



# The Impact of the COVID-19 Crisis on Constitutionalism and the Rule of Law in French- and Portuguese-Speaking Countries of Central and West Africa

Analytical report, Webinar, 23 April 2020



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## 1. Introduction

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As the COVID-19 crisis worsens, its impact on the democratic development of African countries is becoming one of the main priorities. Although a great deal of attention has been paid to the question of its effects on electoral processes, there has not yet been any real consideration of its consequences for constitutionalism and the rule of law in African states in general and even less so in the French- and Portuguese-speaking countries of Central and West Africa.

In an effort to address this gap, the International Institute for Democracy and Electoral Assistance (International IDEA) organized, with the participation of H. E. Minata Cessouma Samate, the African Union Commission's Commissioner for Political Affairs, a webinar on 23 April 2020 on the impact of the COVID-19 crisis on constitutionalism and the rule of law in French- and Portuguese-speaking countries in Central and West Africa.

The webinar—the programme is appended to this report—was based on two premises: first, the need to consider constitutionalism and the rule of law in terms of their ultimate purpose, which is to guarantee respect for the fundamental rights and freedoms of citizens both in ordinary times and in 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.

## 2. Exceptional measures that respect the principles of constitutionalism and the rule of law but that nevertheless pose problems

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In the vast majority of cases, the declarations of states of emergency and the emergency measures adopted by French- and Portuguese-speaking countries in Central and West Africa as a first response aimed at preventing and/or containing the spread of the COVID-19 pandemic respected the principles of constitutionalism and the rule of law. This is true from a procedural point of view in terms of how these measures were proclaimed; the consultations and/or interventions that took place on the part of constitutional bodies, such as parliaments and constitutional courts; and concerning the time limitations placed on such measures, among other factors. In addition, the measures have generally been in line with the principles of constitutionalism and the rule of law in terms of their substance. In other words, they respect constitutional provisions and existing legal frameworks at national, regional and continental levels as well as relevant international and regional human rights conventions, notably the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights, all of which set strict boundaries for the implementation and deployment of such exceptional measures. These provisions, some of which are similar to those taken during terrorist crises, have been justified because they prioritize the right to health. These measures have taken the following forms, which have been relatively similar:

- declaration of a state of emergency;
- declaration of a disaster;
- curfews;
- mass fumigation and disinfection of public spaces, streets, markets, railway and bus stations, and taxi stands;
- imposition of social distancing;
- partial lockdown;
- support for the most vulnerable groups (e.g. the elderly, refugees, the homeless) through support measures, including food and cash transfers;
- restrictions on social/public gatherings (including in churches and mosques);

- restricted movement of all public transport;
- closure of all schools and training facilities;
- closure of public services, shops, restaurants and other community facilities except for essential services;
- promotion of strict hygiene practices (e.g. frequent handwashing);
- travel bans and restrictions on free movement within individual countries and across borders;
- closure of borders (land, air, sea);
- deployment of security forces, including the police and the army.

These provisions, which clearly restrict certain civil and political rights of citizens in French- and Portuguese-speaking countries in Central and West Africa, raise several issues.

On a practical level:

- The issue of their versatility in view of the specific social features of these countries in the context of uncertainty about the development of the pandemic. How, for example, can social distancing be imposed and lockdowns implemented in environments where being close to others is a cultural element? Lockdowns would be a constraint with which the majority of citizens would find it difficult to comply, notably on economic grounds.
- The risk of exacerbating corruption when implementing exceptional measures in contexts of generalized fragility of oversight mechanisms and institutions.

From a legal perspective:

- The question of the proportionality of the measures taken to the threat and the possibility that they might be extended. Will fresh restrictions be considered if the crisis persists over a prolonged period of time? What kind of restrictions would they be? Would they not risk further fuelling the violence and security incidents reported in several countries? How would they be tailored to the easing of a lockdown that would inevitably have to begin in the medium term? Beyond the possible postponement of elections, what is the situation in some countries with regard to strengthening control of freedom of expression and communication, and freedom of the press, in particular on the grounds of preventing the circulation of false rumours? Digital tracking of patients is also envisaged in order to tackle the spread of the virus. What about protecting their personal data in this case? Should such measures be adopted, it is important that they be discussed in parliament by a variety of political groups. Moreover, their compliance with the constitutional provisions governing the functioning of states of emergency must be subject to review by a constitutional judge.
- The broader issue of the need to respect public freedoms during states of emergency, since declarations of a state of emergency do not put an end to constitutionalism and the rule of law but must rather be implemented within the constitutional and legal frameworks in place in each country.
- Absent or insufficient effective measures for the specific protection of vulnerable groups—particularly women—in emergency situations. Efforts have been made in some countries; above all, however, they have revealed the widespread need for mechanisms to identify vulnerable groups and for appropriate policies—appropriate

