



The Impact of the COVID-19 Crisis on Constitutionalism and the Rule of Law in Anglophone Countries of Central and West Africa

Analytical report, Webinar 28 May 2020



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1. Introduction

The COVID-19 crisis requires us to put our heads together as think tanks and intellectuals to try and assist with a coherent and effective policy response.

—H. E. Minata Cessouma Samate, Commissioner for Political Affairs, African Union Commission, 28 May 2020

We are witnessing discrimination in accessing health services. Refugees and internally displaced persons are particularly vulnerable. And there are growing manifestations of authoritarianism, including limits on the media, civic space and freedom of expression.

—António Guterres, Secretary-General, United Nations
Remarks to the Security Council on the COVID-19 pandemic, 9 April 2020

As the COVID-19 crisis worsens, its effects on the democratic development of African countries is becoming a key priority. Much attention has been paid to the question of its consequences for electoral processes. Its impact on constitutionalism and the rule of law in these states has received relatively less attention. Against this backdrop, the International Institute for Democracy and Electoral Assistance (International IDEA), in partnership with the Department of Political Affairs of the African Union Commission and the Open Society Initiative for West Africa, organized a three-hour webinar on the impact of the COVID-19 crisis on constitutionalism and the rule of law in anglophone countries of Central and West Africa. The scope of the webinar included Cameroon (a member of both the Commonwealth and La Francophonie), The Gambia, Ghana, Liberia, Nigeria and Sierra Leone (some of these countries are recovering from a recent civil war or were recently ruled by an authoritarian regime).

The webinar was based on two premises: first, the need to consider constitutionalism and the rule of law in terms of their ultimate goals, i.e. to guarantee respect for the fundamental rights and freedoms of citizens in both ordinary and extraordinary situations; second, the adoption of a holistic perspective that considers not only civil and political rights but also the economic and social rights of citizens in the context of the COVID-19 crisis in the countries concerned.

This report is not a transcript of the webinar; instead, it provides a general summary of the contributions of the panellists and participants. While not necessarily expressing the views of

International IDEA, it covers the main thematic aspects discussed, the key ideas exchanged and the recommendations that came out of the webinar. These inputs—based on a retrospective and forward-looking practical analysis—were aimed at inspiring decision-makers and nurturing the thinking of experts, academics, researchers, journalists and citizens on this subject. More specifically, the discussion considered not only the challenges in terms of the socio-political dynamics induced by the COVID-19 crisis as well as its impact on constitutionalism and the rule of law in anglophone countries of Central and West Africa but also the opportunities it presents for their democratic development. All the presentations and the discussions held during the webinar may be found in the recording of the webinar accessible here: [add link to recording]

The programme for the webinar, including a list of panellists, is attached as an annex to this report.

The report provides an overview of the current situation with regard to constitutionalism and the rule of law in anglophone countries of Central and West Africa, identifies key challenges and introduces the programmatic response from International IDEA and its partners. In doing so, the report aims to answer the following questions:

- As governments must deal with the COVID-19 pandemic in the long term, how can they make sure that emergency regulations do not lead to a new wave of authoritarianism?
- How can this context contribute to a new social contract between the state and its citizens?

2. Constitutional frameworks during emergencies and the risk of authoritarianism

A multifaceted, long-term crisis and unclear constitutional frameworks

COVID-19, which first appeared as a local health crisis with an outbreak in China, quickly became a global pandemic and a multifaceted crisis. International organizations, including the World Health Organization and the African Union, have expressed deep concern about the pandemic for two reasons: (a) because of related health issues; and (b) because of the multifaceted negative impacts of the pandemic in terms of civil, political and socio-economic rights. Given the prevailing sense of uncertainty, some believe that this is going to be a crisis for the long haul.

If the crisis continues for years, how can governments ensure that the emergency-related measures taken in all anglophone countries in Central and West Africa will not result in democratic recession or regression? If this emergency situation is the new normal, how can governments ensure that emergency regulations and measures are not going to become ordinary law?

