6 South Africa in times of a pandemic: Reflections on the fragility of human rights

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Abstract

COVID-19 has created a global public health emergency, unprecedented in the last hundred years. Consequently, many governments in the world reacted with extraordinary measures that directly impact on nationally and internationally recognised human rights. South Africa is no exception. During this global health crisis, the South African government declared a national state of disaster under the Disaster Management Act 57 of 2002, and issued regulations that had the effect of limiting a wide range of constitutionally protected human rights. The chapter starts with a comparison of a state of disaster to a state of emergency. Within the context of a risk-based strategy of the South African government to address, prevent and combat the novel coronavirus, the chapter examines the sweeping powers granted to the executive and the constitutionality of Ministerial regulations. It contends that the fragility of human rights during the pandemic is exacerbated by the shift of power from the legislature to the executive, judicial deference, different standards of judicial review and the identified gap in the legal and normative framework for a pandemic.

1 Introduction

While it is not unusual for human rights to be affected by a public health emergency, what was perhaps surprising, besides the magnitude of the COVID-19 pandemic, was the ease with which many human rights norms, born out of long struggles for political and social justice, suddenly seemed to take on the flimsy appearance of paper tigers. Certainly, the laudable aim of the South African government's measures was to prevent an exponential rise in infections and prepare the health facilities for the

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pandemic.[1] In the process, Cabinet ministers used sweeping powers, granted to them under the Disaster Management Act (DMA), to announce far-reaching restrictions on human rights, such as the right to equality, dignity, education, children's rights, freedom of movement, assembly and speech, and the right to earn a living.[2]

The South African government's decision to expeditiously impose a strict lockdown stood in sharp contrast to the notably slow reaction to the pandemic in some other countries, such as the United Kingdom, the Netherlands and the United States or the denialist approach from the Brazilian President.[3] The swift action was certainly the right thing to do at the time and received the support of the World Health Organisation (WHO).

The South African President's genuine concern about the threats to the lives of the people and access to healthcare posed by the onset of

1 President Cyril Ramaphosa, in his address to the nation on 23 March 2020 and in subsequent speeches, stated that the objective of the lockdown was 'to delay the spread of the virus over a longer period – what is known as flattening the curve of infections' to avoid a massive surge in the number of people who would need to access medical care. 'President Cyril Ramaphosa: Escalation of measures to combat Coronavirus COVID-19 pandemic' South African Government www.gov.za (accessed 4 September 2020). See the risk adjusted approach of the South African government and the five alert levels. Level 5 was regarded as the highest level of lockdown with 'high COVID-19 spread of infections and low health system readiness' and was imposed from midnight on 26 March to 30 April 2020, thereafter, different levels of restrictions were imposed in South Africa in 2020 going into 2021. Level 1 is the lowest level with minimum restrictions. SA Government 'About: Alert system' https://www.gov.za/COVID-19/about/about-alert-system (accessed 5 February 2021).

2 Disaster Management Act 57 of 2002.

3 See T Helm, E Graham-Harrison & R McKie 'How did Britain get its coronavirus response so wrong?' *The Guardian* 19 April 2020 https://www.theguardian.com/world/2020/apr/18/how-did-britain-get-its-response-to-coronavirus-so-wrong; E Lipton *et al* 'He could have seen what was coming: Behind Trump's failure on the virus' *New York Times* 11 April 2020 https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html; W Cornwall *et al* 'The United States leads in coronavirus cases, but not pandemic response' *Science News* 1 April 2020 https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response; P Tullis 'Dutch cooperation made an "intelligent lockdown" a success' *Bloomberg* 5 June 2020 https://www.bloomberg.com/news/features/2020-06-05/netherlands-coronavirus-lockdown-dutch-followed-the-rules; J Kraaijenbrink 'The Dutch answer to COVID-19: The "1.5 Meter Economy"' *Forbes* https://www.forbes.com/sites/jeroenkraaijenbrink/2020/04/14/the-dutch-answer-to-COVID-19-the-15-meter-economy/ (all accessed 3 October 2020); HM Silva 'The Brazilian scientific denialism through the *American Journal of Medicine*' (2021) 134 *American Journal of Medicine* 415; M Malta et al 'Political neglect of COVID-19 and the public health consequences in Brazil: The high costs of science denial' (2021) 35 *EClinicalMedicine* 100878.

the pandemic was apparent from the beginning. As much was unknown about the novel coronavirus, the early lockdown was commendable and supported. But as time went on, questions were raised about the rationality, efficacy and harshness of the measures. The regulations had a devastating impact on the poor. The justification of the adopted measures and the heavy-handedness displayed by the national defence force in townships were criticised.[4]