in terms of how they are formulated, for example in parliaments, and in how they are implemented. In addition, measures are needed to combat the current upsurge in domestic violence and violence against children.

Institutionally and politically:

- The problem of the implementation of these provisions in and by predominantly hybrid democratic systems whose institutions do not have the capacity to enforce the measures enacted and in which there is a real risk that they will be misused for the authoritarian consolidation of power.
- The risk of the militarization of the public space in these countries due to the possible prolonged presence of security forces on the streets to ensure compliance with the exceptional measures adopted—particularly restrictions on freedom of movement and on gatherings and demonstrations, as well as curfews.
- Finally, there is the question of the necessity of building a consensus among citizens around these measures and the legitimacy of leaders. The COVID-19 crisis and the response measures adopted will have revealed to, or confirmed for, the citizens of these states the differences in the capacities of their leaders and institutions to plan and take action in response to a crisis. The need for consensus around these arrangements is all the greater because citizens' trust in their governments and institutions is in most cases eroded, and the situation is likely to worsen if the crisis persists. The leaders of these states therefore need a new way of doing politics, because it is no longer possible to take anything for granted. This is evidenced by, among other things, widespread citizen monitoring of public action during the crisis in often unprecedented forms—such as via WhatsApp—in systems where social control by the authorities is almost total and where criticism can quickly be equated with rebellion; by regular consultation on the part of the governing authorities with opposition and former ruling political parties to create a broad consensus around exceptional measures; by the involvement of civil society organizations and churches in disseminating information about adopted measures and encouraging people to follow them, especially in rural areas; and by the expanded role of local councils and other local authorities—including in the most centralized systems—in their implementation.



### 3. Highlighting and aggravating the vulnerabilities of French- and Portuguese-speaking countries in Central and West Africa

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The crisis and the exceptional measures adopted have highlighted and confirmed the chronic weakness of the healthcare systems and the largely programmatic nature of the right to health for citizens in French- and Portuguese-speaking countries in Central and West Africa, although the right to health is enshrined in all their constitutions. Sixty years after gaining their independence, and while several countries have experienced or are experiencing serious health crises with Ebola, Lassa fever and malaria in particular, their healthcare infrastructure remains, with a few exceptions in French- and Portuguese-speaking Central and West Africa, extremely precarious and not sufficiently resourced in terms of equipment (ICU beds, ventilators, protective equipment, hand sanitizer, reagents, tests, etc.) to deal immediately with the spread of COVID-19. The number of health workers is also far too low, and populations—particularly the most vulnerable—have reduced access to care. With one exception, basic and applied research to deal with the pandemic is in a disastrous state. The subregional mechanisms set up in the 1980s with the support of the World Health Organization, on the basis of the principles of specialization and pooling of knowledge, are totally ineffective despite the existence of proven expertise that either tries to identify treatments by conducting drug trials already used to treat other diseases, or works by default for foreign research organizations. This opens the door to these countries being used as testing grounds for treatments and vaccines developed abroad. Finally, for all these countries, less than one-third of the population has basic healthcare coverage. There is a severe risk of a serious health disaster with possible community transmission, and of a prolonged crisis.

The weakness of the healthcare systems in French- and Portuguese-speaking countries in Central and West Africa is linked much more to a lack of political will and to the fact that their leaders prioritize other—often legitimate—emergencies, such as security emergencies, than to the structural adjustment policies of the 1980s. None of the states in question are complying with the 2001 Abuja Declaration commitment to allocate at least 15 per cent of their budgets to healthcare—yet health is a prerequisite for economic development. Nor are any of the countries in a position to achieve United Nations Sustainable Development Goal No. 3 on time, which aims to ensure the health and well-being of people of all ages. At the same time, security spending by these states is increasing sharply to the detriment of investment in social policies and at the expense of debt.