Emergency regulations and measures adopted in the anglophone countries of Central and West Africa are similar to those adopted by other African countries. They have included the following elements:

- partial or total lockdowns;
- mass fumigation and disinfection of busy streets, markets and bus, train and taxi stations;
- social distancing;
- support for the most vulnerable groups (e.g. the elderly, refugees, the homeless) through social programmes, including food supplies and cash transfers;
- restrictions on social and public gatherings (including at churches and mosques);
- restricted movement of all public transportation;
- closure of all institutions of learning;

- closure of offices, businesses, restaurants and other facilities except for essential services;
- promotion of a rigorous hygiene regimen (e.g. frequent handwashing);
- declaration of states of disaster, states of emergency and curfews;
- travel bans and restrictions on individual freedom of movement inside and outside the countries concerned;
- closure of ports of entry and exit (land, air and sea);
- deployment of security forces including the police and the military; and
- establishment of COVID-19 response funds.

Some of these regulations and measures have been difficult and/or impossible to implement, such as social distancing and total lockdowns—due to the cultural and socio-economic specificities of these countries—or frequent handwashing—because of the lack of access to water.

Emergency regulations and measures have also given extended powers to the executive and, as a consequence, drastically reduced civil liberties in all targeted countries. The rights that have been affected the most under the current state-of-emergency measures are freedom of movement, freedom of peaceful association and assembly, and freedom of belief and worship. In one instance, the lockdown of the population to avoid the spread of the virus caused delays in voter registration, which in turn caused a controversy concerning the inclusivity of all citizens in upcoming elections. The insensitive policing of lockdown measures, with military and police deployed to enforce rules that are inconsistent with the rights enshrined in the applicable constitutions, has been questioned by citizens and human rights defenders. Respect for citizens' right to privacy (including protection of personal data) has become an issue in several countries, in particular in light of governments' potential use of private data to fight the pandemic. These reasons aggravated the deficit of public trust in governments and were the grounds for protests in several countries.

In terms of constitutional frameworks, many states find it difficult to clearly express in their respective constitutions what may or may not constitute an emergency. Firstly, the terminology itself may be confusing, with various terms used such as 'state of emergency', 'state of siege', 'emergency' and 'humanitarian or environmental emergency', which do not entail any difference in practice and therefore can be used interchangeably. The term 'state of emergency' may be used in all of these situations. If a country's constitution provides a definition of emergencies that is too broad, this will leave room for abuse that politicians can easily exploit: This was the situation that prevailed during the democratic reform processes that took place in the 1990s. In addition, national constitutions should provide a list of non-derogable fundamental rights and stipulate oversight mechanisms that apply before, during and after the declaration of a state of emergency. Such oversight should be the purview of the courts, as guardians of the constitution; members of parliament; and national human rights commissions.

From the legal point of view, the anglophone countries of Central and West Africa are subject to binding and non-binding international and regional instruments. The most important of these is the 1966 International Covenant on Civil and Political Rights (ICCPR). Article 4 of the ICCPR provides a list of non-derogable rights, i.e. rights that cannot be suspended or limited, including during states of emergency. The minimum standards in terms of human rights protection during a state of emergency are as follows: restrictions on derogable rights should be provided by law, strictly necessary and proportionate to the aim pursued, and should not affect the essence of the right; mechanisms

should be provided for the judiciary to oversee the legality and proportionality of any emergency measures that restrict rights; all rights should be restored in full as soon as the state of emergency is lifted; and there should be a form of monitoring of the executive during the emergency situations. In terms of regional instruments, the 1981 African Charter on Human and Peoples' Rights remains purposely silent on this matter in order to avoid a situation where states might invoke war in order to derogate from the principles enshrined in the Charter.

