THE 1995 CONSTITUTION AND COVID-19

By

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‘It was the best of times, it was the worst of times,

it was the age of wisdom, it was the age of foolishness,

it was the epoch of belief, it was the epoch of incredulity,

it was the season of light, it was the season of darkness,

it was the spring of hope, it was the winter of despair…’

Charles Dickens, A Tale of Two Cities (1859)

1.0 INTRODUCTION

The Coronavirus disease (Covid-19) has fundamentally challenged many aspects of international and national life that we had long taken for granted. As at current count, over one million people around the world have tested positive for Covid-19, with over sixty-five thousand deaths thus far.1 In Uganda, fifty-two people have so far tested positive,2 and the government has already taken extraordinary measures to try to ensure that this figure remains low.

In the midst of this national and global crisis, it might appear insensitive – perhaps even distasteful – to reflect on the legal questions arising in this moment. However, it is possibly precisely at such a time that we should be mindful of, and cling to, the safety and guidance to be found in law – and, in particular, the Constitution. It is in this spirit that this short piece reflects upon the extent to which the government of Uganda can effectively respond to the challenge posed by Covid-19, while respecting and complying with the safeguards stipulated under the 1995 Constitution.

2.0 STATE ACTION AND HUMAN RIGHTS IN ‘NORMAL TIMES’: THE CONSTITUTIONAL TEST

It should be recalled that, based on a very problematic national history – specifically invoked in the preamble to the Constitution – that document included a number of deliberate safeguards, aimed at ensuring that the human rights of Ugandans would never again be violated with impunity. This is the spirit behind the design and content of Chapter Four of the Constitution (the bill of rights).

In particular, article 43 of the Constitution set out an elaborate and delicate framework for balancing individual rights and broader public concerns. On the one hand, Article 43(1) stipulates that, in the enjoyment of one’s rights and freedoms as prescribed in the Constitution, no person may prejudice the fundamental or other human rights and freedoms of others, or the public interest. On the other, under Article 43(2), it is stressed that the term ‘public interest’, as employed under Clause 1, shall not permit

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1 Lecturer on Law, Makerere University.
2 See https://www.theguardian.com/world/2020/apr/05/coronavirus-world-map-which-countries-have-the-most-cases-and-deaths (last accessed on 6 April 2020).
3 See https://covid19.gou.go.ug (last accessed on 6 April 2020).
political persecution, detention without trial or any limitation of the enjoyment of the rights and freedoms prescribed under the Constitution beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution.

The formulation of Article 43(2) was deliberate – and each word as employed in that provision has particular significance. The effect of this provision was to set a high bar for the limitation of human rights. Any such limitation had to be shown to be such as was ‘acceptable’ and ‘demonstrably justifiable’ – not just in any society, but in a ‘free and democratic one’. Indeed, since 1995, a number of attempts at limiting human rights have been found to fall below this very high threshold, and have consequently been struck down by the courts. As Justice Mulenga opined in Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney General, the import of Article 43(2) was that it placed ‘a limitation upon a limitation’. Given the centrality of this elaboration to appreciating the framework of human rights limitations under the 1995 Constitution, there is value in setting out Justice Mulenga’s dictum on this point, although it is of some length:

It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as ‘a limitation upon the limitation’. The limitation on the enjoyment of a protected in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalized, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society. The co-existence in the same constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution … protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. [Emphasis added]

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It is important to stress the foregoing, because it has immediate and direct implications for the options open to the State in its response to the Covid-19 crisis. It appears that, in the past week, the President met with the Chief Justice Bart Katureebe, and the Speaker of Parliament Rebecca Kadaga, during which meeting the heads of the Judicial and Legislative branches of government urged the President to declare a state of emergency. Apparently, however, an unnamed cabinet minister was able to dissuade the President from adopting this course of action.

At the same time, several far-reaching measures have already been announced, and effected, to respond to the crisis: all schools and educational institutions have been closed; incoming and outgoing passenger flights prohibited; movements of most persons within the country restricted and the majority of business restricted from operating. Most, if not all, of these measures have been purportedly taken under the authority of the Public Health Act.

Now, in the face of the challenge we all face, it is difficult to argue with the logical impulse behind the above measures. The available scientific consensus appears to be that the spread of Covid-19 is most effectively controlled by limiting movement; isolating those who might have been exposed to the virus and treating those who test positive. The measures so far adopted by the State, therefore, seem to rhyme with the dictates of common sense.