The pandemic unmistakably exposed the creeping shift of power from Parliament to the executive and has raised questions about the lack of parliamentary oversight in the curtailment of human rights. The delegation of broad law-making capacity to the executive to issue regulations that encroach profoundly on constitutionally protected rights is a matter of serious concern. This was not unique to South Africa. During the public health pandemic, parliamentary oversight in many countries became less effective than should have been.[5] No doubt, the South African government, like many other governments in the world, faced an immensely difficult task with limited options to bring the spread of the virus under control. But this does not detract from the need to critically reflect on the paths chosen by the executive to deal with the pandemic.

Section 27(2) of the DMA grants sweeping powers to the designated Minister to make regulations, issue directions or authorise the issue of directions by other Cabinet Ministers during a national state of disaster. From a human rights and democratic perspective, extended rule by ministerial regulations and directions, that impact severely on human

4 Amongst others, the impact of the five-week strict lockdown at level 5 on the economy, arrests for violations of COVID-19 rules, the use of force in law enforcement (see the *Collins Khosa* case below), militarisation, alleged irrationality (on physical exercise, sale of over the counter cooked food) and pettiness (clothing directions prohibiting the sale of open-toe shoes) of some of the Ministerial regulations and directions, and the ban on the sale and transportation of alcohol and cigarettes were much criticised. Regulation 11B, Government Notice R 398, *Government Gazette (GG)* 25 March 2020, 43148. Direction by the Minister of Trade, Industry and Competition on the sale of clothing, footwear and bedding, Government Notice R 523, *GG* 12 May 2020, 43307. See 'SANDF deployment and involvement in COVID-19 measures; complaints against SANDF during lockdown' Parliamentary Portfolio Committee on Defence (22 April 2020) https://pmg.org.za/committee-meeting/30107/ (accessed 20 September 2020). See on the different impact of the regulations, N Stiegler & J-P Bouchard 'South Africa: Challenges and Successes of the COVID-19 lockdown' (2020) 178 *Annales Medico-Psychologiques* 695.

5 See OECD 'Legislative budget oversight of emergency responses: Experiences during the coronavirus (COVID-19) pandemic' (25 September 2020) https://www.oecd.org/coronavirus/policy-responses/legislative-budget-oversight-of-emergency-responses-experiences-during-the-coronavirus-COVID-19-pandemic-ba4f2ab5/ (accessed 7 December 2020).

rights and which can be extended indefinitely by the executive, makes for bad law. This approach runs the risk of normalising an exceptional situation without democratic legitimacy. It is contended that any exceptional situation must be time-bound and extensions of a national state of disaster should require oversight by Parliament.

The public health emergency continues into 2021 and as the Gauteng Division of the High Court of South Africa, stated: 'The measures adopted under the DMA have been as far-reaching as the threat posed by the virus. They have affected every aspect of the lives of the populace and the economy'.[6] Consequently, the ongoing pandemic raises existential questions about solidarity and finding the right balance between the common good and autonomy, but also between rights such as access to healthcare, civil liberties, and the inevitable consequences of shutting down the economy on livelihoods, the long-lasting impact on children of closing schools, and the unenviable task of governments to perform this balancing act in conformity with national and international human rights norms and principles. This chapter sets out to examine, from a human rights perspective, this delicate balancing of competing rights by the South African government in its fight against the coronavirus.

The chapter contends that the public health pandemic shows a gap in the legal framework in that the current legislation (DMA) is overly broad and not tailor-made for a global public health crisis of this immensity while a state of emergency in terms of section 37 of the Constitution of the Republic of South Africa, 1996 is not applicable to the pandemic. South Africa continues to be ruled by executive orders more than one year after the start of the pandemic as the public health crisis has led to a wide margin of discretion for the executive, resulting in a diminished role for the democratic lawmaker.[7] Inevitably, the executive must have the freedom to consider various options and interests. It must take rapid decisions and no absolute standards can be included in legislation, but decisions must be justified, transparent and in accordance with legal principles with due consideration of the impact on the most vulnerable.

The second assertion in this chapter, which is related to the first, is that the government in its encroachments on human rights did not specifically motivate *how* the competing claims were weighed and, whether they considered less restrictive means to achieve the same objectives. The courts

6 *Freedom Front Plus v President of South Africa* [2020] 3 All SA 762 (GP) para 3.

