

CONSTITUTIONALISM AND PUBLIC HEALTH EMERGENCIES: COVID-19 REGULATIONS IN SOUTH AFRICA AND THE CONSTITUTIONAL AND HUMAN RIGHTS SLIPPERY SLOPE*

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SUMMARY

This article provides a theoretical and factual-legal analysis of South Africa's response to the COVID-19. The state of disaster and its related COVID-19 regulations are interrogated from a constitutional and human rights perspective. It is conceded that public health emergencies call for a limitation of certain rights to control or curb the spread of the pandemic. However, the measures adopted by the South African government were in some respects disproportional and violated the constitutional and human rights principles. This article carefully examines the South African approach in instances where the constitutional and human rights of its people were brought into contention. For purposes of clarity, the focus is on documented accounts of the violations of fundamental human rights during the declaration and the operation of Lockdown Regulations in terms of the Disaster Management Act 2002.

1 INTRODUCTION

In what has turned out to be the most difficult time of the century, the world has been faced with a novel coronavirus (COVID-19) pandemic.¹ The COVID-19 pandemic has posed many constitutional and human rights challenges for many governments across the world.² Following the World

* This article is intended to mark the year that South Africans were subjected to the Lockdown Regulations of the Disaster Management Act 2002 and is dedicated to all the people who lost their lives during this time.

¹ The official name of the virus, as given by the International Committee on Taxonomy of Viruses, is SARS-CoV-2.

² Zarifi and Powers "Human Rights in the Time of COVID-19: Front and Centre. International Commission of Jurists" (6 April 2020) <https://www.icj.org/human-rights-in-the-time-of-covid-19-front-and-centre/> (accessed 2020-04-17).

Health Organisation's recommendations, various governments adopted multi-pronged measures to curb the spread of the virus. At the beginning of the pandemic, the World Health Organisation (WHO) Director-General Dr Tedros Ghebreyesus called for solidarity and not stigma related to the virus. However, no substantial guidelines on how countries could adopt public health measures to protect the public while respecting human rights were provided.³ This resulted in various states invoking their emergency powers that include nationwide lockdowns, travel restrictions, and curfews among others.⁴ These declarations have been accompanied by regulations that limit people's freedom of movement, freedom of assembly, freedom of association, and freedom of expression among others.⁵ Restrictions imposed by governments have various constitutional and human rights implications and, in some cases, have resulted in constitutional challenges in one form or another. This calls for a critical examination of the implications of public health emergencies on constitutionalism and human rights which forms the context of this article. According to Odigbo "during the 2019–20 coronavirus pandemic, human rights violations including censorship, discrimination, arbitrary detention and xenophobia have been the reported atrocities in different parts of the world".⁶ Some of these derogations were a blatant violation of human rights norms and principles.

Richardson and Devine have cautioned that "well-meaning but poorly considered restrictions in the name of combatting COVID-19 threaten to undermine hard-won human rights protections [...]".⁷ It is conceded that in times of public health emergencies, it may be necessary to limit certain rights to achieve public health objectives. Both South African law and international law provide for permissible limitations of rights. The permissible limitation requirement entails that it is not sufficient for any government to merely pronounce that its actions are necessary but that they should also be necessary, proportionate, and reasonable.⁸ There is, thus, an obligation on the government to provide adequate and transparent justification for the measures taken.⁹ Culture of justification is one cardinal principle of

³ Yamim and Habibi "Human Rights and Coronavirus: What's at Stake for Truth, Trust, and Democracy?" <https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/> (accessed 2020-05-25).

⁴ Thomson and Ip "COVID-19 Emergency Measures and the Impending Authoritarian Pandemic" 2020 *Journal of Law and the Biosciences*.

⁵ Gonese, Shivamba and Meerkotter "A Legal Overview of the Impact of COVID-19 on Justice and Rights in Southern Africa" SALC Policy Brief 1 (May 2020) <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/05/Policy-brief-1-of-2020-COVID-laws.pdf> (accessed 2020-07-2020).

⁶ Odigbo, Eze and Odigbo "COVID-19 Lockdown Controls and Human Rights Abuses: The Social Marketing Implications" 2020 2(45) *Emerald Open Research* 3.

⁷ Richardson and Devine "Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights" 2020 42 *Michigan Journal of International Law*.

⁸ Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" 2014 17(6) *Potchefstroom Electronic Law Journal* 2229–2267.

