The Use of Emergency Powers in Response to COVID-19 in The Gambia

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The first case of COVID-19 was reported in The Gambia on 17 March 2020. As of 2 May 2021, The Gambia has confirmed a total of 5,914 COVID-19 cases and 175 associated fatalities. To curb the spread of the pandemic across the country, there have been successive states of emergency relied upon with varying degrees of restrictions on open markets, shopping areas, public transportation, essential commodities, closure of non-essential public places, educational services, and places of worship. More than a year after the pandemic was first reported in The Gambia, the state is returning to ordinary processes. Many COVID-related restrictions have been lifted, allowing businesses, markets, schools, restaurants, bars, gyms, cinemas, and nightclubs to resume normal operations, and borders to be open. However, from 8 March 2021, police permits will no longer be issued for music festivals, political events, and other forms of social gatherings. This comes against the backdrop of the country's limited resources, weak healthcare systems, and ineffective mitigating measures including social distancing, self-isolation, and avoiding public gatherings to prevent further spread of the virus.

The Gambia's Response to COVID-19

The government of The Gambia in response to the global pandemic rolled out a range of measures including lockdowns, social distancing measures, and humanitarian support. The borders (land, sea, and air) were also closed and only open to "essential travel." The declaration of a state of public emergency (SoPE), as well as emergency powers, were relied upon for more stringent measures in response to the pandemic.

Section 34(1) of the 1997 Constitution gives the President of the Republic the exclusive power to make a declaration of SoPE but limits the exercise of this power under section 34(2) by prescribing that the SoPE shall lapse after 7 days or if the National Assembly is not in session after 21 days. Under the aforementioned provision, the duration of the SoPE can only be extended before its expiration, if a resolution is tabled and approved by two-thirds of the National Assembly Members. In essence, the exercise of the presidential powers to declare a SoPE is subject to legislative oversight and scrutiny.

Since the start of the pandemic in March 2020, the government has adopted seven SoPEs. The President, through a proclamation published in the Gazette on 18 March 2020, declared that the vulnerability of The Gambia as a result of the global pandemic may lead to a state of public emergency. On 26 March 2020, the President in accordance with section 34(1)(a) of the 1997 Constitution declared a state of public emergency throughout The Gambia. The National Assembly extended the state of emergency for forty-five days (3 April- 18 May 2020) through a resolution supported by at least two-thirds of all members. The third state of emergency, through a Presidential proclamation published in the Gazette, was declared on 19 May 2020 until 9 June 2020. The same Presidential proclamation was utilized for the fourth extension from 10 June 2020 to 1 July, the fifth extension for 7 days from 1 to 8 July 2020, and the sixth from 8 July to 15 July 2020. It was further extended for 7 days from 15 July 2020 and then subsequently for 21 days ending on 26 August 2020. On 27 August 2020, the state of emergency was again extended by 21 days, and ended on 17 September. Currently, the President has stopped issuing declarations and has resorted to using the Public Health Act through the Ministry of Health. The various extensions of the state of emergency came amid a surge in COVID-19 cases in The Gambia, with the number of

confirmed cases in the country increasing exponentially.

Restrictive measures under the SoPEs generally included a ban on public gatherings, a 22:00 to 05:00 (local time) curfew, the compulsory use of face masks in public places, and the closure of schools and non-essential businesses. The country's land and sea borders were also closed, with exceptions for freight and security personnel.

While the state of public emergency response strategy was timely, the SoPEs were generally poorly enforced. For instance, given the porous borders between rural Gambia and Senegal, there were difficulties in preventing people from crossing between the two countries resulting in a rising number of imported cases. In addition, there was also evidence of selective enforcement including arresting some imams while allowing others to lead congregational prayers. Public finances related to COVID-19 were also not effectively utilized, thereby not addressing the dire needs of people including food distributions and straining citizens' trust in government.

In addition to the SoPEs, COVID-19 emergency regulations were also issued under the Emergency Powers Act. One of such regulations was the Essential Commodities Emergency Power Regulation 2020 adopted under the Emergency Powers Act to freeze prices of essential commodities such as rice. Thus, in March 2020, several businessmen were arrested around the country for violating measures introduced by the government to ensure there is no spike in the prices of commodities in the wake of the Coronavirus pandemic.

