AUTHOR Christopher Phiri

TITLE Covid-19 and Zambia's Constitutional Dilemma

YEAR 2022

DOI https://doi.org/10.1007/978-3-031-06401-2_4

VERSION Author's accepted manuscript

CITATION Phiri, C. (2022). Covid-19 and Zambia's Constitutional Dilemma. In: Durojaye, E., Powell, D.M. (eds) Constitutional Resilience and the COVID-19 Pandemic. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-031-06401-2_4

Chapter 4
Covid-19 and Zambia's Constitutional Dilemma

Christopher Phiri

Abstract

Desperate times call for desperate measures. This holds true in times of public emergencies. Constitutionalism and the rule of law, however, impose limits on how the powers of government can be duly exercised even in the face of public emergencies. Focusing on the period March 2020 to March 2021, this chapter examines the response of the Zambian government to the Covid-19 pandemic through the lens of constitutionalism and the rule of law. It reveals that the response was exclusively executive-driven. Several measures which the executive introduced to contain the spread of Covid-19 had no legal basis, and enforcement was arbitrary. Parliamentary and judicial oversight was also largely absent. This saw apparent violations of human rights go without redress. The chapter ends with some general observations on what could be learnt from the experience during the period under examination, to facilitate constitutional resilience in the future.

1. Introduction: An overview of the pandemic in Zambia

The Republic of Zambia is a lower middle-income country located in southern Africa.[1] It shares borders with eight other African countries, namely Malawi and Mozambique to the east; Angola to the west; Zimbabwe, Botswana, and Namibia to the south; and the Democratic Republic of Congo and Tanzania to the north. Administratively, Zambia is divided into 10 provinces. These include the Central, Copperbelt, Eastern, Luapula, Lusaka, Muchinga, Northern, North-Western, Southern, and Western provinces. Each province is subdivided into districts, constituencies and wards. [2] Existing official projections have indicated that Zambia would have a national population of 18,400,556 people as of 2021.[3]

Zambia recorded its first two cases of Covid-19 on 18 March 2020.[4] An initial assessment by the United Nations country office painted a bleak picture indicating that between May and October 2020 alone, 10.1 million vulnerable people – representing well over 50 per cent of the national population – would need urgent and lifesaving interventions to fight the pandemic and alleviate its social and economic effects.[5] This was partly informed by the anticipated impact of the measures the government initially introduced to contain the spread of Covid-19, ranging from the closure of learning institutions and selected business establishments to restrictions on

[1] United Nations Department of Economic and Social Affairs, et al. *World economic situation and prospects 2019* (2019) 172.
[2] See article 149 Constitution of Zambia.
[3] Central Statistical Office 2010 census of population and housing: Population and demographic projections 2011-2035 (2013) 23.
[4] Ministry of Health, Zambia National Public Health Institute & World Health Organization 'Zambia COVID-19 situational report No. 01' (19 March 2020), http://znphi.co.zm/news/wp-content/uploads/2020/03/COVID-Situational-Report-No-1_190320_final.pdf (accessed 8 March 2021).
[5] United Nations 'United Nations COVID-19 emergency appeal: Zambia (May-October 2020)' (17 July 2020), https://reliefweb.int/sites/reliefweb.int/files/resources/ZAMBIA_%20COVID-19_Emergency_Appeal.pdf (accessed 8 March 2021).

movement and gatherings. It would appear, however, that the situation turned out to be somewhat less severe. About a year later, on 8 March 2021, the cumulative number of confirmed cases stood at 82,655, with 1,132 Covid-19-related deaths and 78,721 recoveries.[6] This represented a national infection rate of less than 1 per cent of the population, a 1.4 per cent case fatality rate, and a 95.2 per cent case recovery rate. The capital, Lusaka, recorded the highest number of cases overall, while some districts had no confirmed cases throughout 2020.[7]

Having recorded the first case of Covid-19 several weeks after some countries had already seen a surge in the number of confirmed cases, the government's initial response was guided largely by the experiences of other countries. However, it eventually became inevitable for the government to chart its own course. The government therefore reviewed its response measures on a rolling basis, tailoring them to its own assessment of the local situation. Such flexibility should be expected, given the non-ephemeral nature of the Covid-19 pandemic. Constitutionalism and the rule of law, however, impose limits on how the powers of government can be exercised, even in the face of public emergencies.

This chapter examines the Zambian government's response to the Covid-19 pandemic through the lens of constitutionalism and the rule of law. It covers the period March 2020 to March 2021. The next section provides an overview of the relevant legal framework for emergency powers in Zambia. Section 3 outlines the more notable measures the government introduced in response to the Covid-19 pandemic during the period under examination and, in turn, examines the legal basis thereof. Section 4 examines the role which the legislature played. Section 5 examines the impact of the response measures on human rights. Section 6 examines the role the judiciary played in contributing to constitutional resilience. Section 7 makes some general observations on what might be learnt from the experience during the period under examination, to facilitate constitutional resilience in the future.

2. The Constitution and emergency powers

Zambia has a codified constitution. The current Constitution was enacted in 1991 and last amended in 2016. It is the supreme law of the Republic of Zambia.[8] As such, it binds all persons in Zambia, state organs and state institutions alike.[9] Any other law which is inconsistent with the provisions of the Constitution is void to the extent of the inconsistency.[10] For the avoidance of doubt, the Constitution declares illegal any act or omission that contravenes its provisions.[11] The courts of Zambia have invoked the supremacy of the Constitution on several occasions to

[6] Ministry of Health, Zambia National Public Health Institute & World Health Organization 'Zambia COVID-19 situation report no. 163' (8 March 2021), http://znphi.co.zm/news/wp-content/uploads/2021/04/Zambia_COVID-Situational-Report-No-163_8March2021_Final.pdf (accessed 10 March 2021).
[7] United Nations Office for the Coordination of Humanitarian Affairs 'Zambia situation report' (9 December 2020), https://reliefweb.int/report/zambia/zambia-situation-report-9-december-2020 (accessed 8 March 2021).
[8] Article 1(1) Constitution of Zambia.
[9] Article 1(3) Constitution of Zambia.
[10] Article 1(1) Constitution of Zambia.
[11] Article 1(2) Constitution of Zambia.

annul unconstitutional legislative provisions and declare certain executive actions unconstitutional.[12]

The Constitution sets forth the structure and powers of the three organs of the state (executive, legislature, and judiciary) as well as the basic rights of citizens. It establishes a classic presidential system in which the head of government (President) is also the head of state and commander-in-chief of the defence force.[13] Thus, the executive authority of the state vests in the President and is exercised directly by the President and/or through public officers or other persons appointed by the President in accordance with the Constitution.[14]

The legislative authority of the state vests in, and is exercised by, a unicameral parliament which consists of the President and the National Assembly.[15] The National Assembly consists of 156 elected members of parliament (MPs), up to eight MPs nominated by the President, the vice-president, the speaker, and the first and second deputy speakers.[16] Parliament enacts legislation, referred to as Acts, through bills passed by the National Assembly and assented to by the President.[17] Parliament may, however, delegate its legislative authority through an Act by conferring upon a person or authority power to make secondary legislation.[18] A piece of such legislation is referred to as a statutory instrument (SI).

The judiciary consists of four superior courts and three categories of inferior courts. The superior courts include the Supreme Court and the Constitutional Court, which rank equivalently,[19] the Court of Appeal, and the High Court. Inferior courts include subordinate courts, small claims courts, and local courts.[20]

Part III of the Constitution (Bill of Rights) enshrines a range of civil and political rights. Any person who alleges that any of those rights has been, is being, or is likely to be contravened in relation to him may petition the High Court for redress pursuant to article 28 of the Constitution as read together with the Protection of Fundamental Rights Rules, SI 156 of 1969. The Bill of Rights does not, however, contain so-called 'second-generation rights', namely, economic, social, and cultural rights.

