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COMMENTARY

Law, Human Rights, and Pandemic Response: Reflecting on the South African HIV Response 25 Years Later

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Introduction

The 1998 article "Human Rights and AIDS in South Africa: From Right Margin to Left Margin" by Mark Heywood and Morna Cornell examined South Africa's response to HIV five years into the epidemic and how the country's liberation struggle against apartheid shaped its initial response to the epidemic.[1] The authors argued that the government's delay in rolling out a comprehensive HIV treatment program, its lack of integration of human rights principles into HIV/AIDS policies, and its failure to address structural inequalities had serious consequences for the country's ability to combat the epidemic effectively. They noted that the readiness of governments in low- and middle-income countries to dispense with their socioeconomic rights obligations is the biggest obstacle to the HIV response. They predicted that a failure to integrate social and economic rights, especially in light of the deep structural inequalities that plagued South Africa, would render its HIV response ineffective.[2]

Reflecting on these predictions 25 years later, we argue that Heywood and Cornell were right to be concerned with the focus on economic prosperity at the expense of deeper structural social and economic rights.

The South African HIV response 25 years later

There has been significant progress in South Africa in the fight against HIV/AIDS in the last two decades. The South African courts rose to the challenge of integrating rights, especially socioeconomic rights,

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into the HIV response through several landmark decisions that contributed to an enabling legal and policy environment. The courts affirmed human rights in the context of HIV, including through decisions on nondiscrimination in employment based on HIV status, protection from public disclosure of one's HIV status, and the right of people living with HIV to serve in the military.[3] The courts have also intervened in other rights-related issues that evidence shows are important for the HIV response, including guaranteeing women's right to landed property, addressing gender-based violence, decriminalizing consensual same-sex sexual conduct, and securing access to HIV prevention and treatment for people in prison.[4] The most notable HIV-related decision of the South African Constitutional Court is *Minister of Health v. Treatment Action Campaign (TAC)*, in which the court ordered the government to make nevirapine, an antiretroviral drug for HIV-positive pregnant women, available across the country and to devise a plan for its wider distribution, thus affirming the constitutional right to access health care services.[5] This decision probably saved thousands of lives and underscored the judiciary's commitment to uphold socioeconomic rights, setting a significant precedent for future health care-related litigation.

Despite the initial slow rollout of the national program, which is thought to have resulted in over 330,00 deaths, South Africa currently has the largest HIV treatment program in the world, with about 5.7 million people on treatment out of the estimated 7.8 million people living with HIV, and an estimated overall annual price tag of US$25 billion.[6] The country has witnessed a 57% reduction in new HIV infections and a 70% reduction in AIDS-related deaths between 2010 and 2022.[7]

Socioeconomic rights ideals versus deepening socioeconomic inequality

Pro-rights decisions of courts and good laws and policies alone are insufficient to guarantee the enjoyment of socioeconomic rights and successful epidemic responses. South Africa's Constitutional Court has noted that the Constitution requires the government to take "other measures" to "respond to the people's basic social and economic needs."[8] Heywood and Cornel argued that the government's economic priorities and financial investments have not reflected the ambition of the socioeconomic rights guaranteed by the South African Constitution.[9]

South Africa still has intractable socioeconomic challenges that continue to blight the hope of universal health care. The country is considered the most unequal in the world, with the top 10% of its people holding 80.6% of financial assets.[10] Thirty percent of people in South Africa live below the World Bank's absolute poverty threshold of US$1.90 per day.[11] This socioeconomic disparity is reflected in other areas, including employment opportunities, health, and access to decent shelter. Unemployment stands at 32.1%, with youth (ages 15–34) unemployment at 42.2%.[12]

South Africa has a dual-model health care system of stretched, overcrowded, low-quality free public facilities on which the majority of the population relies, and expensive high-quality private facilities accessible mostly through private medical insurance.[13] With only 16% of the population covered by medical insurance, health outcomes are dire for most.[14] The right to shelter guaranteed by South Africa has yet to translate into adequate, affordable housing for most. About 13% of South Africans are estimated to live in shacks and informal settlements.[15] Despite these challenges, South Africa's status as one of the most advanced economies in the region makes it a preferred destination for labor migrants, asylum seekers, and refugees from other African countries.[16] This has undoubtedly placed an additional burden on the country's public services. Government officials stoke the embers of xenophobia by blaming African migrants for poor service delivery and employment opportunities.[17] The media's amplification of these narratives has resulted in several violent attacks on foreign migrants in South Africa, with the government seemingly unable to address them.[18] Although the South African Constitution guarantees asylum seekers and refugees the right to access medical services, bureaucratic inefficiency has left

many asylum seekers undocumented and unable to access health care.[19]