7 In terms of sec 3 of the DMA the President designates a Minister to administer the Act. The designated Minster has powers on a wide range of matters listed in sec 27(2) but these powers are limited by sec 27(3) of the DMA.

did not always fully inquire into the reasonableness and justifiability of the limitations in an open and democratic society based on human dignity, equality, and freedom.

The chapter is divided into four parts, including the introduction, and a conclusion. In part two, the legal framework of a national state of disaster is explored and compared with that of a state of emergency. In part three, several significant South African court cases that have challenged the COVID-19 regulations, promulgated by the Minister of Cooperative Governance and Traditional Affairs (CoGTA), are analysed.[8] This section examines the compatibility of the adopted measures with the human rights law standards found in the South African Constitution and international human rights law. Are the restrictions on rights in the COVID-19 regulations, necessary, proportionate, and non-discriminatory in pursuance of legitimate government objectives? Not surprisingly, the pandemic exacerbated inequalities in South Africa and sharply highlighted the imperative to invest in public healthcare, water, sanitation, and adequate housing to reduce poverty and protect the disadvantaged in society.[9]

The proposal posited here is one for a human rights-based approach to a pandemic. Certainly, this argument does not necessarily entail that the DMA or current regulations are unconstitutional. Even if the DMA and all the regulations issued in terms thereof pass constitutional muster, new legislation or an amendment to the DMA providing for detailed direction to the executive and strengthening the oversight role of the legislature during a public health crisis, would make for better law. Accordingly, the chapter deals with both *de lege lata* and *de lege ferenda*.[10]

2 A national state of disaster: Is South Africa's legal framework adequately equipped for a pandemic?

Ten days after the first case of coronavirus was identified in South Africa,[11] President Cyril Ramaphosa addressed the nation and announced a serious

8 This article was written in the second half of 2020 and finalised in the first part of 2021.

9 Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social, and cultural rights' 17 April 2020, E/C.12/2020/1 (2020) para 24.

10 *De lege lata* means the current law or the law as it is and *de lege feranda* means with a view to future law or the law as it should be.

11 A South African who returned from a holiday in Northern Italy was identified as patient zero on 5 March 2020.

of measures to curb the spread of the coronavirus.[12] On the same day, the COVID-19 pandemic was classified as a national disaster after assessment of 'the potential magnitude and severity of the pandemic in the country'.[13] Another ten days later, a strict lockdown was announced. The regulations were promulgated in terms of the DMA. This section evaluates the suitability of the DMA to address this public health crisis and compares it with the constitutional and legislative framework pertaining to a state of emergency.

2.1 State of disaster v state of emergency

In terms of section 27(1) of the DMA (an ordinary Act of Parliament), the designated Minister of CoGTA declared a national state of disaster. Under the law, the primary responsibility to coordinate and manage the disaster was assigned to the national executive.[14] The initial regulations included travel bans from high risk countries, closing of schools and limiting gatherings while the finalisation of an economic package to mitigate the expected impact on the economy was announced.[15] Before the end of March 2020, a nation-wide strict lockdown was imposed with far-reaching consequences on the freedom of movement, assembly and trade.[16] All but essential workers were confined to their homes, except to obtain essential goods and services. Gatherings were prohibited and so was travel between provinces and all domestic and international passenger flights.[17] All shops were closed except those that sold

12 'President Cyril Ramaphosa: Measures to combat coronavirus COVID-19 epidemic' (15 March 2020) https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-COVID-19-epidemic-15-mar-2020-0000 (accessed 4 September 2020).

13 In terms of sec 23(1)(b) of the DMA, a disastrous event is classified as a local, provincial, or national disaster by the Head of the National Disaster Management Centre. Government Notice 431, *GG*, 15 March 2020, 43096 (Classification of a National Disaster).

14 In terms of sec 26 read together with sec 23(8) of the DMA. In terms of sec 27(1) the Minister declares a national state of disaster. Government Notice 313, *GG*, 15 March 2020, 43096 (Declaration of National State of Disaster).

15 'Declaration of a state of disaster by Minister of Cooperative Governance and Traditional Affairs, N Dlamini Zuma, on 15 March 2020' GN 313 (n 14). Department of CoGTA, Government Notice 318, *GG*, 18 March 2020, 43107. COVID-19 temporary employer/employee relief scheme. Department of Employment and Labour, Government Notice 215, *GG*, 26 March 2020, 43161.

16 Government Notice R 398, *GG,* 25 March 2020, 43148. The prohibition on air travel was extended to cover passenger flights from all countries. See, *inter alia*, Department of Transport, Government Notice 415, *GG*, 26 March 2020, 43160; Government Notice 438, *GG*, 31 March 2020, 43189 (amendment of directions) issued in terms of Regulation 10(7) of the Regulations made in terms of sec 27(2) of the DMA.