The Government has introduced a number of COVID-19 emergency response initiatives, including a nationwide food relief package launched by President Adama Barrow in April 2020 through budgetary appropriations and donor funding. Food and cash relief packages were distributed across the country for vulnerable households. Following the introduction of the state of public emergency, the Ministry of Basic and Secondary Education (MoBSE) partnered with online and broadcast media houses to provide educational lessons covering core subjects on TV and radio to benefit students as schools remain closed. The Gambia Revenue Authority (GRA) also extended the periods for businesses to file their returns and make payments for an additional two months. From June 2020 to date, there has been a general easing of restrictions leading to the reopening of markets, mosques, and churches with the outlined restrictive measures.

Legislative Scrutiny and Oversight

Although the President has the power to declare a state of public emergency, the National Assembly has legislative oversight. The parliament has the obligation to ensure that the actions taken by the executive during an emergency adhere to the dictates of democracy and the rule of law. As illustrated above, there were successive declarations of the state of emergency by the President after the initial 45-day extension by the National Assembly on 3 April 2020. Subsequently, the National Assembly rejected the executive's request for a further 45 days on 18 May 2020. Parliamentarians who opposed the motion to extend highlighted the inadequate implementation of the regulations adopted in the previous first 45 days of the state of emergency by the government and argued that the reasons expounded by the government were unjustifiable given the living conditions of Gambians.

A general unease regarding these successive declarations of states of public emergency was that the President made these declarations under section 34(1) of the Constitution circumventing parliamentary scrutiny and oversight. For example, the Gambia Bar Association (GBA) in July 2020 raised concerns about the continued extensions of the state of emergency without parliamentary oversight. A month earlier, Madi Jobarteh, a rights activist had argued that the President cannot continuously rely on Section 34(6) to always extend his own declaration after declaration, saying it was unconstitutional.

Moreover, an online petition called the National Assembly Members to request an urgent convening of an extraordinary session of the full house of the Assembly through Section 98 subsection 1(a)(ii) of the Constitution and Section 11(3)(c) of the Standing Orders. Citizens were concerned that the government

was not providing the necessary and quality leadership and management for the effective and efficient containment of the COVID-19 pandemic in The Gambia in a transparent and accountable manner. Non-state actors also convened a consultative meeting on COVID-19 on 7 August 2020. The meeting noted with concern that the government's adoption of incessant states of public emergency while sideling parliamentary oversight was a deliberate attempt to undermine constraints on executive power. Based on The Gambia's recent past under a dictatorial regime, there is a justified weariness of the danger of expanding already existing executive powers in very visible ways.

Impact on Human Rights

The declaration of states of public emergency gives the state sweeping emergency powers, which have the consequent likelihood of curtailment of the enjoyment of fundamental human rights. While the government has the right under law to take drastic measures to protect the population from the pandemic, it should not be seen as an open-ended tool to suspend individual rights. Striking a balance between individual rights and freedoms against the public interest is challenging. Section 35 of the Constitution makes provision for derogations from fundamental rights and freedoms under public emergency powers. It provides that an Act of the National Assembly may authorize reasonably justified measures to deal with the situation during a state of public emergency. There is no enumeration of non-derogable rights, though the right to free trial is partially non-derogable (section 24 (5)-(8)).

Given the nature of COVID-19 measures, several rights have been impacted including the freedom of movement, freedom of assembly and association, and freedom of expression, right to health, and access to justice.

Freedom of Expression and Assembly

COVID-19-related restrictions have impacted on section 25(1)(a) of the 1997 Constitution, which protects freedom of expression, which includes protection of the freedom of the press and the media. While these rights are not absolute and are subject to lawful limitations under sections 25(4) and 209 of the Constitution, there have been incidents that have unreasonably limited such rights. For example, on 21 June 2020, officers of Gambia's anti-crime police unit detained Ebou Keita, an editor and camera operator with the privately-owned Gambian Talents Television broadcaster, for photographing police arresting people who protested against the country's COVID-19 restrictions. Protests have also been largely restricted. For instance, the Gambian police "temporarily" banned a demonstration planned in June 2020 in front of the U.S. Embassy in Banjul to protest police violence in the United States, after the deaths of George Floyd in Minneapolis and a Gambian national near Atlanta.