⁹ See Quinot "Regulatory Justification and Coordination in South Africa" (29 April 2020) *The Regulatory Review* <https://www.theregreview.org/2020/04/29/quinot-regulatory-justification-coordination-south-africa/> (accessed 2020-11-27).

democracy which the government cannot abrogate from.¹⁰ Labuschagne notes:

“The regulations promulgated under the state of disaster, which include the criminalisation of those not adhering to these regulations, have been criticised for being disproportionate and more akin to those promulgated under a state of emergency.”¹¹

In dealing with the pandemic, it is essential that democratic principles are adhered to legitimise government action, not only in the eyes of the law but also in the eyes of the public as they are a major stakeholder in curbing the spread of the virus. In the following sections, through an analysis of the theoretical and factual legal challenges, we scrutinise South Africa’s response to the COVID-19 pandemic and analyse the constitutional validity of some of the measures adopted to curb the spread of the pandemic during the period from 18 March 2020 to 31 December 2020. It is submitted that certain restrictions on human rights imposed by the South African government were too invasive and cannot pass the constitutional muster.

2 THEORETICAL ASSUMPTIONS OF PUBLIC HEALTH EMERGENCIES’ LEGAL RESPONSE

Public health emergencies place enormous challenges on governments tasked to combat the spread and minimise the effects of the disease on the health system as well as the economy.¹² Public health emergencies invoke the powers of the state to make pronouncements that seek to ensure people’s health as well as “to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the common good”.¹³ As a result, these powers create fundamental constitutional and legal challenges and can pose a serious threat to the current constitutional order. According to Fombad and Abdulrauf:

“Because the legal framework regulating the conduct of governments during states of emergency was often weak, countries generally experienced high levels of repression and human rights abuses.”¹⁴

Villareal argues that public health emergency powers may result in one or more of the following possibilities: the first possibility involves “the rule of

¹⁰ Klaaren “Human Rights & South African Constitutionalism: An Interdisciplinary Perspective on Debates over the Past Twenty Years” 2014 38(1) *Ufahamu: A Journal of African Studies*.

¹¹ Labuschagne “Ethicolegal Issues Relating to the South African Government’s Response to COVID-19” 2020 13(1) *South African Journal of Bioethics and Law* 26.

¹² Centre for Democracy and Law “Maintaining Human Rights During Health Emergencies. Brief on Standards Regarding the Right to Information” (May 2020) https://www.argentina.gob.ar/sites/default/files/rti-and-covid-19-briefing.20-05-27.final_.pdf (accessed 2020-07-17).

¹³ Gostin “A Theory and Definition of Public Health Law” 2007 10 *Journal of Health Care Law and Policy* 1.

¹⁴ Fombad and Abdulrauf “Comparative Overview of the Constitutional Framework for Controlling the Exercise of Emergency Powers in Africa” 2020 10(2) *African Human Rights Law Journal* 376–411.

law” or “business as usual” model archetype.¹⁵ In this model, the response to the emergence is framed within the existing or current ordinary legal framework.¹⁶ This means that existing legislation is relied on to contain the public health emergence. In this model, the government does not enact new legislation, regulations, or decrees, and does not adopt other extraordinary measures “since they are provided for in a predetermined framework also available during times of normalcy”.¹⁷ It should be noted that emergencies in this model generally do not lead to an upset of the existing legal framework.

The second is the “the constitutional dictatorship” model-archetype, “in which emergencies lead to exceptional and temporary regimes wherein ordinary norms no longer apply”.¹⁸ This basically involves a subliminal suspension of the rule of law but this is done within the confines of a predetermined legal framework that operates on a temporary basis and does not apply during a period of normalcy.¹⁹ This framework is guarded against abuse by a host of substantive and procedural requirements. The third and final is the “extra-legal” model-archetype, in which the government action is justified not by law but by necessity. The culture of legal justification does not exist in this model. There is little to no legal regulation of the emergency.²⁰ The emergency situation may very well be open to abuse. This supposition is supported by Thompson and Ip:

“The COVID-19 pandemic has nevertheless sparked authoritarian political behavior worldwide, not merely in regimes already considered to be disciplinarian or tyrannical but also in well-established liberal democracies with robust constitutional protections of fundamental rights. Authoritarian governance in the name of public health intervention is understood in the present context as being characterized by diverse combinations of governmental and administrative overreach, the adoption of excessive and disproportionate emergency measures, override of civil liberties and fundamental freedoms, failure to engage in properly deliberative and transparent decision-making, highly centralized decision-making, and even the suspension of effective democratic control.”²¹

As such, health emergencies burden states with regulatory measures that pose a serious challenge to the very existence and sustenance of human rights and constitutionalism. If unchecked, the measures instituted can degenerate the entire political system into totalitarianism.

