



**Social Justice and the Rule of Law in Policy Responses to
Corona Virus COVID-19 in Africa – A project of the Law Trust
Chair in Social Justice, Faculty of Law, Stellenbosch University
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1 Introduction

In commemoration of Africa month and the African dream that seeded the African Union, the conversation scrutinised Africa's policy responses to the coronavirus (or, COVID-19) to assess congruence with the rule of law and social justice imperatives. The panellists from Kenya and South Africa addressed questions aimed at clarifying:

- The policy-regulatory environment since the advent of COVID-19.
- The level of congruence between policy choices and the dictates of the rule of law, using the four (4) World Justice Forum requirements:
 1. accountability including participatory democracy;
 2. just laws including human rights and the right to equal treatment;
 3. open government – opacity; and
 4. accessible justice.
- The level of congruence with international law obligations such as article 4 of the International Covenant on Civil and Political Rights (ICCPR) regulating derogations during states of emergency.
- The level of congruence with national constitutions and the law.
- The extent of the use of differentiated responses and implications for social justice for historically disadvantaged groups such as women, rural communities and historically discriminated social classes, and the impact on peace.
- Conclusions, including consideration of a disaster management framework at multilateral level or strong COVID-19 Guidelines covering health, economic rights, and social rights
- Recommendations to appropriate principalities including governments, civil society, the African Union and the United Nations (UN).

Prof Thuli Madonsela (Law Trust Chair in Social Justice and Social Justice M-Plan Convenor, SU) facilitated the event. Panellists included Dr Justice Alfred Mavedzenge, a Constitutional Law academic and Legal Advisor at the International Commission of Jurists and Dr Mshai Mwangola, an oratorist/performance scholar who uses the lens of culture in her work as an academic, artist and activist.

2 Welcome and opening remarks

Prof Madonsela welcomed all participants and in particular the panellists, Dr Mshai Mwangola from the Uraia Trust in Kenya who enabled the collaboration, and Dr Justice Mavedzenge.

Prof Madonsela emphasised how nobody, not even the best of scenario strategists could predict a COVID-19 disruption. Moreover, as somebody who trains on Leadership and Management in a Volatile, Uncertain, Complex and Ambiguous (VUCA) environment, she stressed how her view had always been that VUCA is not only linked to the Fourth Industrial Revolution (4IR), in itself a volatile, uncertain, complex and ambivalent area of work, but that it has always been there. What happened was that the 4IR created VUCA, VUCA on steroids. This has led her to consider, now that we have COVID-19, if VUCA was disruption on steroids, what then would the kind of disruption we are experiencing under COVID-19 be?

In scrutinising the responses of African governments to COVID-19 in terms of the policies they have taken, particular focus will be placed on the impact of these policies on the rule of law and on social justice. While being mindful of the fact that African leaders were already confronted with difficulties and that the novel coronavirus presented a unique situation that not much had prepared them for, Prof Madonsela highlighted the importance of this exercise forming part of accountability, particularly based on the rule of law and social justice. Her preferred formula in this exercise or endeavour is the formula that she used during her time as Public Protector namely, asking the questions: What has happened? And what should have happened? In other words, is there a discrepancy in the way African governments have responded to COVID-19 and the way that they should have responded in terms of international law; at UN level; on the African continent and the South African Development Community (SADC); in terms of their constitutions and existing laws; and finally in relation to common sense, justice, rationality, and reasonableness? Is there a gap between what they did and what they should have done?

If there is a gap, the next question that must be asked is, can that gap be explained? Is it a reasonable gap? Can we rationalise the gap? Moreover, to the extent that the gap cannot be rationalised and to the extent that the gap has a negative impact on the rule of law and social justice, how can it be fixed?

Before proceeding to the panellists for their understanding of the previously mentioned gap, Prof Madonsela explained the meaning of the rule of law and social justice. In her view, the best description of the rule of law was the one that became popular during her time as Public Protector, used by the Public Protector of Bermuda and Mandela.

“Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order. And then he gives us examples of the structures that were put in place. Of course, in the South African context it is the courts, the public protector and so forth being the instruments put in place to make sure that, firstly, government did not operate according to the whims of individuals but, secondly, there was accountability for actions. The way I understand the rule of law therefore is where there is no rule of law you have rule by decree and where there is rule of law, you have governance by consent. Has COVID-19 created an ambivalent environment where the rule of law, as Mandela understood it cannot be obtained or has the executive overreached or has there been scope creep by the executive in our continent? Those are some of the things that our panellists are going to talk to. And the instruments we are going to use are the rule of law as we understand it and our understanding of social justice.”

She further pointed out that the other instrument in understanding the rule of law worth considering, besides international conventions, is the World Justice Forum that explains the environment that allows for the rule of law to prevail – an environment where there is governance by consent, where nobody is above the law and where government never does anything that it is not authorised by law to do. There are four factors or pillars of the rule of law as understood by the World Justice Forum. One is accountability, including participatory democracy. The second is just laws based on human rights, including equal treatment and equal protection of the law – just laws are laws where people have participated in the making of those laws which enable them beforehand to be aware of not only when a law has been violated, but also of their rights in respect of that law. The third is open government. And the last pillar is

accessible justice. In a rule of law environment, when rights have been infringed, people must have access to a forum or a court that can successfully adjudicate on those rights.