At the international level, Zambia is a signatory to the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, among other international instruments that protect civil liberties. Zambia is also party to several international and regional instruments, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights, which guarantee economic, social, and cultural rights. Therefore, although the

[12] See, for example, Mumba v The People (1984) ZR 38; Mulundika & others v The People (1995-1997) ZR 20; Resident Doctors Association of Zambia & others v Attorney General (2003) ZR 33.
[13] Article 91(1) Constitution of Zambia.
[14] Article 91(2) Constitution of Zambia.
[15] Article 62 Constitution of Zambia.
[16] Article 68(2) Constitution of Zambia.
[17] Article 63 Constitution of Zambia.
[18] Article 67 Constitution of Zambia.
[19] Article 121 Constitution of Zambia.
[20] Article 120 Constitution of Zambia.

Bill of Rights does not contain such rights, the Government of Zambia has an obligation under international law to respect them.

It should be noted, though, that Zambia takes a dualist approach to its treaty obligations. International instruments as such are not binding upon national courts unless they have been domesticated through national legislation.[21] Nevertheless, where such instruments have been ratified by the executive, the provisions thereof have some persuasive value. The courts may be inspired by those instruments, as interpreted by relevant international bodies, when interpreting national law.[22]

It must also be noted that some of the rights enshrined in the Constitution are not absolute. First, certain rights can be derogated from when Zambia is at war, or when a declaration of a state of public emergency is in force.[23] The Constitution empowers the President, in consultation with cabinet, to declare that a state of public emergency exists.[24] Subject to approval by the National Assembly within a period of seven days of making such a declaration,[25] the President may make emergency regulations by SI under the provisions of the Emergency Powers Act (EPA) 43 of 1964 to deal with the emergency.[26] Such regulations may derogate from the rights enshrined in the Bill of Rights, except those which the Constitution specifically protects as absolute, non-derogable rights, such as freedom from torture and cruel, inhuman or degrading treatment or punishment. Any derogation must nonetheless be (1) prescribed by law, (2) strictly for the purpose of dealing with the situation existing or arising during that period, and (3) reasonably required for the purpose of dealing with the situation in question.[27] Moreover, a declaration of a public emergency can remain in force only for a period of three months, although the National Assembly may extend the approval of the declaration for periods of no more than three months at a time.[28]

Secondly, the Constitution allows for *law-based* restrictions on derogable rights, generally for the purpose of ensuring that the enjoyment of human rights by an individual does not prejudice the rights and freedoms of others or the public interest.[29] The restrictions envisaged here are distinct from derogations which may entail suspending human rights in response to a public emergency. Derogation measures suspending rights can thus be avoided even during emergencies if 'the situation can be adequately dealt with by establishing necessary and proportionate restrictions or limitations that are normally permitted … for the maintenance of public safety, health and order'.[30]

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[21] Zambia Sugar Plc v Nanzaluka Appeal 82 of 2001.
[22] Attorney General v Clarke (2008) ZR 38 Vol 1.
[23] Article 25 Constitution of Zambia.
[24] Article 30(1) Constitution of Zambia.
[25] Article 30(2) Constitution of Zambia.
[26] Section 3 EPA.
[27] Article 25 Constitution of Zambia.
[28] Article 30(5) Constitution of Zambia.
[29] Article 11 Constitution of Zambia.
[30] OSCE & ODIHR OSCE human dimension commitments and state responses to the Covid-19 pandemic (2020) 21. For more details regarding restrictions/limitations and derogations, including the distinction between the two concepts, see A Spadaro 'COVID-19: Testing the limits of human rights' (2020) 11 *European Journal of Risk Regulation* 317, 320-22, 324; A Lebret 'COVID-19 pandemic and derogation to human rights' (2020) 7 *Journal of*

For example, instead of declaring a state of public emergency, the President may declare a state of disaster under the Disaster Management Act (DMA) 13 of 2010 and make regulations by SI to deal with the public emergency in question.[31] Such regulations may impose restrictions upon, rather than derogate from, human rights in a 'disaster area'. The Public Health Act (PHA) 12 of 1930 similarly empowers the Minister of Health to make emergency regulations for the prevention and suppression of diseases in Zambia.[32] Such regulations may likewise impose restrictions upon human rights without necessarily derogating therefrom.

3. Governmental measures in response to the pandemic

The government started preparing for the Covid-19 outbreak in Zambia on 30 January 2020, well ahead of time.[33] This proactiveness enabled it to identify the first confirmed Covid-19 case within 48 hours 'of the individual entering the country by air travel from a trip to France'.[34] In reality, however, the government announced the first set of measures to the public on 17 March 2020, just a day before it announced the first two confirmed cases of Covid-19. The Covid-19 response measures during the period under examination were mainly announced by the Minister of Health and by the President, who issued directives on a rolling basis through media statements. Most of the initial measures were subsequently 'revoked' through presidential directives.

3.1 Measures introduced

In all, the Minister of Health and the President announced at least 12 different measures during the period under examination. These include (1) mandatory medical screening of travellers, including international travellers, at all ports of entry; (2) quarantine requirements applicable to those suffering, or suspected to be suffering, from Covid-19; (3) mandatory reporting to health officials of all individuals exhibiting Covid-19 symptoms; (4) restriction on all but 'essential' foreign travel; (5) social distancing and restriction on public gathering; (6) mandatory requirements to keep all public places in good sanitary and hygienic condition, and for all such places to provide adequate and accessible facilities for hand hygiene and sanitation; (7) closure of all learning institutions; (8) lockdowns by area; (9) closure of three of the country's four international airports; (10) closure of selected business establishments; (11) restriction of restaurants to providing take-away and delivery services only; and (12) mandatory wearing of face masks in public.

Law and the Biosciences 1, 1-5; M Scheinin 'COVID-19 symposium: To derogate or not to derogate?' *Opinio Juris* 6 April 2020, https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate (accessed 8 March 2021); LR Helfer 'Rethinking derogations from human rights treaties' (2021) 115 *American Journal of International Law* 20. See also generally United Nations Commission on Human Rights 'The Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights (28 September 1984); United Nations Human Rights Committee 'CCPR general comment 29: article 4: derogations during a state of emergency' (31 August 2001).

[31] Sections 36 and 37 DMA.

[32] Sections 9, 28, 30 and 114 PHA.

[33] Ministry of Health, Zambia National Public Health Institute & World Health Organization (n 4).

[34] E Simulundu, et al. 'First COVID-19 case in Zambia: Comparative phylogenomic analyses of SARS-CoV-2 detected in African countries' (2021) 102 *International Journal of Infectious Diseases* 455.

The first seven measures above were announced by the Minister of Health during his first Covid-19 press briefing, on 17 March 2020.[35] The first six measures took effect immediately, while the seventh measure (closure of learning institutions) took effect on 20 March. Three out of those seven measures were subsequently adjusted or revoked by presidential directives. On 25 March, the President directed that up to 50 people would be allowed to gather subject to certification by public health authorities and adherence to public health guidelines, such as social distancing, wearing of face masks, and ensuring hand hygiene.[36] The President also partially lifted the closure of learning institutions during his fourth Covid-19 national address, on 8 May 2020.[37] He directed a phased reopening of both primary and secondary schools, starting with examination classes on 1 June 2020. Later, on 11 September 2020, the President announced the reopening of all learning institutions with effect from 14 to 28 September 2020.[38] Meanwhile, on 22 May 2020, the President adjusted the quarantine requirements.[39] He directed that asymptomatic persons who tested positive for Covid-19 should go into self-isolation at home and that only those who were symptomatic and/or with other underlying illnesses such as tuberculosis and HIV/AIDS should be quarantined in designated health facilities.