3 SOUTH AFRICA’S RESPONSE TO COVID-19

The COVID-19 pandemic was declared as a public health emergency by the World Health Organisation.²² On the 27 of January 2020, South Africa’s

¹⁵ Villarreal “Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International” in Albert and Roznai *Constitutionalism Under Extreme Conditions* (2020) 217–238.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Thomson and Ip 2020 *Journal of Law and the Biosciences*.

²² World Health Organisation, 2020. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).

National Institute for Communicable Diseases (NICD) published a statement that assured the nation that the country was prepared to deal with the possibility of detection of the virus in the country. The statement by NICD read:

“We would like to assure South Africans that South Africa is prepared to deal with the eventuality of a possible imported case as we have put in place systems to rapidly identify, detect and respond to any cases that may reach our borders.”²³

On 30 January 2020, the World Health Organisation announced COVID-19 as a “public health emergence of international concern”.²⁴ This was a key point in the international as well domestic response to the pandemic. On 5 March 2020, South Africa announced its first case.²⁵ On 11 March 2020 COVID-19 was declared a pandemic by the World Health Organisation. This was followed by President Cyril Ramaphosa announcing a series of measures that were aimed at fighting the spread of the virus. These measures affected travel, social interactions, and gatherings of more than the specified number of people.²⁶ A state of national disaster was declared.²⁷ In response thereto, on 23 of March 2020, South Africa announced a nationwide lockdown.²⁸

To curb the spread of the virus, the government of South Africa, acting in terms of section 27(2) of the Disaster Management Act of 2002 declared a State of National Disaster in the country and published accompanying regulations.²⁹ These regulations had the effect of shutting the economy, disrupting social lives as people were confined to their homes essentially limiting their civil rights and liberties.³⁰ According to Labuschagne, the government promulgated a series of regulations restricting, among other things, the movement of persons. Thomas and Ip submit:

“Considering the almost total limitation on the right of assembly (with the exception of a funeral) and the severe limitations on the freedom of movement, the effect of these measures is indeed more akin to a State of Emergency in the context of these rights.”³¹

To enforce the lockdown restrictions, the government deployed the South African National Defence Force (SANDF) into various cities across the

²³ National Institute of Communicable Disease (NICD) “Increasing Cases of Novel Coronavirus (2019-Ncov): Update on South Africa’s Preparedness” (27 January 2020) <https://www.nicd.ac.za/increasing-cases-of-novel-coronavirus-2019-ncov-update-on-south-africas-preparedness/> (accessed 2020-09-26).

²⁴ World Health Organisation “WHO Director-General’s Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)” (30 January 2020) [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ih-ermergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ih-ermergency-committee-on-novel-coronavirus-(2019-ncov)) (accessed 2020-09-27).

²⁵ Abdool-Karim “The South African Response to the Pandemic” 2020 382(24) *New England Journal of Medicine* 95.

²⁶ GN 313 in GG 43096 of 2020-03-15.

²⁷ GN 318 in GG 43107 of 2020-03-18.

²⁸ GN 398 in GG 43148 of 2020-03-25.

²⁹ GN 318 in GG 43107 of 2020-03-18.

³⁰ Staunton, Swanepoel and Labuschagne “Between a Rock and a Hard Place: COVID-19 and South Africa’s Response” 2020 *Journal of Law and the Biosciences*.

³¹ Thomson and Ip 2020 *Journal of Law and the Biosciences*.

country.³² It should be noted that, in South Africa, as well as other countries, allegations of violations of rights have been made and courts have been called upon to make pronouncements on the constitutionality of state action. The deployment of the army to enforce the lockdown in South Africa was criticised from a human rights perspective and fears of brutality were compounded by evidence from across the country.³³ Images and videos went viral on social media and grabbed national attention. Scholars have cautioned that governments have previously used public emergencies, including health emergencies, to justify “discrimination, repression of political opponents or to enhance marginalization of minorities or other vulnerable populations”.³⁴

The restrictions on fundamental rights such as the right to freedom of movement and freedom of assembly coupled with brutal policing by soldiers were apartheid-like. More aptly, the brutality stirred a strenuous sense of *déjà vu* for those who survived apartheid, and a bitter taste of it for those who were born free. Given this, it is important to ascertain how the South African government balanced the need to protect lives from the pandemic and the need to preserve the hard-won rights and freedoms of the people.