This being the case, should the discussion not end here? The answer, based on the problematic history recounted in the Preamble to the 1995 Constitution, is ‘no’. While the measures outlined above appear sensible, they are, in fact, of doubtful legality, if subjected to the strict test under Article 43(2) of the Constitution. To take but one example – the blanket limitation on the operation of private vehicles, presumably based on the fact that some individuals were operating these on a commercial basis. Can this be said to be acceptable and, especially, demonstrably justifiable? One of these ways in which a measure can fail this high test is if it can be shown that the legitimate objective (the protection of public health in this instance) can be achieved through an alternative method which is less restrictive to human rights (in this case the right to movement). In this regard, there are a range of less restrictive means to achieve this objective, including through impounding cars found to be carrying occupants who have no clear relation to the driver or owner of the vehicle in question.

Therefore, in my view, a number of the current measures instituted thus far – while evidently sensible – are actually of doubtful constitutionality. One might ask – and legitimately so: ‘so what?’. Why should we care about the law, in the face of a grave pandemic, which threatens the very life of the State? One response to this is simply

6 As above.
7 Cap. 281.
that the state should not open itself up to legal challenges which could have been easily avoided by more careful and considered action. At this critical juncture all distractions that can be avoided, should be avoided. The second response, and perhaps the more fundamental one – is that it is critical at this moment for the law to be respected lest, in solving one crisis, we create another. If the law is bent ‘a little’ now, it may be too late, further down the road, to protest when it is bent so far out of shape that it is impossible for it to be as it was before. Indeed, there have already been indications of such inclinations – with Local Defence Units (LDUs) and other security personnel adopting arbitrary and self-serving interpretations of even those directives already in place.10 The first response to the ‘so what?’ question speaks to the interests of the State; the second the interests of the citizen. In light of this coincidence of interests, it can hopefully be perceived that there is an urgent need for the responses to the national crisis we face to be based on a scrupulous adherence to the dictates of the Constitution.

The question that then arises is: how can the state effectively respond to the crisis, while at the same time fully respecting the law? It is to this enquiry that we now turn.

3.0 CONSTITUTIONALISM IN TIMES OF NATIONAL CRISIS

_The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact._


The framers of the 1995 Constitution envisaged that there might be critical times in which – to guarantee the well-being of the State – the government would need to be given greater room for action.

3.1 DECLARATION OF A STATE OF EMERGENCY

In such grave times, the proper course of action appears to be that which the Chief Justice and Speaker urged upon the President, that is to say, to declare a state of emergency. If the President were minded to do this, I am sure the Attorney General and other persons who provide him formal and informal legal advice would point to the provisions of Article 110 of the Constitution. The President is empowered, in consultation with the Cabinet, by proclamation, to declare that a state of emergency exists in Uganda, or any part of Uganda (Article 110(1)). To make this declaration, the President must be satisfied that: i) Uganda or a part of it is threatened by war or external aggression; or ii) the security or the economic life of the country or a part of it, is threatened by internal insurgency or natural disaster; or iii) there are circumstances which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community. In the circumstances of Covid–19, the third ground would be a more than adequate basis for such a proclamation.

The President would be required to cause the proclamation declaring the state of emergency to be laid before Parliament for approval as soon as practicable and in any case not later than fourteen days after its issuance (Article 110(3)); and the state of emergency would remain in existence for not more than ninety days (Article 110(2)).

3.2 Implications of a State of Emergency on the Threshold for the Limitation of Rights

The declaration of a state of emergency would be of major legal significance in terms of granting the state greater latitude in responding to the public health challenges posed by Covid-19. The implications of this become apparent when one carefully scrutinizes the provisions of, especially, Article 46(1) of the Constitution.

Under Article 46(1), an Act of Parliament shall not be taken to contravene the rights and freedoms guaranteed under the Constitution if that Act authorizes the taking of measures that are ‘reasonably justifiable for dealing with a state of emergency’. The difference between this legal standard and that under Article 43(2) is subtle – but extremely important. The threshold for review of state action under Article 46(2) is significantly lower than that stipulated under Article 43(2). The measures instituted during a state of emergency are only required to be ‘reasonably justifiable’, as opposed to the strict requirement – in ordinary times – for them to be ‘acceptable and demonstrably justifiable in a free and democratic society’.

It is also noteworthy that, while under Article 25(2) of the Constitution no person may be required to perform forced labour, in terms of Clause (3)(d), the term ‘forced labour’, as used in that Article, does not include ‘any labour required during any period when Uganda is at war or in case of any emergency or calamity which threatens the life and well-being of the community, to the extent that the requiring of the labour is reasonably justifiable in the circumstances of any situation arising or existing during the period or as a result of the emergency or calamity, for the purpose of dealing with that situation’. Article 25 thus reiterates the lower standard – of reasonable justifiability – applicable in a state of emergency.

