

AFRICA COVID BRIEFER

Strategic Efforts to Push Back against Restrictive Measures through Litigation.

Issue Overview

Measures and restrictions adopted by governments in Sub-Saharan Africa to curb the spread of the COVID-19 pandemic continued to raise human rights concerns in the first half of 2021. Some of these measures are considered illegal and disproportionate, while others violate fundamental human rights, including freedom of movement, expression and information, and assembly. In response, civil society groups and other actors challenged the legality of such measures, including through litigation.

Country Examples

In **Kenya**, a group of individuals and civil society groups brought a case against government bodies for their failure to “proactively publicizing information important to the public in relation to the management of the COVID-19 Pandemic.” The petitioners raised concern over the lack of critical information affecting “the general public’s rights to health, life, freedom and security of the person and the rights women and girls to sexual and reproductive health rights.” The petition requested court to order the concerned government bodies, including the Cabinet Secretary for Health, Cabinet Secretary for Interior and Coordination of National Government, Inspector General of the Police and Cabinet Secretary for Information and Communications, to declare that their failure to provide information violated “the right of access to information as guaranteed under Article, 35(1)(a), Article 35(3) and the Access to Information Act,” as well as the right to freedom of expression, and the rights to life and health. On June 15, 2021 the Constitutional and Human Rights Division at the High Court in Nairobi, gave government bodies 10 days to file their responses pending its ruling on the petition.

In **Zimbabwe**, on January 21, 2021, the High Court ordered the Ministers of Health and Child Care and of Information and Publicity and Broadcasting Services to “widely disseminate to the public comprehensive and adequate information.” The order was

issued in response to an urgent application by MISA Zimbabwe, which argued that the information being disseminated on the current public health situation in the country is incomplete, uninformative and inadequate.”

In response, the court ordered the ministers “to publish and disseminate relevant information on the COVID-19 virus strain and measures to be taken by the public in respect of this strain’, on all available platforms and in all official languages. The court also ordered government to avail “COVID-19 statistics for each district in Zimbabwe, using gender disaggregated data.

On April 6, 2021, the Law Society of **Kenya** brought a case against the President of the Republic, Cabinet Secretary for Interior and Co-ordination of National Government and the Cabinet Secretary for Health. The case challenges the Public Order No. 2 of 2021, Public Order (State Curfew) Order 2021 for violating the Constitution and Public Health (COVID-19 Restriction of Movement of Persons) Rules 2021 for violating the Constitution on grounds that the rules were adopted without prior public participation and approval by Parliament. The petition similarly argues that the Rules which limit the right to freedom of movement, the right to enter, remain and reside anywhere in Kenya; and the right to assemble, demonstrate, picket or petition and any such limitation are unconstitutional. The case also challenges the Health Cabinet Secretary’s decision to ban private sector importation, distribution, and administration of COVID-19 vaccines for violating the Constitution.

Regional Norms

The African Commission on Human and People’s Rights 449 Resolution, which focuses on ensuring human rights are a central part of COVID responses, outlines norms for adopting and enforcing COVID-19 measures:

- **Article 2** “Urges States Parties in respect of enforcement of COVID-19 regulations to ensure that:
 - The response of Law Enforcement and Public Security Forces to States of Emergency during the COVID-19 pandemic are consistent with the principles of legality, necessity, proportionality, accountability and do not endanger human life;...
 - Ensure that the measures adopted by State Parties meet the minimum standards for the protection of human rights and are accompanied by policy measures adapted in order to mitigate negative effects, particularly in the most vulnerable sector of society;...
 - Mechanisms are in place for independent, prompt, impartial and transparent investigations of all allegations of excessive use of force, extrajudicial killings, inhuman treatment, assault or arbitrary

deprivation of liberty, gender-based violence, or extortion by members of law enforcement institutions and for holding perpetrators of violations accountable;

- Those whose rights have been violated by members of law enforcement institutions are granted access to remedies, including reparation and compensation;”
- **Article 4** “Further calls on States within the framework of Articles 7 and 26 of the African Charter:
 - To ensure that there exist mechanisms for accountability and access to justice in the face of possible violations of human and peoples’ rights;
 - To ensure that the right to due process of the law are fully complied with;
 - To use detention as a measure of enforcing COVID-19 regulations and pre-trial detention as a measure of last resort to avoid congestion and spread of the virus in places of detention;
 - To make special arrangements for enabling the judiciary to continue dispensing with justice with particular attention to issues of rights violations in the context of the pandemic and for enabling individuals or affected communities to receive legal assistance from civil society organizations and human rights defenders;”