The eighth measure enumerated above was also announced by the Minister of Health. Two temporary lockdowns by area were imposed during the period under examination. The first was a one-day lockdown of Kafue district of Lusaka province, which was announced on 14 April 2020 and implemented on 15 April.[40] This followed the Covid-19-attributed death of a 58-year-old resident who was only tested for the disease post-mortem. When announcing the lockdown, the minister stated that its purpose was to enable health officials to disinfect the area and conduct mass screening to identify those who had contracted the coronavirus but were asymptomatic, so that they could be isolated. He further directed that no one should leave or enter Kafue on 15 April 2020, to enable a surveillance team to conduct door-to-door screening and testing of residents for Covid-19. All residents were directed to stay at home.

The second lockdown was imposed in May 2020 on Nakonde district of Muchinga province. When announcing the lockdown on 10 May, the Minister of Health noted that Nakonde district had become a Covid-19 epicentre and said the government's decision to impose a 10-day lockdown of the area sought to enable health officials to conduct mass screening in order to prevent the further spread of Covid-19 in the district.[41]

All the last four measures enumerated above were introduced through presidential directives. During his first address on Covid-19, held on 25 March 2020, the President announced the closure of international airports, bars, nightclubs, cinemas, gymnasiums, and casinos, and

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[35] C Chilufya 'Press briefing on COVID-19 and additional preventive and control measures' (17 March 2020).
[36] EC Lungu 'Statement on the COVID-19 pandemic' (25 March 2020).
[37] EC Lungu '4th national address on COVID-19' (8 May 2020).
[38] EC Lungu 'Speech for the official opening of the fifth session of the twelfth assembly' (11 September 2020).
[39] EC Lungu 'Fifth address to the nation on COVID-19' (22 May 2020).
[40] Z Mbewe 'Kafue shuts down for mass COVID-19 screening, testing' *News Diggers* (Lusaka) 15 April 2020, https://diggers.news/local/2020/04/15/kafue-shuts-down-for-mass-covid-19-screening-testing/ (accessed 8 March 2021).
[41] United Nations Office for the Coordination of Humanitarian Affairs 'Zambia situation report' (15 June 2020), https://reliefweb.int/report/zambia/zambia-situation-report-15-june-2020 (accessed 8 March 2021).

directed restaurants to operate on a take-away and delivery basis only.[42] Later, on 8 May 2020, the President lifted the restriction on the operation of restaurants.[43] The President also announced the reopening of all international airports during his sixth Covid-19 address, on 25 June 2020.[44] He also partially lifted the closure of bars, nightclubs, cinemas, gymnasiums, and casinos on 11 September 2020, allowing these business outlets to operate from 6.00 to 11.00 pm on Fridays, Saturdays and Sundays.[45]

The mandatory wearing of face masks in public was announced earlier during the third presidential address, on 24 April 2020.[46] This measure was introduced as part of what the President termed the 'new normal' of living with Covid-19 whilst the economy was cautiously being reopened. The President also emphasised during that address that all adjustments of initial measures were on condition that those concerned adhered to public health guidelines. He warned that failure to adhere to his directives would attract penalties, including revocation of trading licences. The President directed law enforcement authorities to pursue any 'offenders', and urged members of the public to report any cases of non-compliance to the relevant authorities.

3.2 Legal basis for measures

The government relied on two pieces of secondary legislation as the legal basis for its Covid-19 response measures: the Public Health (Notifiable Infectious Disease) (Declaration) Notice, SI 21 of 2020 (Covid-19 Notice), and the Public Health (Infected Areas) (Coronavirus Disease 2019) Regulations, SI 22 of 2020 (Covid-19 Regulations). Both instruments were issued by the Minister of Health pursuant to the provisions of the PHA, and published in the government gazette (Gazette) on 13 March 2020. One of the regulations contained in the Covid-19 Regulations was amended on 13 July 2020.[47] Neither the Covid-19 Notice nor the Covid-19 Regulations as amended has a sunset clause. In terms of the Interpretation and General Provisions Act (IGPA) 60 of 1964, this means that both instruments remain in force following their date of commencement unless and until they are repealed by the authority by which they were made.[48]

According to the IGPA, the date of commencement of an SI '*shall* be the date of its publication in the Gazette or, where a later date is specified therein, such later date'.[49] The Covid-19 Notice does not specify its date of commencement. By default, therefore, the date of its publication in the Gazette is also its date of commencement, that is, 13 March 2020. The Covid-19 Regulations, on the other hand, have a commencement clause. Regulation 13 thereof provides that the Covid-19 Regulations would come into effect '*if* the urgency category levels described

[42] Lungu 'Statement on the COVID-19 pandemic' (n 36).
[43] Lungu '4th national address' (n 37).
[44] EC Lungu 'Statement on the COVID-19 pandemic' (25 June 2020).
[45] Lungu 'Speech for the official opening of the fifth session of the twelfth assembly' (n 38).
[46] EC Lungu 'Third national address on COVID-19' (24 April 2020).
[47] Public Health (Infected Areas) (Coronavirus Disease 2019) (Amendment) Regulations, SI 62 of 2020.
[48] Sections 19 and 20(3) IGPA.
[49] Section 19(1) IGPA (emphasis added).

in the Schedule reach[ed] the alert level'.[50] The 'alert level' is defined in the said schedule as one 'conveying the highest level of importance and warranting immediate action or attention'. What this means is that there must be a declaration, presumably by SI, that the Covid-19 pandemic has reached the alert level before the measures contained in the Covid-19 Regulations can be invoked. This makes sense because those regulations were made before the onset of the Covid-19 pandemic in Zambia.

During the period under examination, the government never made a declaration, by SI or otherwise, that the Covid-19 pandemic had reached the alert level in any part of Zambia. In terms of regulation 13 of the Covid-19 Regulations as read together with the IGPA, this means that the Covid-19 Regulations never came into force during the period under examination. The government, however, disregarded the commencement clause and implemented the measures contained in those regulations. For the sake of argument, let us nonetheless proceed on the assumption that the Covid-19 Regulations duly came into force on the date the government started enforcing them. The next question then is whether the Covid-19 Notice and the Covid-19 Regulations provided a sufficient legal basis for all the measures which the government introduced during the period under examination.

The Covid-19 Notice simply declares Covid-19 a 'notifiable' infectious disease. The effect of the declaration is to impose a statutory duty upon certain responsible persons *specified* in the PHA[51] (for example, the head of the family to which a patient belongs) to notify the nearest medical officer of health of any person suffering from Covid-19. Thus, the measure requiring people to report suspected cases of Covid-19 to health officials was supported by the Covid-19 Notice as read with the PHA. That measure was also supported by regulation 8 of the Covid-19 Regulations, which provides that '[a] person who becomes aware or has reason to suspect that another person has died or is suffering from COVID-19 shall immediately inform the nearest authorised officer in a local authority or a public health facility'.

In addition to regulation 8, the Covid-19 Regulations contain more detailed measures. The first set of measures is designed to restrict the movement of *certain* persons. In particular, regulation 3 as read together with regulation 4 empowers an 'authorised officer' to place into a hospital, observation camp, or quarantine station, persons suffering, suspected to be suffering, or those who have been in contact with a person suffering, from Covid-19. Regulation 3 prohibits a person from leaving a quarantine facility without the permission of an authorised officer. It also requires a person held in quarantine to comply with any direction given by the authorised officer. The quarantine requirement announced by the executive was therefore generally supported by the Covid-19 Regulations. However, the presidential directive as to who should and who should not be quarantined was *ultra vires* the Covid-19 Regulations. There was no law during the period under examination that empowered the President to amend those regulations, verbally or otherwise.