4 CONSTITUTIONAL AND LEGAL FRAMEWORK FOR A LIMITATION OF RIGHTS IN SOUTH AFRICA

South Africa is a constitutional democracy whose Constitution speaks to its aspirations as a nation and the values which bind its people.³⁵ A fundamental feature of the Constitution of South Africa was aptly summed up by the former Chief Justice Ismail Mahomed in *S v Makwanyane*:

“it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic”.³⁶

The inequalities that existed in South Africa in the pre-1994 era inflicted undesired pain on the majority of the population. These inequalities were anchored on the system of apartheid which had a blatant disregard for human rights and fundamental freedoms. The post-apartheid era birthed a new constitution whose values were founded on the humane principles of

³² Kiewit “Three-month Covid-19 Deployment of SANDF Planned” (27 March 2020) <https://mg.co.za/coronavirus-essentials/2020-03-27-three-month-covid-19-deployment-of-sandf-planned/> (accessed 2020-11-27).

³³ See Seekings and Natrass “Covid vs. Democracy: South Africa’s Lockdown Misfire” 2020 31(4) *Journal of Democracy* 106–121.

³⁴ Richardson and Devine 2020 *Michigan Journal of International Law* 17.

³⁵ O’Regan “Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa” 2012 75(1) *The Modern Law Review* 1–32.

³⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) 262.

democracy and the respect for human rights and fundamental freedom.³⁷ The Constitution, therefore, affirms human rights but also allows for a derogation of these within its parameters. Unlike during a state of emergency where rights are suspended, during a state of disaster, the government can only limit rights in terms of section 36 of the Constitution.³⁸

The constitutional design places a general standard of “reasonable and justifiable” in an open democratic society, based on human dignity, equality, and freedom. Section 36 of the Constitution provides the guidelines for limitations of rights. In terms of this provision:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including–
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.”³⁹

Van Staden observes that section 36(1) is not designed to be an invitation for the limitation of rights by the state, rather it is a limitation of how the state may do so. Therefore, section 36 should be read as part of the protection of the rights and not the infringement of the rights.⁴⁰ Section 36 provides that a right may be limited if it is reasonable and justifiable to do so in an open and democratic society based on the principles of freedom, dignity, and equality. To determine whether this standard has been satisfied by the state, “the courts must conduct an analysis of the nature, extent, and purpose of the right and its limitation, and ascertain the limitation’s rationality and proportionality”.⁴¹ A further enquiry that courts make is to consider whether there were other less restrictive means to achieve the purpose of the limitation.⁴²

“Because the unmolested exercise (rather than the limitation) of guaranteed rights is the default position, government must ‘restrain itself when regulating’ such exercise – freedom is the general rule, and limitation is the exception. Such exceptional limitations must be for valid, constitutional, public purposes, rather than purposes not contemplated by the Constitution. Purposes that are unconstitutional, or simply extra-constitutional, are insufficient to justify rights limitations.”⁴³

Under international law, the limitation of rights cannot go beyond what is permissible as per various international conventions and protocols. In terms of international law, the widely accepted notion is that such measures or

³⁷ Tambe-Endoh “Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited” 2015 7(1) *Africa Review* 7.

³⁸ Brickhill “Constitutional Implications of Covid-19” 2020 *Talking Points* https://juta.co.za/documents/678/Issue_1_-_Talking_Points__Constitutional_Implications_of_Covid-19.pdf (accessed 2021-01-02).

³⁹ S 36 of the Constitution of the Republic of South Africa, 1996.

⁴⁰ Van Staden “Constitutional Rights and their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa” 2020 20(2) *African Human Rights Law Journal* 484–511.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Van Staden 2020 *African Human Rights Law Journal* 492.

limitations must be necessary, proportionate, and reasonably related to legitimate public ends.⁴⁴ Scholars have however pointed out that “the possibility to derogate in times of emergency does not substitute itself to permissible limitations of human rights, and if states can attain their public policy objectives without using derogatory measures, they should do it”.⁴⁵

While it is conceded that states have an obligation to institute measures, including limiting certain rights, to contain a public emergency or disaster, the derogations should not be disproportionate. The International Covenant on Civil and Political Rights (ICCPR) provides for permissible limitations during a state of a public health emergency. These act as safeguards against states over-exercising their powers to limit human rights beyond what is proportionate. The General Comment No. 31 [80] of the Covenant on Civil and Political Rights of May 2004 provides:

“States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”⁴⁶

The least invasive measures should always be the first option. According to Lebrecht strict necessity implies the need to show a close relationship between the emergency and the measures being taken and that less invasive measures would be inefficient.⁴⁷ International law imposes derogable and non-derogable rights in a public disaster or public emergency. Non-derogable rights include the prevention of all forms of torture⁴⁸ and the right to life⁴⁹ among others. In an address on COVID-19, the Inter-American Commission warned:

“even in the most extreme and exceptional cases in which suspension of certain rights may become necessary, international law lays down a series of requirements such as legality, necessity, proportionality and timeliness, which are designed to prevent measures such a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government”.⁵⁰

It cannot be disputed that emergency powers give wide discretionary powers to governments to institute measures they deem necessary for the containment of the disaster. Measures or safeguards taken should be

⁴⁴ Articles 17 and Article 19 of the International Covenant on Civil and Political Rights and United Nations Declaration of Human Rights respectively.