As Social Justice Chair, Prof Madonsela's understanding of social justice encompasses an environment where the humanity of everyone is embraced, where there is equal enjoyment of all rights and freedoms. Not just some rights. Not just an environment where the poor is only said to be entitled to a basic level of socio-economic rights. It is an environment where everyone is entitled to every human right; being social, economic, cultural, developmental, and so forth. This environment includes the fair and just distribution of all opportunities, resources, privileges, benefits and burdens, whether it is in a group, in a society or between societies.

Prof Madonsela then asked Dr Justice Mavedzenge, to provide the roundtable with an overview of his understanding of the extent to which the way African governments have responded to COVID-19 is in line with the rule of law and the dictates of social justice (or not), starting with what they have done well, where the gaps exist, and which instruments would be used in terms of closing those gaps.

3 Dialogue

3 1 Dr Mavedzenge

Dr Mavedzenge congratulated Prof Madonsela on providing an understanding of the rule of law and access to justice. He then elaborated on the subject from a human rights point of view, and explained that at the core of access to justice and the rule of law is the principle that every human being is entitled to certain human rights which must be respected, protected, and fulfilled at all times; and whenever those rights and other legal interests are threatened or violated the person has the right to access an independent and impartial tribunal for appropriate relief. In debating the extent and meaning of those rights, he pointed out that there is already consensus at a national, regional and global level on the scope of these existing rights in the event of a crisis such as COVID-19, in other words on what is deemed to be permissible or not.

He submitted that globally, the "parent" of the key instruments in this debate and beyond, is the Universal Declaration of Human Rights, followed by the ICCPR, as well as the International Covenant on Economic, Social and Cultural Rights. He also

referred the roundtable to other global instruments dealing with rights pertaining to specific groups of persons who are considered vulnerable in most cases namely, the Convention on the Rights of the Child (dealing with the rights of children), the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.

At the regional level, Dr Mavedzenge pointed to the African Charter on Human and People's Rights, the African Charter on Rights and Welfare of the Child, and the Maputo Protocol on the Rights of Women in Africa. These key instruments reflect a consensus at a regional and global level on the nature of these rights, and on what is deemed permissible or not in terms of government action during times such as COVID-19.

At a national level, Mavedzenge referred to African constitutions, with each jurisdiction codifying the aforementioned consensus and with a Bill of Rights in almost all of these constitutions across the region. The Bill of Rights, of course, underpins the principle that every person, regardless of their standing in society is entitled to certain rights; and when those rights are violated or threatened, each person should have access to an independent and impartial tribunal for redress, being a court of law, a civil or criminal court of law, an indigenous justice tribunal, or any other type of tribunal.

In discussing what governments have done properly, Dr Mavedzenge congratulated governments first and foremost for acknowledging that we are facing a crisis and for putting in place measures, that in his mind, have gone a long way in terms of saving lives. In this respect, he highlighted how African governments had managed to avoid a certain expected level of carnage and loss of human life as a result of COVID-19.

On the other hand, arguments that refer to weak systems of documentation of officially declared figures that do not accurately reflect the reality on the ground has to be taken into account. In this respect, he submitted that even though flaws in the documentation process should be acknowledged, we are not nearly experiencing the levels of loss of life that had been predicted. He, therefore, believes that African governments have done very well in terms of preventing anticipated loss of life, being a positive development.

In referring to the red flags that are emerging, he cautioned against undue criticism due to the unprecedented nature of this crisis - mistakes are bound to happen and opportunists, both within government and outside would always aim to take advantage of the situation to achieve their own personal interests at the expense of the interest of the collective.

In highlighting the five red-flag areas, he submitted that there has been a suspension of supposedly non-derogable rights – obvious rights that cannot be suspended in terms of international and regional law and in terms of national constitutions across the region are freedom from torture and freedom from inhuman treatment.

The right to life cannot be taken away even when faced with or responding to a crisis. Nevertheless, he highlighted obvious violations on the right to life that have been experienced by many citizens including the use of excessive force by security personnel as they were enforcing the COVID-19 regulations, not only in South Africa, but also in other countries such as Zimbabwe, Mozambique and Angola. From a social justice point of view, he also made mention of another important violation or suspension of the right to life, namely the idea that people can be locked up or locked down in their homes for a period of time without being given social supports in the form of livelihoods, such as food.

Statistics show how, in the SADC region alone, approximately 4 million people live from hand to mouth – if they are locked up in their homes with no food aid or assistance, that is if they have homes, they are going to die because they are not food secure. Accordingly, while governments have done very well to introduce lockdown measures to prevent the spread of COVID-19, they may have in a way suspended the right to life for some vulnerable persons within our society, particularly those who live from hand to mouth. He, therefore, submitted that further research is needed to establish how many people have died of hunger during the COVID-19 lockdown period across the region.

The second red flag that he mentioned was the suspension of rights without following due process in terms of seeking parliamentary oversight and in terms of engaging regional and national mechanisms. In terms of Article 4 of the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR and jurisprudence, whenever a state derogates from some or any of these rights, they are supposed to notify the UN

through the secretary-general. He also mentioned that one would have expected that the African Commission would have been notified for purposes of accountability – Although the African Charter does not make provision for a derogation from rights when rights are suspended, a violation occurs extraordinarily.