Regulation 5(1) prohibits a person from entering or leaving an 'infected area' without the permission of an authorised officer in the local authority of that area. It also requires a person

[50] Emphasis added.
[51] Section 10 PHA.

entering or leaving an infected area to comply with any direction given by an authorised officer in that area. Regulation 5(2) further provides that a person who intends to enter or leave an infected area may, before entering or leaving that area, be required to undergo medical examination or disinfection, or to remain in quarantine for a specified period. Regulation 5 therefore appears to be the legal basis for the screening of travellers for Covid-19. But that regulation does not apply to the general restriction on 'non-essential' travel, however defined.

It must be underlined here that regulation 5 applies only to an 'infected area'. Regulation 2 of the Covid-19 Regulations defines an infected area as *a part of Zambia declared* as being or appearing to be threatened by the epidemic of Covid-19. However, neither the Covid-19 Regulations nor the enabling Act specifies how the declaration is to be made. One would assume that, just like a declaration of a notifiable infectious disease, a declaration of an infected area ought to be made by SI. But, apart from the routine ministerial announcement of districts where Covid-19 cases were recorded, no part of Zambia was ever formally declared an infected area during the period under examination. However, even before some districts had recorded any cases of Covid-19, the government applied the Covid-19 Regulations countrywide.

In any event, regulation 5 does not restrict movement *within* an effected area. Nor does it empower the Minister of Health to prohibit entry into or exit from an infected area. That regulation applies only to persons entering or leaving an effected area – and there is no provision in the Covid-19 Regulations that empowers the Minister to impose a blanket restriction on the movement of people into, out of, or indeed within an area, even after being duly declared an infected area. Therefore, the lockdowns imposed on Kafue and Nakonde districts had no legal basis. The door-to-door screening conducted during the lockdowns, however, appears to be consistent with regulation 7 of the Covid-19 Regulations. That regulation empowers an authorised officer to 'enter premises to search for a case of COVID-19 or to enquire whether there is or has been a case of COVID-19'.

Regulation 9 imposes a restriction on gatherings, but only in an infected area. This is the regulation that was amended on 13 July 2020. Before the amendment was adopted, regulation 9 prohibited the holding – by more than five persons, other than a family – of a public ceremony or gathering in an infected area without the written permission of a local authority or a medical officer of health. Therefore, the presidential directive permitting public gatherings of up to 50 people was in direct conflict with regulation 9. Indeed, the President had no legal authority to implicitly amend regulation 9 in that manner or at all. Regulation 9 as formally amended completely prohibits *all* public gatherings 'in an infected area without the written permission of an authorised officer'.

Regulation 10 empowers an authorised officer to prohibit or restrict the trade of food products and ready to eat foods from and in *any location* which may pose a danger to the health of consumers and traders. The temporary restriction on the operation of restaurants would resonate to some extent with this regulation. However, only an authorised officer is empowered to impose such a restriction in a *specified location*. The President had no power under the Covid-19 Regulations or under any other law to impose a countrywide restriction or any restriction at all on the operation of restaurants in the manner he did during the period under examination. The same can be said *vis-à-vis* the closure of international airports and other

business establishments, as well as the mandatory requirement to wear face masks in public. Moreover, none of the measures contained in the Covid-19 Regulations empowers the Minister of Health, or indeed the President, to close learning institutions countrywide.

Regulation 11 imposes an *obligation* on an authorised officer to prohibit or restrict trading or vending of food in unsanitary conditions. Regulation 12 similarly empowers an authorised officer to inspect public premises to ensure that the latter have sufficient sanitation and hygiene to prevent the occurrence or transmission of Covid-19. It further empowers an authorised officer to order the cleaning or closure of public premises or the covering of a contaminated water body to prevent the occurrence or transmission of Covid-19. These provisions could be the basis for the measures the government announced in regard to hygiene and sanitation in public places.

In sum, some of the measures announced by the Minister of Health might have a foundation in the Covid-19 Notice and the Covid-19 Regulations. However, the minister had no legal authority to introduce measures such as lockdowns or the countrywide closure of learning institutions. None of the presidential directives had any legal basis. The President could only have made those directives lawfully by SI, either under the EPA following a declaration of a state of public emergency in accordance with the Constitution, or under the DMA following a declaration of a state of disaster in accordance with the provisions of that Act.

4. The role of Parliament

The parliament of Zambia did not enact Covid-19-specific legislation during the period under examination. However, apart from its legislative function, the National Assembly has a mandate to act as a constitutional check on the executive.[52] The National Assembly fulfils this mandate through various mechanisms, including questions and debates in the House, points of order, and hearings conducted in committees and subcommittees.[53] These oversight mechanisms are provided for in standing orders made by the National Assembly itself, under article 77 of the Constitution.

During the period under examination, the National Assembly largely failed to invoke oversight mechanisms to hold the executive meaningfully to account for its apparent infractions. At the onset of the pandemic, on 18 March 2020, the House was abruptly adjourned *sine die* as a precaution against the transmission of Covid-19 among MPs.[54] This is probably the reason why the President did not declare a state of emergency. As noted above, any such declaration would have required the approval of the National Assembly within seven days of the declaration being made. The House resumed sitting three months later, on 23 June 2020.[55] This was after the issuance of temporary standing orders which allowed for some MPs to participate virtually in

[52] See articles 63(2) and 114(2) Constitution of Zambia.
[53] See Standing Orders of the National Assembly of Zambia of 2016.
[54] National Assembly of Zambia 'Debates and proceedings' 18 March 2020, https://www.parliament.gov.zm/node/8913 (accessed 8 March 2021).
[55] National Assembly of Zambia 'Debates and proceedings' 23 June 2020, http://www.parliament.gov.zm/node/8360 (accessed 8 March 2021).

the business of the House to minimise physical contact.[56] But barely a month thereafter, on 21 July 2020, the House was again abruptly adjourned *sine die* following a Covid-19-attributed death of an MP.[57] It started sitting again after the official opening of the fifth session of the twelfth assembly by the President, on 11 September 2020.[58]

Given these interruptions in the business of the House, the National Assembly was largely unavailable during the period under examination to hold the executive to account for its apparent infractions. A survey of the Hansard reveals that MPs generally failed to perform their oversight function even during the sittings that took place during that period. Notably, on 17 July 2020, the then Minister of Health was asked to make a ministerial statement on why ruling party officials, including the minister himself, had been flouting government measures on Covid-19 while enforcing them against the opposition.[59] This was after the Leader of the Opposition in the House had raised a point of order to that effect. The minister, however, prevaricated as there was no justification for such discriminatory application of government measures.[60]

5. Impact on human rights

Human rights are indivisible, interdependent, and interrelated.[61] As such, the Covid-19 pandemic and government measures in response thereto had an impact across the whole range of the human rights canon during the period under examination.[62]

As alluded to above, the United Nations country office identified a range of deficiencies in the government's resource capacity to respond effectively to the Covid-19 pandemic and its social and economic effects in eleven different sectors.[63] Zambia's health system in particular came under severe stress during the pandemic, 'with human resource, essential health commodities and supplies being diverted to support the response'.[64] The pre-existing lack of adequate health and water, sanitation and hygiene (WASH) services also posed serious challenges for effective prevention of Covid-19 infections and further increased 'vulnerabilities, particularly of women, children, people with disabilities, the elderly and people living with HIV'.[65] Even the Covid-19 vaccination programme which was rolled out *after* the period under examination was characterised by shortages of vaccines as the government did not procure its own vaccines but