⁴⁵ Lebrecht “COVID-19 Pandemic and Derogation to Human Rights” 2020 7(1) *Journal of Law and the Biosciences* 3–4.

⁴⁶ UN Human Rights Committee (HRC) General Comment No 31 [80] *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add.13 <https://www.refworld.org/docid/478b26ae2.html> (accessed 2020-10-4).

⁴⁷ Lebrecht 2020 *Journal of Law and the Biosciences* 6.

⁴⁸ Article 7 of ICCPR; Article 5 of the ACHR.

⁴⁹ Article 6 of the ICCPR; Article 4 of ACHR.

⁵⁰ IACHR “Pandemic and Human Rights in the Americas, Resolution 1/2020” (10 April 2020) <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf> (accessed 2020-10-24).

necessary in terms of both the law and human rights.⁵¹ Palmer and Martin note that “a paradigm shift away from rights protection focusing on the individual to wider protective concerns during the pandemic can be justified in some circumstances”.⁵² The effect of this is that these powers can be abused by states and human rights suspended or diverted to protect a more pressing public health emergency. The approaches adopted by states tend to overlook the importance of human rights in general, especially the rights that permeate the framing of lockdown restrictions.

5 THE STATE OF DISASTER AND ITS CONSTITUTIONAL AND HUMAN RIGHTS IMPLICATIONS IN SOUTH AFRICA

South Africa has so far opted for a less radical measure to curb the spread of COVID- 19 by declaring a state of disaster instead of a state of emergency.⁵³ Acting in terms of section 27 of the Disaster Management Act,⁵⁴ the Minister of Co-operative Governance and Traditional Affairs,

⁵¹ Moodley, Obasa and London “Isolation and Quarantine in South Africa During COVID-19: Draconian Measures or Proportional Response?” 2020 110(6) *South African Medical Journal* 1–2.

⁵² Palmer and Martin “Public Health Emergencies and Human Rights: Problematic Jurisprudence Arising from the COVID-19 Pandemic” 2020 *Forthcoming, European Human Rights Law Review*.

⁵³ GG 43096 of 2020-03-15.

⁵⁴ 27. Declaration of national state of disaster

- (1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if–
 - (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
 - (b) other special circumstances warrant the declaration of a national state of disaster.
- (2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning–
 - (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
 - (b) the release of personnel of a national organ of state for the rendering of emergency services;
 - (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
 - (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
 - (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
 - (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
 - (g) the control and occupancy of premises in the disaster-stricken or threatened area;
 - (h) the provision, control or use of temporary emergency accommodation;
 - (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
 - (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

Nkosazana Dlamini-Zuma cited the “magnitude and severity of the COVID-19 outbreak which has been declared a global pandemic ...” and “the need to augment the existing measures undertaken by organs of state to deal with the pandemic”.⁵⁵ In terms of this the Disaster Management Act, “disasters” are defined as:

“[A] progressive or sudden, widespread or localised, natural or human-caused occurrence which (a) causes or threatens to cause (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) significant disruption of the life of a community; and (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources”.⁵⁶

This declaration was accompanied by extensive Disaster Management Regulations⁵⁷ described as “steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster”.⁵⁸ Section 3 of the Regulations “Prevention and Prohibition of Gatherings” states:

“3. (1) In order to contain the spread of COVID-19, a gathering is prohibited. (2) An enforcement officer must, where a gathering takes place— (a) order the persons at the gathering to disperse immediately; and (b) if they refuse to disperse, take appropriate action, which may, subject to the Criminal Procedure Act, include arrest and detention. (3) The assembly of more than 50 persons at premises where liquor is sold and consumed is prohibited.”⁵⁹

These regulations did not enforce a lockdown but simply regulated the permissible size of gatherings. However, after the announcement of a nationwide lockdown by the government, the Regulations were amended to

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- (k) the dissemination of information required for dealing with the disaster;
 - (l) emergency procurement procedures;
 - (m) the facilitation of response and post-disaster recovery and rehabilitation;
 - (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
 - (o) steps to facilitate international assistance.
- (3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—
- (a) assisting and protecting the public;
 - (b) providing relief to the public;
 - (c) protecting property;
 - (d) preventing or combating disruption; or
 - (e) dealing with the destructive and other effects of the disaster.
- (4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.
- (5) A national state of disaster that has been declared in terms of subsection (1)—
- (a) lapses three months after it has been declared;
 - (b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and
 - (c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.”