The third red flag is unfair discrimination. As lockdown measures are being relaxed to return to normal life and to open up society, there is an over-reliance on digital means to provide public service. Governments are promoting digital courts as a way of enabling access to courts, while forgetting about a huge part of the population across the region who have no access to these digital means and may therefore not be able to access these courts being established. Moreover, other social services and basic services which they are entitled to as a matter of right, including access to education might also not be accessible, adding to their inequality.

The fourth red flag relates to transparency and accountability, being the pillars upon which the rule of law rests. It is impossible to have the rule of law in an environment where decisions are taken in secrecy, in an environment where decision-makers are not answerable for the decisions that they make. Because of the COVID-19 crisis, governments in certain jurisdictions have taken this as a justification to avoid transparency and accountability to a certain extent, resulting in the short term-creation of what other people have characterised as COVID-19 corruption. In South Africa alone, at the beginning of the lockdown, there were reports or allegations of about R22 million that had been misused in procuring blankets by the Social Development Department in KwaZulu-Natal (KZN), coupled with allegations of prices being inflated. Of course, the good thing is that the premier of KZN has committed to conducting a thorough investigation into those allegations. But that situation is a direct result of a lack of transparency and accountability.

In Zimbabwe, there have been reports of corruption to the tune of US\$980 000 when government procured some COVID-19 utensils and materials at inflated prices; And again government reported that they would investigate these allegations. Realistically, these could not be the only reports of COVID-19 corruption in Zimbabwe and South Africa or across the region.

Prof Madonsela thanked Dr Mavedzenge for his contribution and pointed out that one of the areas applauded by him was the speed or agility with which African

governments responded and understood that we had a crisis, whereby the carnage that we could have experienced had been averted. In contemplating the red flags discussed, she reflected on whether the made-in-China approach was not both a gift and a curse in terms of responses to COVID-19, given the different levels of development and levels of integration into the digital world of communities in Africa, and levels of food security and economic security in our continent.

Prof Madonsela then introduced Dr Mshai Mwangola and requested her input on what governments have done right in terms of aligning with the rule of the law and the dictates of social justice.

3 2 Dr Mshai Mwangola

Dr Mwangola thanked the organisers for a conversation that created a space for allowing thought beyond borders. Right at the beginning of the crisis, she was reminded of being struck by something that the prime minister of Singapore had said, in which he made the point that one of the gifts of this pandemic was going to be the opportunity to test our systems. Here she thanked Dr Mavedzenge's mention of the many conventions that African countries have signed.

For the most part, she submitted that Kenya and South Africa have pretty solid, good constitutions. She referred Prof Madonsela to the meeting in Naivasha, Kenya just before this whole season started and reminded the Stellenbosch team of one of the things that were discussed with the team from the World Policy Analysis Centre, how well and how progressive African constitutions actually are. When compared to the rest of the world, some of the most progressive constitutions in the entire world are found in Africa.

She felt prompted to ask, "as we have done the thinking, the theory, and signed the conventions, with some of the most progressive constitutions in the world, and some countries have fantastic laws, what does it actually look like, and policies too, when it comes to the test? I would like to look at this whole question from the point of view of the citizens, from the point of view of what does it look like in real terms to people living on the ground."

She explained how, being a performance scholar, she constantly evaluates everything in relation to lived experience. Mwangola agrees that Africa and African governments have done remarkably well in managing the COVID-19 pandemic, compared to what was expected. She mentioned how Melinda Gates was criticised all over Africa for her prediction that we would be seeing bodies in the streets of Africa and how the world was talking about how things may be bad in other spaces, but wait until it gets to Africa. Not to say that Africa has completely dodged the bullet – we cannot say that things were done perfectly in Africa. People have died and some of the things that went wrong will inevitably be discussed, but we should recognise that African governments, for the most part, took the threat that this pandemic posed very seriously.

She partly ascribed this to being familiar with the disease. Many Western countries have forgotten what it is like to have a disease come through their systems. Here she referred to a project of Nairobi that she is involved in. In focussing on the history of Nairobi, she had been struck by the fact that a century ago the idea of bubonic plague and the question of epidemics in Africa, has always been part of the African experience, especially the urban experience, and knowing what to do and preparing for such a crisis. Asia and Africa are also familiar with Ebola, SARS, and MERS so that the mistake of assuming that this pandemic could be handled was not made. This, she submits informed government's approach and ensured some very quick steps.

In preparation for this roundtable, she looked through some of the policy choices across Africa. In general, the same thread was found, almost as if policymakers were reading from the same book, even though some people have critiqued the fact that so many of these policies seemed to have been taken from the West or Asia, thereby asking whether all of them were right for Africa.

Nevertheless, in general, she had found that almost all countries began restricting travel very, very quickly, with first restrictions coming from China, then Asia, followed by the European countries, especially France and Italy. Many countries extended travel bans internally, especially concerning urban and tourism centres, capital cities and commercial capitals.

In terms of ordinary citizens' experiences, Dr Mwangola has traced the ways in which affluent people's paths, those who regularly travel abroad, have become stigmatised

almost immediately. People were caught sneaking back into the country because when it was known that you had travelled, you would be looked at askance, with people wondering whether you were safe.