The crisis and the initial responses also highlighted the inability of the security institutions in French- and Portuguese-speaking countries in Central and West Africa to guarantee

citizens' right to security in the face of a new and unconventional threat. This is primarily due to the fact that these countries have always favoured a purely security-based and repressive response to crises. Second, it is due to the specific nature of the COVID-19 pandemic, which is not only a health crisis but above all a crisis of human security, leading to several forms of insecurity, the effects of which are multiplied by the concomitant effects of other crises—community and political conflicts, natural disasters, persistent poverty, climate change—related crises, fundamentalist terrorism, serious crime, trafficking in small arms, a large number of refugees and internally displaced persons, migration and so on. The ideal security response on the part of French- and Portuguese-speaking countries in Central and West Africa to the spread of COVID-19 would require a comprehensive approach based on human security that is appropriate to the context and that prioritizes prevention, strengthened protection and the capacity for individual and collective action. When the concept of human security was introduced into political discussions in the 1990s, it was criticized for broadening the concept of security threats to include more than just war. With COVID-19, we are learning that a global outbreak is compromising our safety and security.

It is also necessary to consider the consequences of this pandemic for the implementation of the African Union's flagship project and theme for 2020, 'Silencing the Guns', in these countries and in the rest of Africa. At this stage, the medium- and long-term impact on peace and security in French- and Portuguese-speaking countries in Central and West Africa is difficult to predict. The UN Secretary-General's calls for a global ceasefire have had little impact in either region. COVID-19 has also delayed the implementation of key peace agreements and hampered local mediation efforts in several countries. In addition, terrorist and non-state armed groups are taking advantage of the pandemic to increase attacks. The Boko Haram insurgents launched an offensive that claimed the lives of hundreds of peacekeepers. Clashes between jihadist groups in the Sahel are escalating. While the spread of terrorism and extremism on the continent is worrying, it is even more alarming to see terrorist groups taking advantage of the COVID-19 epidemic to spread misinformation and use various social media platforms to disseminate extremist ideologies and promote recruitment.

Although COVID-19 poses a multitude of challenges to peace and security in French- and Portuguese-speaking countries in Central and West Africa, it also provides an opportunity to work decisively to address the root causes and end the violent conflicts that some are experiencing. Against this background, it is essential to prevent the risk of violence and resolve conflicts by strengthening democratic governance. Once again, we see the connection with the human security approach.

The COVID-19 crisis and the emergency measures adopted are also having a catastrophic socio-economic impact in French- and Portuguese-speaking countries in Central and West Africa. For example, in those countries where over 70 per cent of the economy is informal and where the vast majority of citizens cannot claim social welfare or unemployment benefits, the application of exceptional measures is already resulting in a sharp increase in unemployment—particularly among young people and women—and in further general impoverishment, which is not offset by support measures for vulnerable groups, even where they exist. The authorities in each country have their own view of the private initiatives developed to complement and compensate for the weaknesses of public action. The situation is likely to get even worse if the pandemic continues. The resulting increase in inequalities could generate tensions and result in violence against governments and institutions while undermining the fragile social cohesion that exists in these states.

Similarly, the exceptional measures that have been adopted in the region do not specify the legal status of employees who contract COVID-19. Is it an occupational disease? If so, would these employees and their dependents have certain rights? Or does it fall under the category

of unforeseeable natural disasters for which no compensation is payable unless a specific political decision is taken?

More generally, the COVID-19 crisis and the exceptional measures adopted are causing a severe slowdown in economic growth in these countries, a slowdown whose effects are aggravated by various factors: the fall in the prices of raw materials—especially oil—the loss of financial resources from air transport and tourism, the contraction of exports, the rupturing of the fragile industrial fabric and remittances from the diaspora drying up. This situation undermines states' institutional capacity to deploy shock-absorbing or resilience policies at the end of the crisis. Indeed, they are all dependent on international aid or foreign-debt relief in order to cope with these two challenges. Until now, governments have been ignoring the issue of domestic debt owed to private lenders—particularly smaller lenders, which are the most numerous and have no savings. Serious reflection is needed on the widespread roll-out of response strategies and funds, as well as solidarity to limit the socio-economic impact of the crisis and plan for its end.