Despite the commitments undertaken through the above-mentioned instruments, the constitutions of most of the countries in question do not require the adoption of minimal provisions, nor do they provide a list of non-derogable rights. Most of the constitutions are vague when it comes to human rights protection; they do not provide for rigorous checks and balances; they do not impose obligations on the states to take the appropriate corrective measures in order to mitigate the effects of emergencies. In practice, for security reasons, law enforcement agencies tend to overreact, sometimes deliberately, and citizens are subjected to all kinds of illegal forms of punishment. Consequently, fundamental rights—or non-derogable rights—should be enshrined in constitutions in such a way that makes it clear that they cannot be set aside during a state of emergency. This situation reveals that while constitutions exist in these countries, the culture of constitutionalism is yet to be inculcated. Institutions that are supposed to anchor constitutionalism continue to be very weak.

The potential rise of authoritarianism

The following six main reasons can explain the risk of the potential rise of authoritarianism during the COVID-19 pandemic in the anglophone countries of Central and West Africa, as in other states on the continent:

1. The implementation of emergency provisions by predominantly hybrid democratic systems whose institutions are undergoing reform and have not yet completed the transition to sustainable democracies.
2. The proportionality of emergency measures and regulations. What is going to happen if these measures are prorogued or reinforced with more restrictions on civil liberties due to the spread of the pandemic? What will be the legal basis of such an extension and how can it be limited? The existing constitutional and legal frameworks in the anglophone countries of Central and West Africa are silent on these questions.
3. Oversight of the executive by other branches of government (legislature, courts or judiciary, national independent bodies) is typically limited at first; eventually, the other branches of government are excluded from any decision-making regarding the extension of a state of emergency.
4. There has been a tendency towards the misuse of the current state of emergency in some countries for repressive or purely political purposes. But emergency regulations and measures should not be used as a weapon to quash dissent, to control the population or to perpetuate the current regime's time in power. Exceptional measures should be used only to cope with the spread and effects of the pandemic. The fear is that, as the COVID-19 outbreak persists over time, respect for constitutionalism and the rule of law will progressively decrease and reach a new low, especially after the crisis. In fact, while a state of emergency cannot be permanent, some countries are in the process of passing, or have already passed, laws that allow them to maintain the restrictions imposed in the fight against COVID-19. This de facto legalizes a kind of 'regime of exceptions', which in many cases can hardly pass constitutional muster. In addition, the current environment makes it very difficult for civil society and human

rights defenders to oppose such moves. In order to manage the pandemic, there must be political and social dialogue as well as public trust between political leaders, governments and citizens. Transparency and accountability are two important ingredients for building and maintaining this trust. A show of force and rolling back citizens' rights and civil liberties will not contribute to these processes and will bring these countries back to the situation they were in before the introduction of democratic processes.

5. The constitutional implications of the postponement of elections scheduled to take place after the end of the current term of incumbent presidents, especially in cases where constitutional provisions, or the lack thereof, can be manipulated to prolong tenures or to result in a constitutional and political crisis.
6. The use of bellicose language by governments and the extensive powers granted to security forces—the police and the military—to enforce emergency measures that go beyond restricting people's movement and include authorization to search people's homes without a warrant are contrary to article 14.1 of the 2007 African Charter on Democracy, Elections and Governance. Such abusive measures constitute serious threats to a culture of peaceful democracy and constitutional civilian control over armed and security forces, and they hamper the consolidation of democracy and constitutional order in most of these emerging democracies.

3. A pandemic that has highlighted and exacerbated the vulnerabilities of the anglophone countries in Central and West Africa

Impacts on socio-economic life and vulnerable groups

The emergency measures and regulations implemented have already limited economic activity, and they will also have lasting effects on Central and West African economies, especially in those countries that are dependent on natural resources and those that are better integrated in the global economy. For example, in the countries where the informal sector accounts for more than 70 per cent of the economy and the vast majority of citizens have no social protection or unemployment insurance, the implementation of emergency measures has resulted in a sharp increase in unemployment—in particular among young people and women—and difficulties in accessing food, while also exacerbating poverty in general, which is not offset by social safety nets targeting vulnerable groups—where available. The situation is likely to get even worse should the pandemic continue. The resulting increase in inequality could generate tensions and result in violence against those in power and against institutions while undermining the fragile social cohesion that exists in these states.