In terms of anecdotal evidence, she remembers a BBC documentary where a service provider to various domestic households was interviewed. She lived in a place called Kawangware. Being close to other affluent neighbourhoods, this lady reflected on the danger she was putting herself into, going into these affluent areas on a daily basis, and how these affluent people were considered to be the ones bringing the disease into the country.

Another example applicable to Kenya in terms of social consequences is the case where people would want to be buried in their ancestral homelands, even when they lived in urban centres. This led to reports that when people travelled for funerals, even after government restrictions on numbers, some people were being told that if you have come from Nairobi or Mombasa, you should stay over there. Even in the same funeral, they would be told to park their cars separately and to stay away from the rest of the funeral attendees.

The closure of borders happened very quickly and, in some cases, certain borders were closed, while others were kept open. The lesson that this taught us is how connected people are in Africa. For some countries closing a border is an impossibility. Here she mentioned President Museveni who had this really interesting image of East Africa. He said the following:

“Some countries are like the living room, some countries are like the bedroom, you cannot shut the door. You cannot shut the door to your kitchen because you need to go. But we saw the closing of borders.”

She also referred to the closing of several spaces, such as religious spaces. Kenya had just gone through Ramadan which means closing religious spaces was a really big thing for Muslims. Churches were closed. Entertainment and sports centres were closed. Artists' income immediately went down. Governments were very quick to realise that these places, restaurants and shopping centres, could increase the spread of the virus.

Governments also began to impose curfews with the idea to restrict movement, thereby lowering the likelihood of infections.

Dr Mwangola also found Africa's innovative and quick move to making cloth masks of interest and the speed with which people realised that they did not have to buy the imported masks that were not readily available, as masks were being made at home.

She also noted with interest the range of medical innovations, not only in terms of the COVID-Organics cure originating from Madagascar but that people were also going back to the kind of indigenous treatments that can raise immunity. Moreover, apps for testing were also being developed within the country itself. Quarantine centres were another example of the good things happening within the country.

She further highlighted that some countries' governments have told landlords to be more lenient in terms of people being late with rents, and in advising banks for instituting greater leniency in its practices. For instance, in Kenya banks have tried to make it easier to do mobile payments by suspending certain payments.

Some governments have been providing financial relief or food relief to vulnerable communities; giving masks to people and extending some personal protective equipment (PPE) not only to hospitals but to other essential services. Some governments have paid for people who were in quarantine and have actually paid for people who are undergoing treatment. In Nigeria, electricity and water bills have been paid for the entire country or certain areas in the country, adding to the range of actions being taken by various African governments.

However, she acknowledged that everything has come with costs. For instance, one of the biggest and fastest impacts have been the way in which restrictions on movement has had on people's livelihoods. Here she referred to the social cost that food aid does not immediately address, for example, restaurant owners and workers, as well as informal traders not being able to go into the streets to sell and with no access to the markets.

Another fall-out has been the abuse by security services. In Kenya, there were ten documented cases, for example, that morning alone ten people had died because of police brutality. She explained how the latest one that died the previous night was a homeless person who was found outside – the police found him on the streets, they

beat him up so badly that he died the next morning. And of course, other people have died. One of the people who died actually died because he took a mother to hospital. He was a cyclist, a boda-boda. He took this woman to hospital because she was about to deliver a baby. On his way back the police stopped him, and he was killed. As this story spread, many more people were afraid of leaving their homes even in terms of an emergency at night. So, we do not know how many other people have died as a result of this.

In relation to travel restrictions, another big story concerned a man whose wife died in Mombasa. In travelling to the centre of the country with his family to bury his wife, and after going through several police checks, they were stopped at the very last one as they are entering his home state. The police stopped him and told him that they should not be travelling for burials and forced his family to return to Mombasa. This poor man then had to spend the night with a body in a coffin by himself outside a police station. The trauma of that kind of thing is completely unconscionable.

Clearly, governments had not considered the effect of these rigid policies – they had not taken into account how very good ideas affected ordinary people in so many different ways, in ways that fail to see the humanity of the people that they are dealing with.

Her final thought was on scenarios that can predict pandemics. She referred to a scenario process on energy futures for East Africa that she was involved with the previous year. The types of questions that they looked at was – what would happen if an epidemic came through? How would they think? How would they respond?

She ended her presentation with thoughts on prospective thinking, based on an article by a Senegalese philosopher, Prof Souleymane Bachir Diagne.

“And one of the things that Prof Bachir has emphasised is that when we develop a prospective attitude to our policies, when we develop a prospective attitude to thinking through our laws, and you’ve talked about the rule of law, what it enables us to do is not to act and react in a reactive mode when crises come. Because crises will come. Pandemics will come. Epidemics will come. All sorts of natural disasters will come. But it means that we get ahead and we think through the implications of some of the things that we are doing.” She then reflected on how Nairobi as a city, when dealing with health and epidemics and even the pandemic a century ago, was in a crisis mode.

“And so we reacted and we set up some of these restrictions that have affected us or affected the people of that type in very negative ways. And I fear that for many of the African governments we’ve fallen into that trap again. We’re back to reactive modes as opposed to a prospective attitude.”

3 3 Questions

In the final section of the dialogue, Prof Madonsela posed some questions to the panellists, the first being about the made-in-China versus made-elsewhere approach, whether there was sufficient scrutiny given to these solutions and whether it was matched to the circumstances?