[56] National Assembly of Zambia Corona Virus Disease 2019 (COVID-19) Temporary Standing Orders of 2020.
[57] National Assembly of Zambia 'Debates and proceedings' 21 July 2020, http://www.parliament.gov.zm/node/8447 (accessed 8 March 2021).
[58] National Assembly of Zambia 'Debates and proceedings' 11 September 2020, http://www.parliament.gov.zm/node/8454 (accessed 8 March 2021).
[59] National Assembly of Zambia 'Debates and proceedings' 17 July 2020, http://www.parliament.gov.zm/node/8446 (accessed 8 March 2021).
[60] See also U Nkomesha 'Chitalu dodges questions on why PF members are flouting COVID-19 guidelines' *News Diggers* (Lusaka) 18 July 2020, https://diggers.news/local/2020/07/18/chitalu-dodges-questions-on-why-pf-members-are-flouting-covid-19-guidelines/ (accessed 8 March 2021).
[61] Section I, para 5 Vienna Declaration and Programme of Action of 1993.
[62] See OSCE & ODIHR (n 30) 92; K Bennoune '"Lest we should sleep": COVID-19 and human rights' (2020) 114 *American Journal of International Law* 666, 669; P Dąbrowska-Kłosińska 'The protection of human rights in pandemics—reflections on the past, present, and future' (2021) 22 *German Law Journal* 1028, 1033.
[63] United Nations 'United Nations COVID-19 emergency appeal' (n 5).
[64] United Nations 'United Nations COVID-19 emergency appeal' (n 5) 6.
[65] ibid.

depended on donations, at least for several months after the commencement of the programme.[66] Covid-19 response measures such as the closure of learning institutions and business establishments and lockdowns also exacerbated longstanding socio-economic problems and inequalities. For example, due to lack of food security, the Nakonde lockdown is said to have triggered a riot; the rioting residents reportedly complained of being hunger stricken as the lockdown had further restricted their access to food.[67]

These are just examples of how the Covid-19 pandemic might have led to wide-ranging violations of social and economic rights in Zambia. However, affected individuals could not seek legal redress as the Constitution does not specifically guarantee social or economic rights. Thus, the remainder of this section focuses on civil and political rights. More specifically, given time and space constraints, only justiciable rights enshrined in the Constitution that seem to have been most directly affected are considered.

5.1 Right to liberty

The right to personal liberty as enshrined in article 13 of the Constitution protects individuals from arbitrary arrest and detention. A person may, however, be deprived of his liberty for the purpose of preventing the spread of an infectious or contagious disease as may be *authorised by law*.[68] A person who is unlawfully arrested or detained is entitled to compensation.[69]

Under the Covid-19 Regulations, the right to liberty may be lawfully restricted by quarantine. However, the presidential directive as to how that measure was to be implemented during the period under examination contravened article 13 of the Constitution, as it was unlawful. There were also reports during the period of arbitrary detentions by police under the pretext of enforcing the Covid-19 Regulations.[70] The presidential directive to law enforcement officers to pursue 'offenders' gave impetus to the participation of police in the enforcement of unlawful presidential directives and other Covid-19 measures, including those contained in the Covid-19 Regulations. This flew in the face of the Covid-19 Regulations, as those regulations assign

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[66] Zambia received the first consignment of Covid-19 vaccines, consisting of 228,000 doses of the Astra Zeneca vaccine, on 12 April 2021. The consignment was 'procured by UNICEF, working closely with WHO under the COVAX Facility, co-led with GAVI and CEPI' (United Nations 'Zambia receives first consignment of COVID-19 vaccines' 14 April 2021, https://zambia.un.org/en/124797-zambia-receives-first-consignment-covid-19-vaccines (accessed 4 August 2021)). The vaccination programme was launched on 14 April 2021 but the administration of the first dose was suspended on 24 May 2021 'following a decision to ring fence the remaining doses for use as [the second] dose' (Ministry of Health, Zambia National Public Health Institute & World Health Organization 'Zambia COVID-19 situation report no. 300' (19 March 2020) 4, http://znphi.co.zm/news/wp-content/uploads/2021/07/Zambia_COVID-Situational-Report-No-300_21July2021_Final.pdf (accessed 4 August 2021)).

[67] U Nkomesha 'Cops nab 9 in Nakonde riots, shoot one in both legs' *News Diggers* (Lusaka) 21 May 2020 https://diggers.news/local/2020/05/21/cops-nab-9-in-nakonde-riots-shoot-one-in-both-legs/ (accessed 8 March 2021).

[68] Article 13(1)(g) Constitution of Zambia. cf LO Gostin & JG Hodge 'US emergency legal responses to novel coronavirus: Balancing public health and civil liberties' (2020) 323 *JAMA* 1131, 1132 (noting that, in addition to the 'lawfulness' requirement, the US 'Supreme Court requires "clear and convincing" evidence…for civil confinements, with the right to appeal to independent tribunals).

[69] Article 13(4) Constitution of Zambia.

[70] Advancing Rights in Southern Africa, et al. 'SADC: Restrictive COVID-19 regulations presenting concerning ramifications for enjoyment of human rights, including livelihoods' 22 May 2020, https://www.amnesty.org/download/Documents/AFR0323922020ENGLISH.pdf (accessed 8 March 2021).

'authorised officers' as enforcers of the measures contained therein. Regulation 2 defines an authorised officer as 'a Medical Officer of Health, Health Inspector, District Medical Officer, Environmental Health Officer or a suitably qualified person authorised in writing by the Minister or a local authority with approval of the Minister'.

The participation of the police in enforcing the Covid-19 Regulations was therefore itself unlawful. Only authorised officers as defined in regulation 2 are empowered to enforce the Covid-19 Regulations.

5.2 Freedom from inhuman treatment

As enshrined in article 15 of the Constitution, the right to freedom from torture, inhuman or degrading punishment and other similar treatment is absolute. It cannot be derogated from or otherwise restricted. This is in keeping with the *jus cogens* status of that right.[71]

During the period under examination, a number of reports suggested that the police contravened article 15 of the Constitution under the pretext of enforcing Covid-19 measures. For example, the police were reportedly beating up people found in bars at night in the capital, Lusaka.[72] Although the measures announced by the President and the Minister of Health did not include a curfew, there were also reports of police beating up people with batons on the streets to force them to stay at home at night.[73] The national police spokesperson openly announced that 'police in Zambia had adopted a strategy to "hit and detain" anyone found on the streets'.[74] The then Lusaka provincial minister was reportedly threatening people with flogging if they did not comply with presidential directives, claiming that human rights had been suspended during the Covid-19 pandemic.[75] On 20 May 2020, the police used live ammunition to disperse Nakonde residents who were participating in the lockdown-triggered riot , and one person was reportedly shot.[76]

The High Court considers that subjecting individuals to medical testing without their informed consent is also a violation of the right to freedom from inhuman and degrading treatment.[77] Thus, depending on the threshold employed to determine what amounts to such treatment, regulation 5 of the Covid-19 Regulations, which provides for mandatory medical examination, might come into conflict with article 15 of the Constitution.

5.3 Right to privacy

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[71] E de Wet 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law' (2004) 15 *European Journal of International Law* 97; JD Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and People's Rights' (2006) 6 *African Human Rights Law Journal* 423, 425-27.

[72] Advancing Rights in Southern Africa, et al. (n 70) 2.

[73] ibid.

[74] ibid.

[75] D Chansa & N Sakala 'There're no human rights now, we just beat – Lusambo' *News Diggers* (Lusaka) 8 April 2020, https://diggers.news/local/2020/04/08/therere-no-human-rights-now-we-just-beat-lusambo/ (accessed 8 March 2021).

[76] Nkomesha 'Cops nab 9 in Nakonde riots' (n 67).

[77] Kingaipe & another v Attorney General (2010) ZR 94.