The pandemic has also revealed the failure of the anglophone countries in the region to carry out important economic reforms that could have helped had they been implemented earlier. For example, integrated reforms across several sectors—including health, finance and trade—could have addressed the structural issues that have made these countries less resilient to shocks, such as the ongoing pandemic, and limited their range of policy responses. In the long run, better decisions need to be made, including, but not limited to, diversifying the countries' revenues—so that they will not be reliant solely on oil and/or minerals exports—and increasing investments in priority sectors in order to make sure that their economies can quickly recover from future shocks. Therefore, the COVID-19 crisis presents a good opportunity to reflect on what these countries should and could do differently to improve their resilience.

The economic collapse that has taken place in every anglophone country of Central and West Africa has affected the poor and vulnerable groups disproportionately. Women, who carry most of the burden in terms of caring for children and the elderly, have been affected by sudden lockdowns and the inability to travel. Women are more vulnerable under these circumstances because it is difficult for them to take care of their homes and (extended)

families if they are away from home or unable to leave their home. The numerous rules that have been imposed have disturbed their everyday lives. For example, access to marketplaces in every country in the region has been restricted, which is an issue for many families. Violence and sexual assault are also on the rise.

Other vulnerable groups have been affected, such as people with disabilities. With practically non-existent social protection, those among them who were begging on the streets before the crisis find it impossible to earn an income. People with HIV/AIDS, especially women, used to travel to a different district to get their medication because of the social stigma associated with the disease; now, they either are unable to get their medication or have to face that stigma. More generally, people who need medical attention or women giving birth are not allowed to enter healthcare facilities with any of their relatives, making the experience difficult and potentially traumatizing.

Finally, children are among the most affected vulnerable groups due to the shutdown of schools; and girls find themselves more at risk of never resuming their education even if countries are deconfining. No one should be left behind.

In essence, the issue of inequalities, which was already of great concern before, has been brought to the fore because of the different ways the pandemic has impacted various segments of society. Inequalities must therefore be addressed as fundamental elements of the management of the pandemic.

Limited access to basic public services

The anglophone countries of Central and West Africa entered the COVID-19 crisis in an already weak position in terms of citizens' access to basic public services. The pandemic has brought into sharp focus deficiencies in terms of education, water and sanitation, housing and particularly health. Indeed, in all the anglophone countries of the region, health systems are fragile and weak, and public trust in health institutions is very low. Unfortunately, the knowledge and experience gained during previous epidemics, such as recent outbreaks of Ebola and Lassa fever, has not been helpful. The number of health workers is also largely insufficient, and populations—particularly the most vulnerable—have reduced access to healthcare. These countries' health infrastructures remain extremely precarious and are not sufficiently equipped to cope with the spread of COVID-19, as they lack emergency beds, respirators, personal protective equipment, hydroalcoholic gels, reagents, tests, etc. Basic and applied research to deal with the pandemic is very poor or non-existent. Finally, less than a third of the population in each of these countries has access to the most essential healthcare. The risks of a serious health disaster with possible community spread and the exacerbation of the crisis over time are serious. None of these states are in compliance with the 2001 Abuja Commitment to Health Care, which encouraged governments to allocate at least 15 per cent of their budgets to healthcare, since this is a requirement for economic development. None of them are in a position to achieve United Nations Sustainable Development Goal No. 3 in time, which aims to ensure healthy lives and well-being for people of all ages. In the meantime, these countries' security spending has increased sharply over the last 20 years, thereby creating public debt at the expense of investments in social programmes.