⁵⁵ GG 43096 of 2020-03-15.

⁵⁶ Disaster Management Act 57 of 2002.

⁵⁷ GG 43107 of 2020-03-18.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

include various other measures on, but not limited to, the sale of liquor, religious gatherings, and funeral gatherings.⁶⁰ The most relevant provision for purposes of this article is the amendment of Regulation 11B of the Regulations:

“(b) During the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service, save where operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence.”⁶¹

In an urgent application of *De Beer v The Minister of Cooperative Governance and Traditional Affairs*,⁶² the South African High Court, on the 2nd of June 2020, ruled that the regulations issued in terms of section 27 of the Disaster Management Act⁶³ were unconstitutional and invalid. This decision was deeply flawed in many respects,⁶⁴ however, it made some interesting observations. Relevant to the scope of this article is the expression by the learned judge that the blanket ban imposed on all gatherings (except religious gatherings under strict conditions), including under alert level 3 is tantamount to reverting to the pre-constitution era of blanket bans. The High Court held:

“no recognition has been given to any section 17 rights nor has any consideration been given to the infringement thereof or whether a blanket ban could be justifiable as opposed to a limited and regulated ‘allowance’ of the exercise of those rights. The reversion to a blanket ban harks back to a pre-Constitutional era and restrictive State of emergency regulations”.⁶⁵

The importance of demonstrations cannot be understated. At a time when the government and government officials are being accused of looting COVID-19 related funds and gross irregularities in the awarding of COVID-19 related tenders, this type of ban stifles any form of demonstration and picketing against corruption.⁶⁶ Demonstrations and other forms of protests are important to hold the government to account.⁶⁷ COVID-19 pandemic has laid bare “the weaknesses of our systems of governance, including the abusive culture of security institutions in the name of upholding law and order and the appetite of some in government to pocket public resources meant for fighting the pandemic”.⁶⁸ Widespread corruption, as well as human

⁶⁰ Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2).

⁶¹ Act 57 of 2002.

⁶² *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184.

⁶³ GG 43258.

⁶⁴ Brickhill “The Striking Down of Lockdown Regulations: Constitutional Implications of Covid-19” 2020 14 *Talking Points*.

⁶⁵ *De Beer v The Minister of Cooperative Governance and Traditional Affairs supra* 8.

⁶⁶ Heywood “Scandal of the Year: Covid-19 Corruption” <https://www.dailymaverick.co.za/article/2020-12-27-scandal-of-the-year-covid-19-corruption/> (accessed 2021-02-27).

⁶⁷ Omar “A Legal Analysis in Context: The Regulation of Gatherings Act – A Hindrance to the Right to Protest?” 2017 62 *South African Crime Quarterly* 21–31.

⁶⁸ Derso “The Impact of COVID-19 on Human and Peoples’ Rights in Africa” ACCORD (20 September 2020) <https://www.accord.org.za/analysis/the-impact-of-COVID-19-on-human-and-peoples-rights-in-africa/> (accessed 2020-10-17).

rights abuses, have taken place under the cover of COVID-19 lockdowns and the regulations have not helped matters as the public cannot hold the government to account.⁶⁹ The closing down of the spaces to exercise the rights to demonstrate and picket government in terms of section 17 of the Constitution has been synonymous with dictatorships elsewhere in Africa and beyond.⁷⁰

The Wisconsin Supreme Court, in the United States of America, in a COVID-19 related case, made a very instructive argument about the respect of constitutional rights during states of emergencies. The Court held:

“[T]here is no pandemic exception [...] to the fundamental liberties the Constitution safeguards. Indeed, individual rights secured by the Constitution do not disappear during a public health crisis. These individual rights, including the protections in the Bill of Rights ... are always in force and restrain government action”.⁷¹

According to Staunton, Swanepoel, and Labuschagne, the restrictions on freedom of movement and assembly in South Africa are worse than those imposed during apartheid. They argue that even though the restrictions on freedom of movement during the lockdown were imposed in a different context to those imposed during apartheid, they have been met with the same apprehension.⁷²