## 4. A unique opportunity to rethink the governance of French- and Portuguese-speaking countries in Central and West Africa

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The COVID-19 crisis and the challenges posed by the exceptional measures adopted in response highlight the dynamic of dependence in which French- and Portuguese-speaking countries in Central and West Africa find themselves and which urgently needs to be broken. The negative effects of these responses on civil and political, but also economic and social, rights require a paradigm shift in the governance of these states. The approach to governance and its content must be thought out endogenously and must always place economic and social transformation and the interests of citizens at the heart of political processes. In this context, a new social contract will inevitably be established between the state, its institutions and citizens. The structure of the state will be redesigned to retain only the most effective and efficient institutions and to abolish all those whose ineffectiveness or uselessness has been demonstrated by the crisis, to the detriment of scarce national resources. The form of the state will also be rethought, with the sole objective of meeting the basic needs of all citizens. African expertise and local innovations should be encouraged and bolstered, particularly in sovereign areas, including healthcare. Here, the crisis represents an opportunity to reduce the economy's dependence on the informal sector. The successful leaders in this new form of governance will be those who, in difficult circumstances, have continued to prioritize the development of their countries and strengthened democracy and respect for human rights in the common interest of the people, paving the way for sustainable and equitable prosperity. International partnerships and relations with former colonial powers will have to break away from the asymmetry that characterizes them to adopt an egalitarian approach based on respect for the specific national interests of each party. The COVID-19 crisis can therefore pave the way for genuine independence for the French- and Portuguese-speaking countries of Central and West Africa.

The COVID-19 crisis and the questions that the adoption of exceptional measures have raised in these states require reflection on new methods of accountability on the part of leaders in the region. Direct citizen oversight and transparency must and will inevitably be strengthened, all the more so as citizens' demands for results in the area of economic and social rights will increase in strength. The integrity and independence of parliaments as oversight bodies and a proactive source of ideas should be encouraged and safeguarded. The role of advisory and independent authorities (national human rights commissions, national communication commissions, anti-corruption commissions, national data protection commissions, etc.) will also have to be expanded in terms of decision-making support and

executive scrutiny. Despite the many challenges the COVID-19 crisis poses, it offers an opportunity for independent authorities to assert their role in promoting democratic governance and to become firmly anchored in the institutional architecture of the countries concerned. From this perspective, moratoriums on debts or loans granted by international financial institutions or bilateral partners to cushion the impact caused by the crisis on the economies of French- and Portuguese-speaking countries in Central and West Africa are not necessarily an appropriate solution. Instead, leaders should prioritize vigorous action to stop and repatriate illicit financial flows from their economies. They should also explore the seizure and repatriation of their nationals' illicit assets held in foreign financial institutions. This will help to foster ownership of the plans developed to cushion the economic and social effects of the crisis and will guarantee independence and the priority given to national interests in the implementation of the strategies developed to deal with it.

## 5. The programmatic response of International IDEA and its partners

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Faced with these challenges, International IDEA and its partners—first and foremost the Department of Political Affairs of the African Union Commission<sup>1</sup>—are developing a programmatic response. The response is based on the outlook provided by the African Union’s 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, while also planning for the possible risk of a deterioration in terms of constitutionalism and the rule of law in French- and Portuguese-speaking countries in Central and West Africa as a result of a protracted crisis.

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

- Replicate the webinar model for other regions and organize themed webinars at the request of policymakers, practitioners, researchers, academics and civil society organizations.
- Continue to closely monitor COVID-19 crisis developments and to assess the impact of response measures on civil and political rights as well as economic and social rights in French- and Portuguese-speaking countries in Central and West Africa. This calls for rapid reflection on a potential monitoring mechanism and on the form such a mechanism might take, while also considering how the observations resulting from such a mechanism might be used.
- Develop a database of the emergency measures adopted in these states in this emergency context, as well as useful initiatives and practices deployed to safeguard all rights and freedoms at the same time.