Impact on security

The crisis and the emergency responses to it have also highlighted the inability of security institutions in the anglophone countries of Central and West Africa to guarantee citizens' right to security in the face of a new, unconventional threat. This is primarily due to the fact that, like francophone and lusophone countries, these countries have always favoured a repressive, security-based response to crises. It is also due to the specificity of the COVID-19

pandemic, which is not only a health crisis but above all a human security crisis. Indeed, the pandemic has led to several forms of insecurity whose effects are multiplied by the concomitance of other shocks—community and political conflicts, natural disasters, persistent poverty, climate change, fundamentalist terrorism, serious crime, trafficking in small weapons, large numbers of refugees and internally displaced persons, migration and so on. Community infections are becoming a serious security risk, particularly with deconfinement measures gradually adopted in these states. For the anglophone countries of Central and West Africa to come up with an optimal security response in the face of the COVID-19 pandemic, they require a comprehensive approach based on human security that is adapted to different contexts and that favours prevention, strengthened protection and the capacity for individual and collective action, as well as mobilizing local communities.

4. Rebuilding the social contract

The COVID-19 pandemic and the impact of the emergency measures adopted to fight the spread of the virus have revealed the urgent need to rebuild the social contract in the anglophone countries of Central and West Africa based on the following elements:

- The imperative for accountable political leaders to prioritize the provision of services to their citizens. Governance in this new context should be defined as the provision of political, social and economic public goods and services by capable states that citizens may rightfully expect from their leaders; such governance also means that leaders are accountable for delivering the necessary goods and services to their citizens whatever the situation and/or context is. This should become the sole criterion for accessing and/or staying in power within the framework of constitutional provisions, including term limits.
- The necessity to have operational constitutions in which citizens' civil, political and socio-economic rights—particularly rights to health and access to food, to basic public services and to sustainable development—are not merely programmatic but are protected in practice and fully implemented. This is not only about implementing regional, continental and international standards, it is about accountability from governments which should become the new norm in governing citizens in these countries.
- The need to improve the role of local governments and authorities. Indeed, these actors are in the front line in the fight against the COVID-19 pandemic. They provide emergency services and communicate with citizens on the measures that are being taken to contain the spread of the disease. They coordinate with other levels of governance and partners in all sectors of society, including the private sector. They also support their counterparts in other jurisdictions, thereby helping to mitigate the impact of the epidemic. In accordance with the principles guaranteed by the 2014 African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, they must be given clear powers and sufficient financial resources to enable them to fulfil their responsibilities.
- The imperative to invest in research and development and in strengthening African innovations.
- More generally, the full implementation of principles enshrined in the African Charter on Democracy, Elections and Governance as well as the 2011 African Charter on Values and Principles of Public Service and Administration.

5. The programmatic response of International IDEA and its partners

Faced with these challenges International IDEA and its partners—led by the Department of Political Affairs of the African Union Commission and the Open Society Initiative for West Africa—are developing a programmatic response. This response is based on the forecasts of Africa CDC (Africa Centres for Disease Control and Prevention), which predict that the COVID-19 crisis will last as long in Africa as it does in the rest of the world, as well as on the anticipation of possible risks of a deterioration of respect for constitutionalism and the rule of law in the anglophone countries of Central and West Africa due to the continuation of the crisis.

In the short term, International IDEA and its partners will:

- Continue to duplicate the webinar model for other regions and organize thematic webinars at the request of decision-makers, practitioners, researchers, academics and civil society organizations (CSOs).
- Continue to closely follow the developments in the COVID-19 crisis and to assess the impact of response measures on civil and political rights as well as on economic and social rights in the anglophone countries of Central and West Africa. International IDEA, with the support of EU, is developing a COVID-19 Democracy and Human Rights Global Monitor.