She proceeded to explain that at the Social Justice Chair we say that government should use data analytics to predict the likely impact of any policy that they are about to take on all members of society or all groups in society. In referring to Dr Mavedzenge’s submissions that we were too quick to say that everything should go digital and that the right to life is not only about the absence of illness or death caused by illness or being killed by the state or somebody else, but that the right to life is also about exposure to amenities and opportunities for enhancing your quality of life.

She further commented on him mentioning that by restricting the movement of goods and persons some people did not end up with food. So, it was inevitable that if you locked people down, there would be no food. But, if data analytics had been used, for example in a country like South Africa, where we do have a poverty map, if data analysts took the poverty map and looked at the vulnerabilities, hotspots for vulnerability and the decision was then made to impose a lockdown – and if we had more than ten days to consider this – then poverty maps could have been taken during the ten days to consider who is likely to be vulnerable. Employment statistics could have been taken to look at those who are self-employed, who are likely to be completely without income, the ones who are living from hand to mouth. However, she conceded that it is very difficult to think laterally during a catastrophe.

Prof Madonsela, then made the argument, in responses to Dr Mshai Mwangola submitting that we should not think transactionally or reactively, that this was exactly what was happening in the midst of this. Here she noted that three months have passed since lockdown was initiated and that her foundation, the THUMA foundation

had been approached by communities in South Africa that were saying that they had not received food aid. She explained:

“We got one of our ambassadors or a couple of our ambassadors to take names of people, data, and send it to government and say, check these people. They came, they have not received food, can you check if they have received food and assist them? And guess what? Government said, no, we can't assist you. Every one of them must approach us as an individual. And we said not everyone has access to a smart phone. They say, no, they don't have to have a smart phone, they must have a phone. But statistics from Statistics South Africa show that only about 30% of our people engage in using their cellphones beyond just answering a call from the other side. I don't know about the rest of Africa, but I'm saying governing for impact and also the rule of law is about governance by consent, governance by consent being we govern together and then we comply by consent.”

Consequently, from the point of view of just laws, Prof Madonsela posed two questions to the panellists, requesting that they respond in terms of what do we do now? What has gone wrong and what would be recommended for governments to adapt to the reality on the ground?

The first question to Dr Mwangola was whether there could have been a greater understanding of local environments at an earlier stage, ensuring that either the laws or the regulations were changed or that better compensation strategies were devised?

Her second question addressed to Dr Mavedzenge concerned open government and pertained to his statement that the ICCPR was very clear on when a state of emergency should be imposed, on how it should be imposed and on the non-derogable rights.

Dr Mwangola responded by pointing out that countries and governments should always have disaster preparedness at the back of their minds. Governments should anticipate and prioritise the types of disasters that might happen. Disasters are a fact of life and no matter how well organised; it will come to every country.

In referring to the intellectual community that she founded, the Elephant, Dr Mwangola explained how they had been engaged in an online series of conversations with African intellectuals during the past month. One of the things that have completely blown her away was the depth of thinking and the level of expertise locally, on the

continent and out there in the diaspora. One such an example is Dr Njoki Mwarumba, living in the United States, specialising in and teaching disaster management. She talked them through the levels of disaster management. What is it that you need to have put in place? How do you prepare your systems so that when something happens you have a plan? She explained how we did not know what virus would erupt or the form that the disease will take, but that daily, a team was tasked with thinking through some of these questions and to start planning, so that, when a crisis comes, the turnaround time is not long. She emphasised that even though governments should be commended for doing well, for acting quickly, and for taking some good steps, we had not really invested in the intellectual resources that are sitting right here in the continent. Apart from looking at the actions that were needed, a multidisciplinary team was required, including disaster management specialists, in other words, people from different fields of expertise that can inform the thinking process. Here she referred to how the public health infrastructure across the continent can contribute to solutions. Unfortunately, so many African countries have let their public health infrastructure fall into disrepair, have not had proper investment or resources put in place.

On the other hand, when this pandemic came, one of the discoveries was that what had been most effective for Africa has not been the clinical side. That is the way China had to go because by the time they woke up to it the people were dying and in need of hospitals. The same thing goes for Europe. However, where Africa is ahead, is on the public health side of things – the whole thing of lockdowns, of wearing masks, of sanitising and thinking through some of these things, is a public health response.

This takes us back to the question of social justice.

“Because now, and I know in Kenya those have been some of our big debates, it is one thing to tell people you must wash your hands, you must sanitise constantly, you must have hand sanitiser at home, it’s another thing for people to be able to do it. If I am living in an informal settlement where we do not have access to running water, how do I then wash my hands even if I know? I know how to wash my hands, I know the two metre thing and so on. If I don’t have access to clean, running water I may not be able to fulfil that. If I do not have access, if I share my sanitation facilities with 20 other people and then you tell us we must keep distance from each other, not just the physical distance, in this case it’s the social distance, you tell people to stay at home, it’s not going to work.”

She, therefore, concludes that governments should think through the meaning of social distancing in a particular kind of a circumstance. Governments needed to tap into their countries' own intellectual resources where a certain set of people should think through the question of physical distancing in society, where society is how we survive.