Given that the various restrictions under scrutiny here were imposed under a state of national disaster to deal with a national crisis, people are likely to be forgiving of the associated violations. However, the deployment of armed forces to enforce the national lockdown led to some reprehensible consequences.⁷³ While it was conceivable that the deployment of soldiers was going to cause despondency, no one could imagine that this would lead to a *déjà vu* of the apartheid era. The deployment of soldiers was announced on national television by President Ramaphosa dressed in full military regalia. Scholars have criticised this as a show of force and militarised response to the coronavirus pandemic.⁷⁴ Soon after the deployment of the army, there were allegations of the army and police discharging rubber bullets, and videos of abuse and torture circulated on social media. 11 lockdown enforcement-related deaths had been recorded as of 1 June 2020.⁷⁵ According to Staunton *et al*:

⁶⁹ Fakane “Regulating Freedom of Expression Amidst the Covid-19 Response in South Africa” <https://cipesa.org/2020/11/regulating-freedom-of-association-amidst-the-covid-19-response-in-south-africa/> (accessed 2021-02-12).

⁷⁰ James and Alihodzic “When is it Democratic to Postpone an Election? Elections During Natural Disasters, Covid-19, and Emergency Situations” 2020 19(3) *Election Law Journal: Rules, Politics, and Policy* 344–362.

⁷¹ *Wisconsin Legislature v Secretary-Designee Palm* 2020AP65 – OA.

⁷² Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

⁷³ On 25 March 2020, the President of the Republic of South Africa, Cyril Ramaphosa deployed the members of the South African National Defence Forces in terms of s 201(2)(a) of the Constitution of the Republic of South Africa, 1996, read with s 18(1) of the Defence Act (Act 42 of 2002).

⁷⁴ Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

⁷⁵ Labuschaigne 2020 *South African Journal of Bioethics and Law*.

“Eight people were reported to have been killed by the police during the first week of the lockdown in enforcing the COVID-19 regulations, which at that time was more than the number of deaths related to the virus.”⁷⁶

Torture is prohibited in terms of both domestic and international law. In terms of section 4(4) of the Prevention and Combating of Torture of Persons Act,⁷⁷ not even a state of emergency can warrant the exercise of torture or inhumane degrading treatment of persons. Article 2(1) of the United Nations Convention Against Torture and other Inhumane or Degrading Punishment places an obligation on the state to take legislative and other measures to prevent torture.⁷⁸ The right to life and the right to freedom from torture is peremptory in nature.⁷⁹ They cannot be derogated from. Article 2(2) of the Convention against torture and Other Cruel, Inhumane and Degrading Treatment or Punishment further provides that; “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.⁸⁰ The deployment of the armed forces to enforce lockdown measures resulted in an imminent violation of both the Constitution of South Africa and international law. As of 1 June 2020, just three months into the lockdown a staggering 230 000 people had been arrested for violating regulations.⁸¹

The death of one Collins Khosa at the hands of the armed forces drew the nation’s attention to issues of torture, inhuman and degrading punishments associated with lockdown enforcement. Khosa’s death resulted in a court application, *Khosa v Minister of Defence and Military Veterans* for, *inter alia*, a declaration that members of the public are still entitled to having their fundamental rights upheld and protected by members of the security forces during the lockdown and the declared State of Disaster. The Court declared:

“[N]otwithstanding the Declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002, all persons present within the territory of the Republic are entitled to (among others), [...] the right to human dignity, right to life, right not to be tortured in any way, right not to be or punished in a cruel, inhuman, or degrading way”.⁸²

This judgment was widely celebrated as it affirmed the rights of persons during a state of national disaster. With regards to permissible limitations of rights the court also held that “the least restrictive measures must be sought, applied and communicated to the public”.⁸³ According to Brickhill, “[t]he [Khosa] matter has laid bare the abuse of arrest powers and the use of force by the police and the military to enforce the lockdown and ordered the

⁷⁶ Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

⁷⁷ A13 of 2013.

⁷⁸ UN General Assembly “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (10 December 1984) United Nations, Treaty Series <https://www.refworld.org/docid/3ae6b3a94.html> (accessed 2020-10-12) vol 1465 85.

⁷⁹ United Nations “Office of the High Commissioner for Human Rights and International Bar Association” 2003 9 *Human Rights in the Administration of Justice: A Manual on Human Rights For Judges, Prosecutors and Lawyers*.

⁸⁰ Article 2(2).

⁸¹ Labuschaigne 2020 *South African Journal of Bioethics and Law*.

⁸² *Khosa v Minister of Defence and Military Veterans* [2020] ZAGPPHC 147 46.