According to article 17 of the Constitution, 'no person shall be subjected to the search of his person or his property or the entry by others on his premises' without his consent. This right to privacy may, however, be restricted *by law* if the restriction in question (1) is reasonably required, inter alia, in the interest of public health, and (2) is reasonably justifiable in a democratic society.[78]

Unlike in other countries where surveillance technology was reportedly used to track people's movements during the Covid-19 pandemic,[79] there were no such reports in Zambia during the period under examination. However, subjecting a person to medical examination without his or her informed consent has also been held to be a violation of the right to privacy.[80] Thus, regulation 5 of the Covid-19 Regulations might come into conflict with both articles 15 and 17 of the Constitution. The Covid-19 Notice and regulation 8 of the Covid-19 Regulations on mandatory reporting of persons suspected to have Covid-19 also affect the right to privacy. So too does regulation 7, which empowers an authorised officer to enter premises to investigate suspected cases of Covid-19, which the government apparently relied on to conduct door-to-door Covid-19 screening during the two lockdowns. To pass constitutional muster, as noted above, these measures must not only be lawful but also reasonably required in the interest of public health and reasonably justifiable in a democratic society.

5.4 Freedom of expression

Article 20 of the Constitution guarantees freedom of expression in general and freedom of the media in particular. Freedom of expression may be restricted, inter alia, in the interest of national defence, public safety, public order, public morality, or public health, or for the purpose of protecting the reputation, rights and freedoms of others. Any restriction on any of the enumerated grounds must be (1) provided by law, (2) reasonably required for the attainment of the objective in view, and (3) reasonably justifiable in a democratic society.[81]

During the period under examination, the government was said to have taken advantage of the Covid-19 pandemic to advance its agenda of clamping down on critical private media. For example, on 9 April 2020, the government-controlled Independent Broadcasting Authority (IBA) shut down a popular television station, Prime TV. The decision was taken after the proprietors' alleged refusal to air the government's Covid-19 awareness campaigns on the channel free of charge. The IBA cited 'public interest ... safety, security, peace, welfare and

[78] Article 17(2) Constitution of Zambia.

[79] See generally S Whitelaw, et al. 'Applications of digital technology in COVID-19 pandemic planning and response' (2020) 2 *Lancet Digital Health* e435; W Lim 'Assessing the implications of digital contact tracing for COVID-19 for human rights and the rule of law in South Africa' (2020) 20 *African Human Rights Law Journal* 540; M Ryan 'In defence of digital contact-tracing: human rights, South Korea and Covid-19' (2020) 16 International Journal of Pervasive Computing and Communications 383; R Kitchin 'Civil liberties or public health, or civil liberties and public health? Using surveillance technologies to tackle the spread of COVID-19' (2020) 24 *Space and Polity* 362; A Guinchard 'Our digital footprint under Covid-19: should we fear the UK digital contact tracing App?' (2021) 35 *International Review of Law, Computers & Technology* 84; S Jacob & J Lawarée 'The adoption of contact tracing applications of COVID-19 by European governments' (2021) 4 *Policy Design and Practice* 44. See also DA Gawu & RO Mensah 'COVID-19 contact tracing and privacy rights in Ghana: A critical analysis of the Establishment of Emergency Communications System Instrument, 2020 (EI 63)' (2021) 65 *Journal of African Law* 361.

[80] Kingaipe & another v Attorney General (n 77).

[81] Article 20(3) Constitution of Zambia.

good order' as the reasons for its decision, but civil society saw this decision 'as part of the wider government policy of systematically closing civic space ahead of the 2021 elections'.[82] True, the decision was not supported by any evidence that could reasonably justify the closure of Prime TV on any of the grounds envisaged in the Constitution. It should therefore come as no surprise that the said television station was allowed to reopen after the ruling party at the material time, the Patriotic Front (PF), lost the 2021 presidential election to the United Party for National Development (UPND).

5.5 Freedom of assembly and non-discrimination

Freedom of assembly and association, as enshrined in article 21 of the Constitution, includes the 'right to assemble freely and associate with other persons, and in particular to form or belong to any political party'. Article 23 of the Constitution reinforces this freedom by prohibiting discrimination on political grounds, among others. The Constitution does permit restrictions of freedom of assembly and association in the interest of public health. However, any such restriction must not only be reasonably required for that purpose but be provided by law and be reasonably justifiable in a democratic society.[83]

In principle, regulation 9 of the Covid-19 Regulations, which prohibits gathering in an 'infected area', is a justifiable restriction on freedom of assembly. But the countrywide application of that restriction during the period under examination was unlawful, and might be difficult to justify insofar as it was applied to areas that had no confirmed cases of Covid-19. Furthermore, since it prohibits all public gatherings without the prior permission of an authorised officer, regulation 9 itself is problematic. Such licencing of the right to peaceful assembly has been previously declared unconstitutional for contravening article 21 of the Constitution.[84]

Similarly, apart from being *ultra vires*, regulation 9, the presidential directive restricting to 50 the number of people who could gather cannot pass constitutional muster. First, that directive was unlawful. Secondly, the President did not provide a reasonable explanation of how the magical number 50 was arrived at.[85] Thirdly, the countrywide application of that directive would be difficult to justify, especially in areas that had no confirmed Covid-19 cases.

There were further concerns during the period under examination that the government had taken advantage of the Covid-19 pandemic to thwart peaceful assemblies and mobilisation activities by the opposition ahead of the 12 August 2021 general election.[86] The police repeatedly prohibited public meetings under the pretext of enforcing the Covid-19 Regulations.

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[82] Advancing Rights in Southern Africa, et al. (n 70) 5.
[83] Article 21(2) Constitution of Zambia.
[84] Mulundika & others v The People (n 12); Law Association of Zambia v Attorney General Appeal 08 of 2014.
[85] Interestingly, even Sweden, a country that adopted one of the 'laxest' responses to the Covid-19 pandemic, is said to have also imposed a restriction on freedom of assembly by banning public meetings of more than 50 people as a measure aimed at curbing the spread of Covid-19. See L Jonung 'Sweden's constitution decides its exceptional Covid-19 policy' *SSRN* 10 June 2020, 3, https://ssrn.com/abstract=3796848 (accessed 8 March 2021). See also FS Bethke & J Wolff 'COVID-19 and shrinking civic spaces: patterns and consequences' (2020) 9 *Z Friedens und Konflforsch* 363, 367.
[86] Nkomesha 'Chitalu dodges questions' (n 60).

In June 2020, this led some youths to hold an anti-government protest in the bush.[87] As noted above, the government also failed to provide a justification for the discriminatory application of its Covid-19 measures against the opposition.

5.6 Freedom of movement

Article 22 guarantees freedom of movement, which includes the right to move freely and reside in any part of Zambia and the right to leave and to return to Zambia. Any restriction on this freedom in the interest of public health must be (1) prescribed by law, (2) reasonably required in the interest of public health, and (3) reasonably justifiable in a democratic society.[88]

Regulation 5(1) of the Covid-19 Regulations, which prohibits individuals from entering or leaving an infected area without the permission of an authorised officer, is a restriction on freedom of movement within Zambia. The temporary lockdowns of the areas of Kafue and Nakonde, prohibiting people from leaving or entering those districts, had the same effect. Similarly, the temporary closure of international airports and the restriction of 'non-essential' international travel were restrictions on freedom of movement, specifically the right to leave Zambia. Even without considering their justification, these measures were unconstitutional as they were not based on any law.