Prof Madonsela thanked Dr Mwangola for the wonderful presentation and summarised that it was, therefore, good to borrow and a good idea in general, but once having borrowed, do not copy and paste. "Borrow, review and use internal intellectual capital to adjust and adapt to circumstances."

She further commented on Dr Mwangola's mention of the fact that some of these rules are completely blind to social life and partly it is the characterisation of life as commerce and health with nothing in between. Therefore, there does not seem to be sufficient understanding that it is life, commerce and social life. And a lot of the infringements of social life have come from, possibly being blind to those things. There are also similar concerns around in South Africa around the issue of funerals. Prof Madonsela was telling the story of how her friend's mom was sick and going in for an operation. In terms of the law, she was allowed to go and bury her, but in terms of the law, she cannot get a permit across provinces to go and see her before she goes to the hospital. There is no way that she can ask for a permit because the regulations did not foresee that kind of thing.

She also mentioned that another concern that had been raised was the emphasis on rule as opposed to governance.

"We rule and we'll rely on the police to get you to comply as opposed to a governance situation where we rely on you to collaborate because we're in the same boat and it's in all our interests to make this thing work."

Dr Mavedzenge then proceeded to address the question around the rule of law. He prefaced his response with some key statistics which reveal what he calls Africa's pre-existing conditions before COVID-19. He emphasised that these were not statistics from the whole of Africa, but just anecdotes that point to certain things.

According to the SADC 2019 synthesis report on the state of food and nutrition, 41.2 million people are food insecure.

In Zimbabwe, because of lack of employment opportunities in what is commonly regarded as the formal economy, there are 4 million informal traders, in other words, people who are living on informal trade as a form of employment and as a way of generating livelihoods. In Harare and Chitungwiza alone there are 800 000 vendors – these are people who trade at market stores.

In South Africa, according to World Poverty Clock and some extent corroborated by Oxfam, 10 million people are living in poverty, in abject poverty without access to basic commodities. Of these, 5.4 million living are in informal settlements without access to basic sanitation and all these other necessities of life. Moreover, according to the Human Sciences Research Council 200 000 people are homeless. These anecdotes revealed the pre-existing conditions that these countries were faced with. He submitted that what we needed then and what we need going forward to strengthen, or to ensure that we have this open governance principle taking shape in our response, is a Pan-African, pro-African approach to responding to our disasters.

He proceeded to explain that there were two types of responses. Those responses which impose restrictions on fundamental rights, which we as citizens are used to or which are guaranteed to us as human beings. It is therefore necessary going forward that African governments need to ensure that they comply with the two critical principles of necessity and proportionality. These restrictions must only be imposed if they are necessary. For each restriction every government official should be urged to ask the question, is it necessary? Is it really necessary? And the second question is, are we not using a sledgehammer to crack a nut? Are we not causing more damage to the right than what is actually necessary and what is actually needed? That is the principle of proportionality. This is what is needed to comply with insofar as every other restriction being put in place are concerned. In having flattened the curve in most jurisdictions, time has been bought to review these restrictions and to test them as to whether there is compliance with the two principles.

Lastly, he emphasised that responses were not just about restricting human rights. He explained that responses to disasters were also about taking certain positive actions to actually address a particular disaster by way of enabling people to access certain facilities or to access certain necessities.

He underscored three key things that were needed for stronger regional coordination. Firstly, he explained that in dealing with a virus, it was not going to be adequate to deal with it only in South Africa, because South Africa does not exist in a vacuum. As a member of a regional community of nations, being a member of a continental community of nations, South Africa needs to consider all other governments' responses. We need to ensure that there is solidarity between nations, between peoples, to ensure that as we are dealing with the virus in South Africa, in Zimbabwe, in Tanzania, in Kenya, we are also dealing with it in the rest of other countries. So that when we open up borders, we are all able to prevent, and not to backslide in terms of the rate of infections.

The second area of concern that he mentioned was to ensure that we have lockdown with social support. Here he referred to unequal access to food and available resources. If we actually want to provide social support to vulnerable people, we should marshal resources that are locked up in exclusive pockets and make those resources accessible together with leveraging solidarity amongst African countries.

Lastly, he highlighted the deepening of transparency and accountability as a key concern. It is important for African governments to have confidence in their own people, to acknowledge that they can take self-responsibility if given enough information and if governments reveal their plans timeously. Public trust cannot be obtained without transparency and accountability.

Prof Madonsela summarised that clearly while African responses have been great, there are areas where there could be improvement – one being readiness for disaster. Here she pointed to the UN definition of good governance that is based on the World Bank definition and includes the ability to manage disaster, in other words, disaster management readiness. She mentioned how South Africa has been commended as one of those that are competent to do so because of the law. However, in referring to South Africa's disaster management legislation, she stressed that it is one thing to have a law, and another to implement that law.

In commenting on Dr Mavedzenge's response, she referred to him underscoring the importance of a continental response and that pandemics do not know any borders. She agreed that there have been predictions of pandemics, even though no-one knew that it was going to come so soon and test our systems so fast and leapfrogging

everyone into the 4IR where we find ourselves on e-governance, e-learning and everything basically on the matter and in commerce.