⁸³ *Khosa v Minister of Defence and Military Veterans supra* 7.

imposition of vital accountability mechanisms, reasserting Bill of Rights guarantees".⁸⁴ Fears of abuse of powers by authorities during lockdown are widespread. Durojaye and Nanima note that commentators have raised concerns over the potential abuse of the lockdown regulations. They further stress that "under no circumstance should human rights be compromised for the sake of protecting public health".⁸⁵ South African police also used physical punishment such as water cannons and rubber bullets on people caught violating lockdown regulations.⁸⁶ As such, in this work, we call for there to be checks on executive powers and for the judiciary to exercise its judicial review powers to curb the potential abuse of state power by the executive during a lockdown.

The courts in South Africa have ruled that there are certain regulations imposed by the state to limit human rights which are neither irrational nor unproportionate. In the case of *Mohamed v President of South Africa*,⁸⁷ an urgent application was heard in the High Court wherein the Applicants sought to challenge the constitutionality of some of the regulations made in terms of section 27 of the Disaster Management Act. The Applicants contended that the regulations limited their right to exercise their right to religion, their daily prayers to be exact. In addition to this, it was also contended that the regulations limit their right to freedom of assembly, liberty, dignity, and association.⁸⁸ It was further contended that Regulations 11(B)(i) and (ii) as read with the definition of "gathering" was too broad and was an excessive limit on fundamental rights and should be declared unconstitutional. In dismissing the application Neukircher J held:

"[I]n South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of 'the greater good', the spirit of 'ubuntu' (sic) and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic."⁸⁹

In as much as the pandemic generally places an obligation on every citizen to play their part to minimise the spread of the virus, government action should not be seen to be arbitrary. A pandemic does not detract from the government's responsibility to act within the bounds of the law and respect for fundamental rights. The way the lockdown was handled as well as the implementation of some of the regulations posed a serious legal challenge

⁸⁴ Brickhill "Constitutional Implications of COVID-19: Arrests and the Use of Force to Enforce Lockdown" https://www.researchgate.net/publication/341670838_Constitutional_implications_of_COVID-19_Arrests_and_the_use_of_force_to_enforce_lockdown (2021-02-12).

⁸⁵ Durojaye and Nanima "From Muhammed and Others to De Beer and Others: Striking the Balance Between Public Health Measures and Human Rights During COVID-19 Era in South Africa" 2020 *Commonwealth Law Bulletin* 15.

⁸⁶ Delvac "Human Rights Abuses in the Enforcement of Coronavirus Security Measures" 2020 X(289) *National Law Review*; Muri Assuncao "Hefty Fines, Jail Time, Expulsion: How Governments Around the World are Dealing with People who Ignore Quarantine Orders" (2020-03-21) *New York Daily News* <https://www.nydailynews.com/coronavirus/ny-coronavirus-hefty-fines-jail-....> (accessed 2020-07-23).

⁸⁷ *Mohamed v President of South Africa* 2020 (5) SA 553 (GP).

⁸⁸ *Ibid.*

⁸⁹ *Mohamed v President of South Africa supra* 75.

for South Africa. De Vos has argued that when regulations are enforced arbitrarily, it erodes the support for the government's efforts to curb the spread of the virus.⁹⁰ The National Peace Commission criticised the implementation of the regulations arguing that they were procedurally irregular and unconstitutional.⁹¹

6 CONCLUSION

It is common and rational for certain rights to be limited in a public health emergency. In South Africa, this was done in the public interest to minimise or curb the spread of the COVID-19. While this was in the public interest, some of the limitations, as well as enforcement of the regulations thereof, were disproportional. It has also been cautioned that disproportional derogations, in particular, the use of force by law enforcement agencies may have a paradoxical effect of increasing the number of deaths and hospitalisations. The blanket bans imposed by the government during Level 5 of the Lockdown Regulations as illustrated in this article, are a cause for concern as they clearly lacked rationality and proportionality. As the COVID-19 pandemic is still prevalent, it is essential that the government adhere to the constitutional and human rights principles on which the South African democracy is founded. It is submitted that conforming to these democratic principles is not only necessary for compliance with the law but also ensures a definite buy-in from the citizens who are undoubtedly the biggest stakeholder in the fight against the pandemic.

⁹⁰ De Vos "Why the Management of the Covid-19 Lockdown Threatens Respect for the Rule of Law" IACL-AIDC Blog (23 April 2020) <https://blog-iacl-aidc.org/2020-posts/2020/4/23/why-the-management-of-the-covid-19-lockdown-threatens-respect-for-the-rule-of-law> (accessed 2021-02-27).

⁹¹ Comins "Peace Commission Warns of Constitutional Court Battle Unless Lockdown is Lifted" (2020-05-4) Mercury <https://www.iol.co.za/mercury/news/peace-commission-warns-of-constitutional-court-battle-unless-lockdown-is-lifted-47517383> (accessed 2021-02-12).