6. The role of the courts

The general penalty for any contravention of the measures contained in the Covid-19 Regulations is a fine of up to 2500 penalty units (K750.00)[89] or imprisonment for a term of up to six months, or both.[90] A case concerning alleged contravention of those regulations would be prosecuted in a subordinate court. Since only the High Court is vested with original jurisdiction over the Bill of Rights, article 28(2) of the Constitution requires subordinate courts to refer to the High Court all questions concerning alleged contravention of the protective provisions enshrined in the Bill of Rights.[91] As noted above, police beatings and arrests of people on allegations of contravening the Covid-19 Regulations were widely reported during the period under examination. Corresponding reports of prosecution or reference of cases to the High Court were, however, largely elusive.

Notably, on 15 May 2020, a Lusaka resident filed a case relating to allegations of human rights violation.[92] The plaintiff sued the state, seeking damages for injuries he allegedly sustained after being beaten by police at a bar under the pretext of enforcing the Covid-19 Regulations. He also sought a declaration that the police had no power under those regulations or any other law to humiliate, assault, torture, or subject him to inhuman or degrading treatment or

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[87] S Ncube 'Youths dribble police, as they take protest to the bush' *News Diggers* (Lusaka) 23 June 2020, https://diggers.news/local/2020/06/23/youths-dribble-police-as-they-take-protest-to-the-bush/ (accessed 8 March 2021).
[88] Article 22(3)(a) Constitution of Zambia.
[89] Fees and Fines (Fee and Penalty Unit Value) (Amendment) Regulations, SI 41 of 2015.
[90] Regulation 14 Covid-19 Regulations.
[91] See, for example, *Chipenzi & others v The People* HPR/03/2014.
[92] Sikananu v Attorney General 2020/HP/0485.

punishment. One would have expected the court to prioritise the determination of this case as it was the first and only notable case during the period under examination that provided an opportunity for the judiciary to pronounce itself on the government's breach of the commencement clause of the Covid-19 Regulations and to clarify the nature and scope of executive powers under those regulations. However, the case was still pending before the High Court at the time of writing.

There was also a general interruption in judicial operations in the wake of the Covid-19 pandemic, particularly between March and June 2020. The High Court, the first port of call for judicial redress in human rights claims, had suspended the hearing of civil matters with effect from 30 March 2020 for an initial period of two weeks.[93] During that period, the court would only attend to 'urgent matters' such as applications for injunction and for stay of execution. All criminal sessions in the High Court had also been suspended indefinitely with effect from 6 April 2020.[94] Sessions of other superior courts, including the Constitutional Court, which had been scheduled to commence in April 2020, were suspended too.[95] Inferior courts continued operating, albeit under precautionary guidelines.

On 20 May 2020, the Chief Justice issued detailed guidelines to facilitate the continuity of judicial operations during the pandemic.[96] The guidelines were issued under article 136(2)(e) of the Constitution which empowers the Chief Justice to 'make rules and give directions necessary for the efficient and effective administration of the Judiciary'. Following the publication of those guidelines, the Chief Justice announced the resumption of full judicial operations effective from 1 June 2020.[97] The guidelines would apply to all courts in Zambia for an initial period of 90 days subject to extension for such further period as the Chief Justice would determine from time to time. Upon the expiration of that period, the guidelines were extended for a period of 180 days.[98] But no further extension was announced after the expiration of that extended period, at least not at the time of writing. On a more lasting basis, the High Court civil procedural rules were amended in June 2020 to promote usage of technology in court proceedings.[99]

7 Analysis of constitutional resilience

The rule of law requires all state power to be exercised under the authority of law and, as an element thereof, constitutionalism 'largely depends on how constitutional limitations imposed on government are interpreted and enforced'.[100] It is now an open secret that Zambia's performance as concerns constitutionalism and the rule of law during the period under examination was suboptimal. All the three institutions of the state could have done better.

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[93] C Kafunda 'Public notice' (27 March 2020).
[94] ibid.
[95] C Kafunda 'Public notice' (19 March 2020).
[96] Judiciary (Coronavirus) May 2020 Guidelines.
[97] IC Mambilima 'Chief justice's circular no. 1 of 2020' (21 May 2020).
[98] C Kafunda 'Public notice' (18 September 2020).
[99] High Court (Amendment) Rules, SI 58 of 2020
[100] M Ndulo 'Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system' (2013) 2 *Zambia Social Science Journal* 1, 3-4.

For its part, the executive had the relevant legal framework at its disposal to make secondary legislation in response to the Covid-19 pandemic, but opted to introduce several non-law-based measures. The lack of parliamentary and judicial oversight also provided an enabling environment for lawlessness to thrive.[101] Of great concern are presidential directives which are tantamount to 'rule by decree' and could thus mark the start of a new 'authoritarian pandemic',[102] if left unchecked. Indeed, those directives were cited as the basis for the unlawful conduct by government officials and the police. Significantly, the inconsistencies of presidential directives with the Covid-19 Regulations created a great deal of legal uncertainty. An average citizen would not know that the purported implicit amendments to the Covid-19 Regulations made through presidential directives had no legal effect. It was also unclear at the time of writing whether the presidential directives which were not fully 'revoked' were still 'in force', as the latest presidential address on Covid-19 measures during the period under examination was given on 11 September 2020.

Granted, desperate times call for desperate measures. A constitution that does not bend during public emergencies is liable to break.[103] Constitutionalism and the rule of law nonetheless demand the upholding of constitutional values and functions, even during public emergencies, as opposed to forgoing them. To avoid breaking, the Constitution itself, and the entire system that it establishes, must be resilient.[104] In other words, the constitutional system as a whole must *anticipate* and be able to *absorb* the effects of public emergencies while ensuring the preservation of its basic structure and functions. Constitutional resilience is also about the ability of the constitutional system to *bounce back*; that is, to recover from the effects of a crisis 'in a timely and efficient manner by ensuring restoration or improvement of its essential basic structures and functions'.[105]

A declaration of a state of public emergency, insofar as it entails suspending the normal functions of the Constitution, does not as such fit into the equation of constitutional resilience. Thankfully, the Zambian constitutional system does anticipate emergencies, including public health emergencies. The Constitution, as we have already seen, does permit law-based restrictions on derogable rights in the interest of public health. It is incumbent upon the executive to make secondary legislation to deal with public emergencies in a manner that is proportionate to the situation obtaining from time to time to ensure constitutional resilience. As oversight institutions, the legislature and the judiciary also play an indispensable role in any resilient constitutional system. Fortunately again, the Constitution also allows both institutions

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[101] For details concerning such oversight and its significance during public emergencies, see generally J Petrov 'The COVID-19 emergency in the age of executive aggrandizement: What role for legislative and judicial checks?' 8 *The Theory and Practice of Legislation* 71; E Griglio 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance'8 *The Theory and Practice of Legislation* 49.

[102] S Thomson & EC Ip 'COVID-19 emergency measures and the impending authoritarian pandemic' (2020) 7 *Journal of Law and the Biosciences* 1.

[103] RA Posner Not a suicide pact: The constitution in a time of national emergency (2006) 1.

[104] See generally X Contiades & A Fotiadou 'On resilience of constitutions: What makes constitutions resistant to external shocks' (2015) 9 *Vienna Journal on International Constitutional Law* 3; X Contiades & A Fotiadou 'Constitutional resilience and unamendability: Amendment powers as mechanisms of constitutional resilience' (2019) 21 *European Journal of Law Reform* 243.

[105] C Field, et al. (eds) Managing the risks of extreme events and disasters to advance climate change adaptation (2012) 33.

to regulate their own procedure. It is therefore incumbent upon those institutions to make relevant operational and procedural adjustments to contribute to constitutional resilience during public emergencies.