At this stage, a participant from the audience proposed a research question about the right to life, namely that we needed to find out how many people have died from hunger due to COVID-19. How will we get this data and is mortality data readily available and how can we go about it? Another participant commended, Dr Mshai Mwangola and mentioned that Africa has begun with finally looking inward to resolve its problems with the key question of how Africans will sustain this innovativeness? An example was whether we will have thinktanks, funding sources and organisations so that would-be innovators would be able to apply for funding? Whether we would be able to establish venture capitalists in Africa so that the William Kamkwambas, the boy who harnessed the wind, Elon Musk's SpaceX, Tesla and many more would be able to stay on the continent. In other words, what type of funding prospects do we have? In relation to the question of data, Prof Madonsela suggested that we do know that South Africa does have the capacity for data in relation to many areas of life. Even though it might be a question around disaggregation, we are fortunate enough to have data. She proceeded to request Dr Mwangola's input with regards to Kenya's capacity for data. She also asked her input with regards to innovation especially considering the fact that Dr Mwangola suggested not only that we should have a continental response and that we should also use available intellectual capital in the continent, but also since she applauded African governments for igniting innovation and supporting innovation in areas such as masks, ventilators and so forth. Furthermore, Prof Madonsela stressed that the question was, how can this be sustained at a continental level? For example, she mentioned that we have heard that Sierra Leone had invented a test that could allow one to know one's COVID-19 status immediately. If that was true, she questioned, how do we make that accessible to everyone? How do we invest in that? We know that the Africa Institute for Mathematical Sciences, AIMS, is working with Rwanda to find a better way of testing and they have started piloting in Rwanda. They would like to pilot in South Africa. How do we have that support at a continental level?

In her response to these questions, Dr Mwangola had the following to say in terms of disaster management. She confirmed that Kenya did have such an institution. However, for her, one of the issues that have emerged in Kenya was that in the last

couple of decades, lots of their thinking around disaster management had been in connection with terrorism, which has meant that their disaster management responses tended to have been securitised. In this regard, she agreed with Dr Mavedzenge's view that governments would have greater success in getting people to understand and to willingly follow when they were clear and realistic in their explanations to citizens on what was necessary and realistic, instead of beating people into submission.

Dr Mavedzenge responded to the question of how we research to find data which unravel or show the extent of mortality as a result of things such as hunger and so forth. He submitted that it was important to highlight the work that was being done by many civil society network groups across the continent. A few that came to his mind included the Southern Africa Human Rights Defenders Network, the International Commission of Jurists, as well the Media Institute for Southern Africa, organisations that have been monitoring and most likely have some relevant data which could respond to this question.

He also recommended that it would be beneficial if we could touch base on traditional structures. Here he referred to traditional chiefs that have knowledge and information about what is going on in their communities. He also mentioned how independent commissions were crucial and how he had seen some wonderful work being done by human rights commissions across jurisdictions as they had been monitoring the situation. Moreover, government agencies, especially those that are mandated to collect stats, like Statistics South Africa, could be very useful or could have some data that would be useful.

The only thing that he would further underscore as that a lot of discussions had focused on the number of people who have died as a direct result of the COVID-19, the pathogen or the virus, but there has not been much conversation about mortality as a result of hunger, as a result of poverty arising from responses to COVID-19, the pathogen. He believed there was a need for that discussion to continue and that this platform had touched on that as part of the social justice question. He further stressed the importance of recalibrating our responses in the continent and to ensure social justice, even as we respond to this crisis.

3 4 Closing observations

Prof Madonsela then requested some closing observations from both panellists in terms of how they saw the congruence between the rule of law dictates, the social justice dictates and how African governments have responded to the coronavirus, COVID-19. In so doing she asked them to touch on international law and to centre their observations around the congruence between what has happened and what should have happened. In assessing that congruence, she also asked the panellists to look at their own understanding of what was the requirement in terms of social justice and compliance with national constitutions and laws and to end with clear suggestions on what should be done going forward.

Dr Mwangola referred to twenty-first-century Pan-Africanism and suggested a re-thinking of how to work across borders, to help each other. Here she pointed to how civil society organisations are already working across borders in finding solutions and methods so that instead of us trying to replicate these things in our different countries, we are actually working across.

She also stressed the importance of similarities in social justice issues and of raising collective voices, so that if something goes wrong in one country, other countries and other people are also raising their voices, because that is how you put pressure on governments collectively.

She also mentioned how the area of philanthropy was very important and how there was a growing number of African philanthropic organisations. Even though it was great that Africans were turning to the International Monetary Fund (IMF) and to other external bodies, because we are a part of the world and so that is our right, she highlighted how it was truly time to begin to think about and to grow the response of philanthropic organisations on our continent.

Here she referred to one of the very heart-warming things that has happened in Kenya, namely to see how, locally, people began to collect and to organise and to give and to see how sometimes the small giving grows into a big stream. But also to really begin to think about how as a continent we can put in the big picture philanthropic organisations because the money and the resources are right within this country, this continent.

Dr Mwangola also mentioned how she liked the idea that there has been so much talk about how governments can collaborate, and that it formed part of this discussion too. She, however, pointed out that what is really important is to create structures within the judicial system. She pointed to how we often talk about the executive and how the executive can come together and can work together, but that it is equally important to think about the bigger picture. Here she highlighted, for example, the African Court of Justice, the regional courts of justice, but also all these ... She went on to say that she knows judges get together; she knows lawyers get together. But, she asked, “how do we think through these questions of access to justice as the judiciary and then also as the legislators?”