In addition, Article 46(3) envisages that an Act enacted to deal with a state of emergency would be permitted to provide for the detention of persons ‘where necessary for the purposes of dealing with the emergency’.

3.3 Limitations within the Limitations during a State of Emergency

At the same time, a declaration of a state of emergency would be accompanied by a number of important in-built constitutional safeguards to ensure that human rights continue to be respected and protected – while ensuring that the state has the necessary room for effective action.

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11 Under Article 46(2), the provisions of ‘any enactment other than an Act of Parliament’ dealing with a state of emergency declared under the Constitution shall apply only to that part of Uganda where the emergency exists.
Non-Derogable Rights

In the first place, it must be recalled that, under Article 44, notwithstanding anything in the Constitution, there can be no derogation from the enjoyment of the following rights and freedoms: i) freedom from torture, cruel, inhuman or degrading treatment or punishment; ii) freedom from slavery or servitude; iii) the right to fair hearing; and iv) the right to an order of habeas corpus.

The rights under Article 44 are, therefore, placed above reach of limitation – whether in ‘normal times’ or under a state of emergency. Any declaration of a state of emergency would thus have no adverse legal impact on those rights.

Rights of a Person Restricted or Detained

Additionally, under Article 47 of the Constitution, a person restricted or detained under a law made for the purpose of a state of emergency: i) would have, within twenty-four hours after the commencement of the restriction or detention, to be furnished with a statement in writing specifying the grounds upon which they are restricted or detained; ii) their spouse or next-of-kin or other person that the person restricted or detained may name, would have to be informed of the restriction or detention and allowed access to the person within seventy-two hours after the commencement of the restriction or detention; and iii) in not more than thirty days after the commencement of their restriction or detention, a notification would have to be published in the Gazette and in the media stating that they had been restricted or detained and giving particulars of the provisions of the law under which their restriction or detention was authorized, as well as the grounds of their restriction or detention.

Review of Detention by the Uganda Human Rights Commission

The Uganda Human Rights Commission would be required to review the case of a person any person so restricted or detained, no later than twenty-one days after the commencement of the restriction or detention; and after that, at intervals of not more than thirty days (Article 48(1)).

Further, in terms of Article 48(2), a person so restricted or detained would have to be permitted and afforded every possible facility: i) to consult a lawyer of their choice or any group of persons, who would have to be permitted to make representations to the Uganda Human Rights Commission for the review of that person’s case; and ii) to appear in person or by a lawyer of their choice at the hearing or review of their case.

On a review of the case, the Uganda Human Rights Commission would be entitled to order the release of the person, or to uphold the grounds of the restriction or detention (Article 48(3)).

Ministerial Accountability to Parliament Re detained or Restricted Persons

In every month in which there is a sitting of Parliament, the Minister responsible would have to make a report to Parliament in respect of: i) the number of persons restricted or detained under the state of emergency; and ii) actions taken in compliance with any findings of the Uganda Human Rights Commission (Article 49(1)).
The Minister would also be obliged to publish, on a monthly basis, in the Gazette and in the media: i) the number and names and addresses of the persons restricted or detained; ii) the number of cases reviewed by the Uganda Human Rights Commission; and iii) the action taken in compliance with the findings of the Uganda Human Rights Commission (Article 49 (2)).

Release at the end of the Emergency

At the end of the emergency declared under the Constitution, any person in or under restriction, detention or custody as a result of the declaration of emergency, would have to be immediately released, unless charged with a criminal offence in a court of law (Article 49(3)).

4.0 The Importance of Transparency: Greater Room for Institutional rather Than Personalized Action

In the foregoing Section, we have endeavoured to show that, through declaring a state of emergency, the government would be allowed greater scope for taking necessary and effective measures to respond to the Covid-19 crisis, that would otherwise be allowed in normal times. We have also tried to demonstrate the ways in which, under the Constitution, such exercise of power would continue to be balanced against the respect and protection of fundamental human rights.

There is, however, another critical consideration in this regard. Under the Constitution, the state of emergency – and the responses thereunder – require various institutions of government to cooperate. Power in this instance would have to be shared, with the result that certain critical checks would exist to prevent the abuse of power by any one branch.