In short, the lack of constitutional resilience in Zambia during the period under examination cannot be attributed to constitutional rigidity. It can be attributed mainly to what appears to be a deliberate disregard for constitutionalism and the rule of law on the part of the executive and to a lack of preparedness on the part of the legislature and judiciary. However, even the Constitution itself is somewhat deficient. Recall that human rights are indivisible, interdependent, and interrelated. This means that civil and political rights cannot be fully enjoyed in the absence of economic, social, and cultural rights and vice versa. Based on the United Nations assessment referred to above, it is obvious that the latter set of rights were widely affected during the period under examination, especially in relation to vulnerable groups. Despite Zambia's commitment under international law to uphold human rights, the non-domestication of economic, social, and cultural rights means that victims of violations of such rights cannot seek legal redress, because those rights are non-justiciable in national courts. Let us consider each of these lessons in turn in more detail.

7.1 Constitutional and law-based executive response

The PHA, as already mentioned, confers upon the Minister of Health wide-ranging powers to make regulations by SI for the purpose of preventing the spread of an infectious or contagious disease or generally to prevent, control, or suppress infectious diseases, including novel ones.[106] There was therefore no legally valid excuse during the period under examination for the minister to introduce unlawful measures such as closure of schools or lockdowns by area. If anything, the PHA should be amended to bring it into line with the Constitution and international standards on the temporary nature of emergency powers.[107] Specifically, the PHA should require the minister's emergency regulations to be time-bound. The lack of such a requirement is the reason why the Covid-19 Regulations do not have a sunset clause. This provides leeway for the authorities to feather their own nest by unnecessarily prolonging the implementation of those regulations, and so delaying the process of 'bouncing back' in the aftermath of the Covid-19 pandemic.

The DMA also confers wide powers upon the President to regulate an emergency or any situation within a disaster-stricken or -threatened area.[108] Therefore, the President's decision to make unlawful directives in response to the Covid-19 pandemic during the period under examination cannot be justified either. It must be pointed out that the emergency provisions under the PHA and DMA are not mutually exclusive. They can be invoked concurrently to complement each other. But unlike the PHA, which confers sweeping powers upon the Minister

[106] Sections 9, 28, 30 & 114 PHA.
[107] See article 30(2) and (5) Constitution of Zambia. See also OSCE & ODIHR (n 30) 21; United Nations Human Rights Committee 'Statement on derogations from the Covenant in connection with the COVID-19 pandemic' (24 April 2020), para 2; E Mykhalovskiy, et al. 'Human rights, public health and COVID-19 in Canada' (2020) 111 *Canadian Journal of Public Health* 975, 976; S Sekalala, et al. 'Health and human rights are inextricably linked in the COVID-19 response' (2020) 5 *BMJ Global Health* 1, 2.
[108] Section 36 DMA.

of Health, the DMA has important human rights safeguards which should make it more appealing in a constitutional democracy.

First, the President can only make a declaration of a state of disaster upon receiving information from the National Disaster Management Council that it has 'reasonable grounds to believe that an emergency or a situation aggregating to a disaster exists' in a *particular area*.[109] Secondly, the President can only make regulations in consultation with the said Council.[110] Thirdly, the restriction of the declaration to 'a disaster area' ensures that only such an area is directly affected by the attendant regulations. This prevents indiscriminate, countrywide application of response measures even to non-affected areas, as witnessed during the period under examination. Fourthly, the regulations made by the President can be *only* for the purpose of assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption, or dealing with the destructive and other effects of the disaster.[111] Lastly, and importantly, the declaration of a state of disaster can remain in force only for a period of three months unless it is extended for a like period.[112] The DMA should therefore be preferred to the PHA until similar safeguards are enshrined in the latter.

7.2 Parliamentary and judicial oversight

The National Assembly, for its part, should improve its organisational and procedural arrangements to provide for continuity of committee and plenary activities even during times of emergencies. Organisational and procedural flexibility during the Covid-19 pandemic is what enabled parliaments in other countries to continue operating from the onset of the pandemic while 'guaranteeing the safety of MPs and parliamentary staff'.[113] This means, for example, that standing orders should anticipate emergencies by allowing for virtual meetings, hearings, voting, and the like at such times. The use of written procedures should also be expressly envisaged in the standing orders. In particular, 'questions for written answer' would not generally pose public health concerns. These could help expose executive infractions, especially if the media are purposely encouraged to publish them. The National Assembly should also maximise the use of specialised oversight committees on constitutional and human rights issues during public emergencies.

As for the judiciary, the revised High Court procedural rules provide a good starting-point for improving its preparedness. One can only hope that the initiative will be extended to other courts. Importantly, if the judiciary is to contribute meaningfully to constitutional resilience, courts should prioritise the determination of cases challenging emergency measures and the implementation thereof. This should be clearly provided for in court procedural rules.

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[109] Section 36(1) and (2) DMA.
[110] Section 37(1) DMA.
[111] Section 37(1) DMA.
[112] Section 36 DMA.
[113] Griglio 'Parliamentary oversight under the Covid-19 emergency' (n 101) 53. See also HH Pedersen & E Borghetto 'Fighting COVID-19 on democratic terms. Parliamentary functioning in Italy and Denmark during the pandemic' (2021) 57 *Representation* 401

The paucity of Covid-19-related litigation, despite many apparent constitutional infractions during the period under examination, suggests that the judiciary would not have played a significant oversight role even if it had not scaled down its operations. This can be attributed to a general lack of civil rights litigation culture in Zambia and to what economists call the 'free-rider problem' in particular. In the face of widespread infringements of human rights, there tends to be insufficient incentive for private litigation. Every victim is disinclined to litigate in the hope that other victims will do so and he or she then benefit from the outcome while avoiding the cost of litigation. By the same token, private individuals tend to have no incentive to institute litigation to challenge legislation or other measures of general application.

Under these circumstances, the use of 'public interest litigation' tends to be a more effective and efficient way of enforcing human rights and advancing constitutionalism and the rule of law. Thankfully, article 28 of the Constitution allows for 'public interest' petitions to be filed in the High Court to seek redress in respect of human rights violations.[114] It is therefore incumbent upon human rights and civil society organisations to contribute to constitutional resilience during public emergencies by instituting public interest litigation.[115]

7.3 Economic, social, and cultural rights

The experience during the period under examination points to the need to enshrine economic, social, and cultural rights in the Constitution in order to make them justiciable domestically. Article 79 of the Constitution requires a national referendum to effect amendments to the Bill of Rights. On 11 August 2016, Zambia held a referendum in parallel with a general election. The referendum, inter alia, sought the people's approval of a proposal to include economic, social, and cultural rights in the Bill of Rights. However, the proposal failed to garner enough support from eligible voters to meet the 50 per cent threshold required by article 79.

According to independent observers, the referendum failed mainly because it was held in parallel with a general election. The general election, it has been observed, led to the politicisation of the referendum in that citizens were encouraged to vote 'yes' or 'no' based on the party they were supporting, and the combination of the referendum and the general election 'created further confusion in the minds of voters'.[116] The government should therefore consider holding a referendum independently of political elections so as to sensitise the people on the need to enshrine economic, social, and cultural rights in the Constitution.

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[114] See *Attorney General v Law Association of Zambia* (2008) ZR 21 Vol 1. See also section 11(2)(c) Constitutional Court Act 8 of 2016.

[115] For general arguments against liberalising the requirement of standing in public interest litigation, including its potential abuse, see MN Chaturvedi 'Liberalizing the requirement of standing in public interest litigation' (1984) 26 *Journal of the Indian Law Institute* 42; C Phiri 'Limitation of presidential terms in Zambia: Annotating the judicial interpretation' (2019) 45 *Commonwealth Law Bulletin* 752, 764

[116] The Commonwealth 'Zambia general elections and referendum 11 August 2016', https://thecommonwealth.org/sites/default/files/press-release/documents/Zambia%20COG%20Report%20FN%202016.pdf (accessed 8 March 2021).

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