Right to Health

The Gambia already had a fragile health system before the pandemic that has been further strained by COVID-19 thereby leading to barriers in accessing healthcare services. This is more so for women accessing reproductive health services. In a series of national dialogues organized by The Gambia office of Westminster Foundation for Democracy (WFD) under the theme: "Learning from Gambia's response to COVID-19: Lessons, Successes and Challenges", participants highlighted specific negative consequences for marginalized groups due to COVID-19 response measures. As COVID-19 deepens gender inequalities, women and girls are disproportionately affected by the adverse effects of the pandemic. For example, it was noted that some private health facilities had temporarily shut their doors to taking care of reproductive health issues during COVID-19. In public health facilities, priority was given to COVID-19 related services, as some women needing reproductive health care were allegedly turned away.

COVID-19 disrupted essential sexual and reproductive health services in an already weak health system. The disruption of services coupled with the fear of contracting the virus at the health facilities faced by women patients, led to an increase in at home-births. Women were unable to get the adequate and efficient delivery and postnatal care services they needed. It has been reported that maternal death have increased during the pandemic in more visible ways leading to a protest dubbed "Gambian Women's Lives

Matter", which saw hundreds of people marching over the "alarming rate" of maternal mortality. In brief, there are numerous consequences of COVID-19 response measures to which marginalized groups are particularly vulnerable.

Right to Liberty

Since the COVID-19 outbreak, the right to liberty as guaranteed in section 19 of the 1997 Constitution was restricted. Limitations of people's liberties were prominent due to the enforcement of the states of emergency regulations and measures. In March 2020, at least three Imams were arrested in Kanifing Municipality, West Coast, and Lower River Regions for violating COVID-19 regulations. In April 2020, the WANEP National Early Warning System (NEWS) documented that 30 people were arrested in the North Bank region for performing congregational prayers in violation of the emergency regulations. Similar arrests were made throughout the COVID-19 restrictions particularly when a curfew was introduced to contain the further spread of the virus. While these arrests related to the curfew might have been justifiable, underlying factors that exacerbated the situation were not considered. For instance, the nightly curfew came with high demand for public transportation, which resulted in individuals not being able to travel home before the time of the curfew. Commercial vehicles were also required by the government to use half oftheir capacity. Thus, fewer spaces and higher demand meant that certain groups such as women and persons with disabilities were at a higher risk of flouting such rules. In addition, in the majority of police stations, there are no separate detention facilities for men and women, thereby increasing the vulnerability of women and girls. The capacity issue of detention facilities and prisons was also a key challenge. On one hand, where large numbers of people are arrested, police stations cannot house them, and on the other hand, placing individuals in open-air centers such as stadiums overnight without any protective clothing in the chilly weather would be unpleasant. Through the intervention of the National Human Rights Commission, the President used his Prerogative of Mercy powers to pardon some 115 prisoners serving various prison terms, in the effort to decongest the prisons.

2021 Outlook

The COVID-19 pandemic brought the world to a halt and a public health emergency in many countries including The Gambia. While recognizing the need for the state to safeguard public interest and rights to life, health, and safety, this does not give government a license to put aside their obligations to uphold fundamental rights and liberties. Given ongoing response measures to curb the spread of COVID-19, the Gambian government needs to strike the right balance between the protection of public health and the protection of individual rights and freedoms.

As noted above, there is a need for the state to pay attention to underlying determinants and burdens associated with adopted measures including loss of income, privacy, stigmatization, and discrimination. This is essential to limit the impact of the restrictions and hence allow for greater enjoyment of rights. It is imperative that in efforts to ensure an effective response to the COVID-19 pandemic the government works closely with non-state actors including the private sector, civil society organizations, and opinion and religious leaders to promote and model positive behaviors of prevention and containment measures.

It is equally important for the parliament to provide oversight and accountability for measures and procedural compliance given the potential for prolonged misuse or abuse of emergency powers. This is essential to uphold democracy, human rights, and the rule of law. As Gambians get ready to go to the Presidential polls in December 2021, there is an urgent need for government to maintain a delicate balance of addressing the COVID-19 pandemic while preserving human rights and maintaining democratic principles.

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