In the first place, as noted in Section 3.1, the declaration of the state of emergency by the President would have to be made following consultation with the Cabinet, and would have to be laid before the Parliament within fourteen days. In addition, any extension of the state of emergency beyond the initial ninety days provided under Article 110(2) could only be done by Parliament (Article 110 (4)), and even then for only ninety days at a time; and for the duration of the state of emergency, the President would be required to submit to Parliament. At such intervals as Parliament would prescribe, regular reports on actions taken by or on his behalf for the purposes of the emergency (Article 110(6)). The power to revoke the proclamation declaring the state of emergency is also one which could be exercised either by the President or Parliament, if either of them are satisfied the circumstances which necessitated it had ceased to exist (Article 110(5)). It is also significant that, Parliament would be empowered to enact such laws as would be necessary for enabling effective measures to be taken to dealing with the emergency (Article 110(7)).

The provisions of Articles 48 and 49, examined in Section 3.3 above, also envisage, and outline, clear roles for the Uganda Human Rights Commission and the responsible
Minister (in this case presumably the Minister of Health) – and demarcate the ways in which they would be required to interact with each other and with Parliament in dealing with the emergency.

The role of the judiciary would also be necessarily preserved and protected, as the body charged with reviewing executive and legislative action for consistency with the constitutional safeguards outlined above.

It is also important to point out, in this regard, that in terms of Article 209(b) of the Constitution, one of the functions of the Uganda Peoples’ Defence Forces (UPDF) is to cooperate with the civilian authority in emergency situations and in cases of natural disasters. The UPDF therefore also has a role to play in this regard – in terms of supporting (not supplanting) the efforts and functions of the civilian authorities as elaborated under the Constitution.

Clearly, therefore, there are definite and immediate advantages attached to the declaration of a state of emergency, in terms of establishing a clear and transparent legal basis for effective state action in responding to Covid-19; while at the same time ensuring that: i) such a response is delicately balanced with the protection of human rights; and ii) the response is institutional rather than individualized. To be clear, while the guidance and leadership of the President in the current crisis is necessary and welcome, the Constitution did not envisage that he would be the sole or dominant actor in this regard. Rather it envisaged, and required, institutional action and cooperation in meeting any national emergency.

It must be acknowledged, given the dynamics of the Ugandan State, that a declaration of a state of emergency may have additional implications, and complications, including: the possible extension of the life of Parliament; the possible postponement of the presidential elections; and the possible takeover by the central government of the powers of districts or regional governments.

However, all factors considered, both the State and citizens would be better served by the transparency and legal certainty that would be provided by the declaration of a state of emergency. At the very least it would ensure institutional checks and balances in determining the appropriate response to the crisis.

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14 Under Article 77(4) of the Constitution, where there exists a state of war or a state of emergency which would prevent a normal general election from being held, Parliament may, by resolution supported by not less than two-thirds of all members of Parliament, extend the life of Parliament for a period not exceeding six months at a time.

15 Under Article 103 (3) of the Constitution, apart from the election required to be held by Article 61 (2) of the Constitution, the election of the President shall also be held, among other circumstances: ‘an election necessitated by the fact that a normal presidential election could not be held as a result of the existence of a state of war or a state of emergency in which case, the election shall be held within such period as Parliament may, by law, prescribe’.

16 Under Article 202 (1) (a), the President may, with the approval of two-thirds of all the members of Parliament, assume the executive and legislative powers of any district where, among other things, a state of emergency has been declared in that district or in Uganda generally. This would be for a period not exceeding ninety days, unless extended by Parliament (Article 202 (3)).

17 Under Paragraph 14 (1) (c) of the Fifth Schedule to the Constitution, where, among other things, a state of emergency has been declared in the region or in Uganda generally; a regional government shall be liable to a take-over of its administration by the President in a manner prescribed by an Act of Parliament and similar to the take-over of administration of a district under Article 202 of the Constitution. This would also be for a period of ninety days, unless extended by Parliament (Paragraph 14 (5), Fifth Schedule). This is currently a moot point, since no regional government has yet been established under the Constitution.
5.0 CONCLUDING THOUGHTS

We end with where we started, by recognizing that these are most uncertain times, which have confounded, and in many respects overwhelmed, a number of States with a longer institutional tradition. Indeed, thus far, the response of the Ugandan state has been more rational and effective than that of many other States around the world.

This is, therefore, not a flippant condemnation of the measures taken by the State thus far. The various officials involved are, no doubt, doing their best in a difficult and uncertain time. Rather, it is a call for the government to now do one better – and ground its response to the Covid-19 crisis on a firm constitutional footing.

It is the right thing to do, for the State, and for the citizens of Uganda.