Pandemic preparedness and response: Lessons from COVID-19 and HIV

The COVID-19 pandemic exposed the fault lines of inequality in both rich and poor countries worldwide, and South Africa was no exception.[20] South Africa had the highest number of COVID-19 cases in Africa, with an estimated four million cases and over 100,000 deaths.[21] Food prices soared, and almost 70% of people in the country reported that they could not work due to the strict lockdowns imposed by the government. Protests and violence broke out across South Africa, with the looting of shops occurring across the major cities.[22] Xenophobic attacks were common, with many Zimbabwean migrants scapegoated and wrongly accused of spreading COVID-19.[23]

The South African government declared a national state of disaster using disaster management powers designed to allow it to mobilize resources, coordinate responses, and implement special measures for effectively addressing crises.[24] Under a state of disaster, certain rights may be limited but not derogated through the promulgation of regulations. While the lockdowns may have been necessary, their effect on certain groups, especially those living in informal settlements and workers in the informal sector, was disproportionate. The conditions of the informal settlements made it virtually impossible to observe social distancing, self-isolation, or frequent handwashing.[25] Additionally, the lockdowns meant that those who worked in informal jobs as domestic workers, gardeners, roadside vendors, or restaurant employees were out of work, without savings, food, or a social safety net to absorb the impact of the pandemic.[26] The courts highlighted this structural vulnerability in *De Beer N.O and Others v. Minister of Cooperative Governance and Traditional Affairs*, which held that some of the government's lockdown regulations were unconstitutional. The ruling referred to the millions of informal workers who had lost their livelihoods and to the communities that watched children go hungry, stripped of their rights to dignity and equality.[27]

COVID-19, just like HIV, revealed that although pandemic responses may be rooted in biomedical responses, social relations and socioeconomic realities undermine the effectiveness of the response.[28] Sadly, the lessons of effective community engagement and public education campaigns that contributed to the success of the HIV response were not deployed to the same extent for COVID-19. Furthermore, evidence from the HIV response shows that the excessive use of criminal law has the effect of increasing stigma around the virus and discrimination and human rights abuses against people living with the virus, as well as driving people suspected of having the virus underground.[29] South Africa was one of the few countries that did not criminalize HIV nondisclosure, exposure, and transmission as part of its response, instead opting for an approach that incentivized voluntary testing and treatment. Unfortunately, for its COVID-19 response, the government chose to lean heavily on criminal law, issuing fines and prison sentences to those who broke lockdown restrictions.[30] The absence of a human rights-based approach and effective community engagement may have contributed to hesitancy when vaccines eventually became available. Surveys consistently showed that vaccine hesitancy in South Africa was associated with age, race, education, geography, and employment status.[31]

Another issue that further complicated the human rights dimensions of the COVID-19 pandemic response was the use of new technologies and digital health surveillance of the population, including global positioning systems, cell phone apps, and facial recognition to control the spread of COVID-19. To its credit, the government piloted and discarded a few applications and technologies following concerns over data privacy and the surveillance of people without due consent and the involvement of the private sector.[32]

Conclusion

In May 2023, the World Health Organization declared the COVID-19 pandemic over, with much

relief. As the pandemic recedes from South African memories, priorities shift to more economic ones, such as establishing mRNA hubs. There is a danger of forgetting the deep structural inequalities that this pandemic highlighted. Although health interventions often rely on working toward clearly discernible ends of pandemics, official announcements of the end of a pandemic or a public health crisis risk undermining governments' commitments to and investments in addressing deep socioeconomic challenges in societies such as South Africa as part of their obligations concerning the right to health and pandemic preparedness. The COVID-19 pandemic might be over, and South Africa is making steady progress toward achieving global targets of HIV epidemic control. However, the country still needs to grapple with other health challenges, such as tuberculosis, noncommunicable diseases (including diabetes and high blood pressure), and whichever global pandemic may be lurking around the corner. South Africa must double up efforts to "take additional measures" necessary to effect the South African Bill of Rights promises.[33] A human rights approach, as Heywood and Cornel spelled out—which puts the rights of structurally marginalized groups at the center—is the only way that states like South Africa can create enduring and sustainable responses to pandemics.

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