Dr Mwangola pointed out that in many countries, of which she knows at least one, parliament was shut down. This occurred especially in those countries where there has been a state of emergency. She highlighted the importance of people’s representatives in the forms of parliaments starting to think about how to respond during a time like this and going forward.

She thanked the Social Justice Centre for hosting the webinar and continued by stating that she believes that as African intellectuals we must begin to connect – first of all across our own spheres, those working in research institutes, those working in artistic and cultural spaces as intellectuals, then those working in the academy, and finally turning to regional bodies or continental bodies.

She then mentioned a conversation that somebody had about the Louis Pasteur Institute of Dakar. She pointed to what is happening in Senegal noting that it is very interesting that the Institute has a regular programme where the whole academy gets together to think through the intellectual side to this.

She further referred to organisations like CODESRIA (which is the Council of the Development of Social Science Research in Africa) that focuses on bringing together all these social scientists and people in the humanities. She highlighted the importance of an entity like the Social Justice Centre stepping up and also emphasised the importance of having these conversations right across the continent.

She concluded by thanking Prof Madonsela for those kinds of collaborations noting that it is the future when it comes to guarding and furthering social justice and the rule of law in Africa.

Dr Mavedzenge thanked Prof Madonsela and the Social Justice Chair for creating this platform which allowed a necessary conversation to take place across Africa. He noted that this platform allowed the creation of synergies that leverage each other's strengths which, in turn, promotes solidarity.

Dr Mavedzenge then referred to something that the secretary-general of the UN said which was also quoted by the chairperson of the African Union Commission namely, that we must ensure that when we come out of this crisis we should be better than we were when we entered into this crisis. As a second point, he stressed the fact that this cannot be achieved if we do not, number one, take a human rights-centred approach to our responses. He explained human rights as the sense that you are putting people's needs at the centre of your response. And, as the last point, he emphasised the need to ensure solidarity. He commended Dr Mshai Mwangola for providing the nuts and bolts about what that solidarity looks like.

Dr Mavedzenge formulated as his parting thought a message to our governments that above all it is important to always mainstream the needs of the most vulnerable persons in society in our responses. He emphasised the importance of asking the question, how would this kind of a response impact on the needs and circumstances of some of the most vulnerable persons in our society. He then clarified that when talking about vulnerable, it is not necessarily because of COVID-19, since these persons were already vulnerable before COVID-19 since they have particular disadvantages which require special attention.

He concluded by stating that when we begin to ask those questions and that now is the opportune time to ask those questions because we have to some extent flattened the curve, then we will be able to respond as a continent to this disaster. Dr Mavedzenge, in his final note, thanked Prof Madonsela and his fellow panellist.

4 Conclusion

Prof Madonsela concluded the webinar by thanking Drs Mavedzenge and Mwangola as well as everyone who participated by way of questions, comments, and suggestions. She also extended a special thank you to the social justice team who has helped to put this together including Mss Diane Gahiza and Marna Lourens and thanked them for being part of the platform and for making the webinar possible.

Prof Madonsela started her concluding observations by summarising the aim of the webinar which was to review the policy decisions of governments on the African continent. She reminded the attendees of the purpose of the conversation that took place which was to assess the level of congruence between the policies that have been adopted in response to COVID-19 and the dictates of the rule of law and social justice.

She then referred to two colleagues and some of the attendees who have commented and have applauded African governments for the swiftness with which these governments responded to the problem before it became a crisis, the compassion with which these governments considered to extend health services to everyone, almost creating national health services – universal national health services across the continent.

Prof Madonsela then referred to the colleagues who have commented about certain disparities or discrepancies between what should have happened and what had happened. Here she pointed to the concern around the fact that some of the governments seem to have declared de facto states of emergencies without complying with the dictates of international law, particularly the ICCPR.

She further highlighted that emphasising the right to life when talking about the spreading of the virus, does not give enough consideration to the impact of not having food and that African governments have been warned to look at those factors. There have also been concerns, generally, about the dictates of democratic governance and the non-derogability of many of the human rights that seem to be derogated under these states of emergencies.

Prof Madonsela moved on to the solutions that were proffered during the webinar. She highlighted the main solution which was suggested by the two panellists and

some of the commentators namely, that it is okay to borrow from other countries, but these solutions still need to be domesticated. She then referred to Dr Justice Mavedzenge's suggestion that we should make sure that, in the domesticating process, we pitch our policy responses to the level of the most vulnerable in society.

Prof Madonsela linked this to Dr Mshai Mwangola's contention that in doing so, the intellectual capital of the continent should be leveraged. She encouraged all the attendees to leverage the innovative capacity present on the continent and to operate as one family and as one ecosystem. She emphasised that within the continent, there are enough resources and enough solutions to take care of this virus.

She repeated the panellists' warning that this is not the only pandemic or disruption that we are going to face in our lifetime. She emphasised the need for our respective governments to always be ready for a problem of this nature. And as a result, it is important to have some continental approach to this.

Prof Madonsela concluded the session by thanking everyone who has participated. She advised that a report will be put together that will hopefully be the beginning of the continental approach to the rule of law and social justice focussing in the near future on how to respond appropriately to the COVID-19 pandemic.

Thank you. Blessings.