In the medium term, in addition to all the above actions, International IDEA and its partners will:

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

In the long term, in addition to all of the above, International IDEA and its partners will:

- Finalize the development of guidelines for constitutional reviews, the adoption of exceptional measures in emergency situations—including pandemics—and the inclusion of the African Charter on Democracy, Elections and Governance in schools in Africa with a view to inculcating a culture of democracy, governance and human rights.

#### Endnotes

1. See the keynote address by the African Union Commissioner for Political Affairs attached to this report.

## Annex

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Webinar on the impact of the COVID-19 crisis on constitutionalism and the rule of law in French- and Portuguese-speaking countries in Central and West Africa, 23 April 2020.

### Programme

#### 14:00–14:05 **Welcome remarks**

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

#### 14:05–14:15 **Introductory presentation**

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

#### 14:15–14:50 **Presentations by panellists**

- **Prof. Theodore Holo**, Professor of Law, Former Minister of Foreign Affairs and former President of the Constitutional Court of Benin: *Review of the declaration of states of emergency and exception to respond to the COVID-19 crisis in French- and Portuguese-speaking countries in Central and West Africa.*
- **Dr Cristina Fontes Lima**, Lawyer, Former Deputy Prime Minister and Minister of Health, National Defense, State Reform and Justice in Cabo Verde: *Sociopolitical dynamics caused by the COVID-19 crisis in terms of access to basic public services in French- and Portuguese-speaking countries in Central and West Africa.*
- **Ms Michelle Ndiaye**, outgoing Director of the Programme of Peace and Security in Africa at the Institute for Studies in Peace and Security of the University of Addis Ababa, Ethiopia: *Sociopolitical dynamics caused by the COVID-19 crisis in terms of security in French- and Portuguese-speaking countries in Central and West Africa.*
- **Prof. Bathily**, Professor of History, Former Minister in Senegal and former UN SG Special Representative for Central Africa, He is Advisor at the Mo Ibrahim



Foundation: *Sociopolitical dynamics caused by the COVID-19 crisis in terms of state governance in French- and Portuguese-speaking countries in Central and West Africa.*

#### 14:50–15:10 **Speaker contributions**

- **Prof. Frédéric Joël Aïvo**, Professor of Law and former Dean of the Faculty of Law and Political Science of the University of Abomey Calavi of Cotonou, Benin: *Are the states of emergency and exception in French- and Portuguese-speaking countries in Central and West Africa an appropriate response to the COVID-19 crisis? Would it be appropriate to define a new type of state of emergency, namely a health state of emergency?*
- **Prof. Ondoua Biwolé**, Professor of Management at the University of Yaounde II Cameroon. She was General Inspector at the Ministry of Public Service Reform and Deputy CEO at the Institute of Public Management in Cameroon: *The impact of the states of emergency and exceptional situations within the framework of the COVID-19 crisis on the socio-economic dynamics and the business sector in French- and Portuguese-speaking countries in Central and West Africa.*
- **Dr Christine Desouches**, Senior Lecturer in Political Science at the University Paris I Panthéon-Sorbonne. She was Delegate to Peace, Democracy and Human Rights at the International Organization of Francophonie: *Respect for human rights and public freedoms in the context of the states of emergency introduced in French- and Portuguese-speaking countries in Central and West Africa in response to the COVID-19 crisis.*
- **Prof. Rossatanga-Rignault**, Professor of Law and Political Science at the University Omar Bongo of Libreville Gabon. He was Minister and Secretary General of the Presidency of the Republic of Gabon: *Executive power oversight mechanisms during a state of emergency or exception linked to COVID-19 in French- and Portuguese-speaking countries in Central and West Africa.*

#### 15:10–15:20 **Questions from five preselected participants**

#### 15:20–15:50 **Responses from panellists and speakers**

#### 15:50–16:00 **Moderators' conclusions and closing of the webinar**

Maurice Engueguele, Thibaut Noel and Mathias Hounkpe

## 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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As the COVID-19 crisis worsens, its impact on the democratic development of African countries is becoming one of the main priorities. Although a great deal of attention has been paid to the question of its effects on electoral processes, there has not yet been any real consideration of its consequences for constitutionalism and the rule of law in African states in general and even less so in the French- and Portuguese-speaking countries of Central and West Africa.

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