In the medium term, International IDEA and its partners will:

- Develop and disseminate comparative tools for the exchange of experiences as well as virtual technical assistance and capacity development in emergency situations for national institutions (constitutional courts, parliaments, electoral management bodies, transitional justice and national reconciliation institutions, independent constitutional authorities, consultative bodies, etc.) and other stakeholders (political parties, CSOs, media, experts, etc.).

In the long term, International IDEA and its partners will:

- Finalize the development of guidelines to frame constitutional revisions, the adoption of exceptional measures in emergency situations—including pandemics—and the

inclusion of the teaching of the African Charter on Democracy, Elections and Governance in schools in Africa to inculcate a culture of democracy, governance and human rights.

Annex

Webinar on the theme ‘The Impact of the COVID-19 Pandemic on Constitutionalism and Rule of Law in Anglophone Countries of Central and West Africa’, 28 May 2020.

Programme

14:00–14:10 **Welcoming remarks**

- **Prof. Adebayo Olukoshi**, Regional Director for Africa and West Asia, International IDEA

14:10–14:25 **Introductory remarks**

- **H. E. Minata Cessouma Samate**, Commissioner for Political Affairs, African Union Commission

14:25–15:25 **Presentations by panellists**

- **Prof. Charles Fombad**, University of Pretoria, ‘Comparative Analysis of the Constitutional Framework for Controlling the Exercise of Emergency Powers in Central and West Africa’
- **H. E. Dr Oby Ezekwesili**, former minister in Nigeria and former Vice-President of the World Bank’s Africa Division, ‘Socio-economic Impact of Emergency Regulations in Anglophone Countries of Central and West Africa’
- **Mr Roland Amoussouga-Gero**, Director of the Political Section, United Nations Office for West Africa and the Sahel, ‘Impact of COVID-19 Pandemic on Conflict Resolution in West Africa’
- **Barrister Haddy Dandeh Jabbie**, President of the Female Lawyers Association, The Gambia, ‘Impact of Emergency Regulations on Vulnerable Groups—Particularly Women, Youth, Children/Elderly, Refugees and IDPs in Anglophone Countries of Central and West Africa’
- **H. E. Tiawan S. Gongloe**, former minister, Head of the Bar Association, Liberia, ‘Impact of COVID-19 Pandemic and Emergency Regulations on Security and Peace in Anglophone Countries of Central and West Africa’

- **Prof. Kwasi Prempeh**, Director, Ghana Centre for Democratic Development, ‘Impact of Emergency Regulations on State–Citizens Relations in Anglophone Countries of Central and West Africa’
- **Barrister Augustine Marrah**, legal practitioner, Sierra Leone, ‘Impact of Emergency Regulations on Access to Basic Public Services, Particularly Health Services/Systems in Anglophone Countries of Central and West Africa’
- **Justice Gabriel Pwamang**, Justice of the Supreme Court of Ghana, ‘Control/ Oversight of Executive under Emergency Regulations in Anglophone Countries of Central and West Africa’

15:25–15:35 **Questions for panellists**

15:35–16:40 **Responses from panellists**

16:40–17:00 **Conclusions and closing remarks**

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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The COVID-19 pandemic is not only a health challenge for anglophone countries of Central and West Africa. It is also a litmus test for the consolidation and sustainability of their democratic governance systems. In that regard, respect for constitutionalism and rule of law during emergency contexts, adopted by governments to stop the spread of the virus, remains a priority.

It is within this context that International IDEA organized a webinar on ‘The Impact on the COVID-19 Pandemic on Constitutionalism and Rule of Law in Anglophone Countries of Central and West Africa’ on 28 May 2020. Key recommendations from the discussion included: (a) the urgent need to monitor closely and to advocate for the respect of constitutionalism and rule of law in emergency measures and regulations adopted by governments of the region to stop the spread of the pandemic; (b) the need to take advantage of this exceptional situation to rethink the social contract between citizens and states in these countries; and (c) the necessity to build capable developmental states that can respond to the basic needs of their citizens during the pandemic or similar emergency contexts.



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