsblog.de/nigerias-emergency-legal-response-to-covid-19-a-worthy-sacrifice-for-public-health/> (accessed 26 July 2020).
- 95 See A llaboudy 'Emergency law amendments to fight COVID-19 in Egypt: Putting the poison in the honey' *VerfBlog* 19 May 2020, <https://verfassungsblog.de/emergency-law-amendments-to-fight-covid-19-in-egypt-putting-the-poison-in-the-honey/> (accessed 26 July 2020).
- 96 See ME Addadzi-Koom 'Quasi-state of emergency: Assessing the constitutionality of Ghana's legislative response to COVID-19' (2020) *The Theory and Practice of Legislation*, where she contended that parliament hurriedly passed the legislation after a voice count. K Agyeman-Budu 'COVID-19, constitutionalism and emergencies under Ghana's 1992 Fourth Republican Constitution' *VerfBlog* 23 May 2020, <https://verfassungsblog.de/covid-19-constitutionalism-and-emergencies-under-ghanas-1992-fourth-republican-constitution/> (accessed 26 July 2020).
- 97 The Control of Infectious Diseases Bill 2020 grants the Minister of Health and the Director-General of Nigeria Centre for Disease Control (NCDC) sweeping powers.
- 98 A Maleche et al 'Excessive law enforcement in Kenya' *VerfBlog* 14 May 2020, <https://verfassungsblog.de/excessive-law-enforcement-in-kenya/> (accessed 26 May 2020).

fundamental human rights. In most of these instances, the primary objective has been to suppress dissenting voices and pave the way for the incumbent to perpetuate his stay in power. Yet genuine emergencies, whether man-made or natural, or both, are normal in the life of any nation. The recent COVID-19 pandemic has challenged this *status quo* and has been an example of a natural emergency that requires the use of extraordinary powers. The extraordinary powers given to governments to enable them to act swiftly in such emergencies threatening the existence of a country place a huge responsibility on them to act with caution and sensitivity and within the bounds of the law.

These exceptional powers are prone to abuse, as the historical record demonstrates has been the case in Africa since the 1960s. Although most African states now have an improved constitutional and legal framework for dealing with emergencies, the abuse of emergency powers remains one of the greatest threats in Africa today to entrenching a culture of constitutionalism, good governance, and respect for human rights and the rule of law. The continent's sit-tight dictators are using all manners of democratic paraphernalia to disguise their autocratic designs. The key to reversing the trend lies in a better understanding of democratic constitutional emergency regulations and their enforcement.

The choice of a regulatory framework is usually between a constitutional and legislative approach, the former clearly being preferable to the latter. The constitutional entrenchment of the framework shields it from arbitrary changes by opportunistic leaders using their transient parliamentary majority for their selfish political ends. An analysis of African constitutions reveals that the constitutional emergency regulatory approach has been adopted by all. However, the lack of clear detail on matters such as what constitutes an emergency, when it can be declared, who can make the declaration, and what safeguards exist against abuses of that state of emergency, suggest that states taking the minimalist approach have adopted what amounts to a legislative regulatory approach, because most of this detail then depends on the whims of the legislature. This is especially true for managing COVID-19 where most governments have chosen to go the way of ordinary legislation with its attendant implications for the rule of law and constitutionalism. While this style may not be an issue for advanced democracies, it will always be problematic for African countries with executives that are always willing to arrogate as much powers as possible to themselves. Accountability will also always be a challenge.

It is understandable that an emergency should not be defined in precise and rigid terms. What counts as an emergency inevitably varies from one time and place to another. For example, advances in technology can make it possible to anticipate, and so ward against, situations that decades ago would have been classified as emergencies. As such, this calls for both clarity and flexibility in defining what constitutes a state of emergency.

Carefully-crafted constitutional provisions regulating declarations of a state of emergency, as the experiences of the last three decades shows, may not prevent abuses. Nevertheless, they may limit and at least reduce the incidence of repression and human rights violations experienced in the exercise of emergency powers. Even if implementation of the constitutional provisions will remain a challenge in making constitutionalism and respect for the rule of law and fundamental rights a reality in Africa, an important step in this direction is having the appropriate constitutional framework.⁹⁹ Although a number of African countries have adopted fairly elaborate constitutional frameworks to regulate states of emergency, many lacunae remain.

To counter the risks that emergency powers pose to Africa's fledgling democracies, there is a need to adopt a constitutionally-entrenched regulatory framework based on good international practices, such as ICCPR and the Paris Minimum Standards, as well as to take into account Human Rights Committee General Comment 29. Emergencies must be defined in terms that ensure that they can be invoked only in serious crises where the survival of the state and its institutions is at stake. The conditions for declaring a state of emergency must be clearly defined in a manner that ensures that emergency powers are not used as a pretext for solving other temporal political problems, or as an indirect and illegitimate means to modify the legal order, even the constitution itself. Such abuses are tantamount to abrogating or amending the constitution rather than functioning to preserve it.

Ideally, a declaration of a state of emergency should be preceded by prior authorisation or immediately followed within 72 hours by legislative approval. The poor human rights record of African states means that there is a need to ensure that citizens' human rights are protected. The list of non-derogable rights contained in ICCPR and the Paris Minimum Standard constitutes the lowest standard of

⁹⁹ For a general discussion of this issue, see CM Fombad (ed) *The implementation of modern African constitutions. Challenges and prospects* (2016).

human rights protection that should be recognised and protected. One of the major lessons to be drawn from the experience of the last three decades involves enforcement. However elaborate a constitutional framework for regulating states of emergency, this will serve no purpose if there is no effective enforcement mechanism in place to monitor and ensure compliance with its provisions.