17 Although the strict prohibition on gatherings was later amended and inter-provincial travel for funeral attendance was allowed. See Government Notice 318, *GG,* 18 March

essential goods and medicines and a curfew was imposed from 20h00 to 06h00. South Africa was put on the highest alert level (level 5)[18] for 21 days and this was extended for another 14 days.[19] This lockdown was regarded as one of the strictest in Africa. At the time of the commencement of the strict lockdown, South Africa had 402 confirmed coronavirus cases, but the government expected a possible 'catastrophe of enormous proportions'.[20]

A closer look at the enabling legislation reveals that the purpose of the DMA is to provide for

> an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and the establishment of national, provincial and municipal disaster management centres.[21]

A 'disaster' has been defined as: progressive or sudden, widespread or localised, natural or human-caused occurrence which:

> (a) causes or threatens to cause, injury, death, or disease; damage to property, infrastructure or the environment; or disruption of the life of a community; and
> (b) is of a magnitude that that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.[22]

In terms of section 2, the DMA does not apply to an occurrence that falls within the definition of disaster if, and from the date on which, a state of emergency is declared to deal with the disaster, nor does it apply to a

2020, 43107; Government Notice R 419, *GG,* 26 March 2020, 43168 (Amendment of Regulations); Government Notice R 446, *GG,* 2 April 2020, 43199 (Amendment of Regulations); Regulation 11B(1)(a)(i) and (ii) provide as follows: '(a) For the period of lockdown – (i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving, or chronic medical attention; (ii) every gathering, as defined in regulation 1 is hereby prohibited, except for a funeral as provided for in subregulation (8).' See also Government Notice R 465, *GG,* 16 April 2020, 43232 (Amendment of Regulations); Government Notice R 471, *GG,* 20 April 2020, 43240 (Amendment of Regulations).

18 Stiegler and Bouchard (n 4).

19 The first lockdown took effect from midnight on 26 March 2020 and lasted to 16 April 2020 but was extended for another 14 days (level 5). Thereafter level 4 was applicable, subsequently, level 3 and lower levels.

20 Speech by President Ramaphosa, 23 March 2020 (n 1).

21 The Preamble of the DMA.

22 Section 1 of the DMA.

situation when the disaster can be dealt with effectively in terms of other national legislation.[23] In other words, the DMA does *not* apply when a state of emergency is already dealing with the disaster and does *not* apply when the disaster does not require new regulations and directives to be issued under the DMA. In this instance, the South African government opted to use the DMA to deal with the COVID-19 pandemic. Hence, as the Supreme Court of Appeal concluded, a state of disaster is applicable when a disaster 'is not serious enough' to justify a state of emergency but the ordinary laws do not suffice.[24]

Did the South African government have any other legal avenues available besides the DMA to deal with the pandemic? A brief examination is apposite here as ordinarily, far-reaching curtailment of human rights, including severe restrictions on freedoms and the right to movement, and the deployment of the national defence force is associated with a state of emergency – both in South Africa and abroad. Many countries indeed opted to declare a state of emergency to deal with the pandemic.[25] For this reason, the question whether a state of emergency could have been declared in South Africa instead of a state of disaster is pertinent.

The Constitution does not allude to a national state of disaster but includes detailed provisions for a state of emergency in section 37(1)-(8). A state of emergency may be declared in terms of an Act of Parliament and only under certain conditions. The State of Emergency Act 64 of 1997, which is an Act of Parliament, allows the President to declare a state of emergency by proclamation, which shall be subjected to approval by Parliament, and to issue regulations.[26] Per section 37(1) of the Constitution, a state of emergency may be declared only in terms of an Act of Parliament, and *only* when:

> (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

23 Section 2(1) of the DMA.

24 *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) para 10.

25 By 19 April 2020 almost 100 countries had declared a state of emergency on national level according to C Bjørnskov & S Voigt 'The state of emergency virus' *Verfassungsblog* 19 April 2020 https://verfassungsblog.de/the-state-of-emergency-virus (accessed 25 September 2020). The International Centre for Non-profit Law 'COVID-19 Freedom Tracker lists 107 countries with emergency declarations, including national disasters and public health emergencies' https://www.icnl.org/covid19tracker/?issue=5 (accessed 3 March 2021). See also CM Fombad & LA Abdulrauf 'Comparative overview of the constitutional framework for the controlling the exercise of emergency powers in Africa' 2020 (20) *African Human Rights Law Journal* 376.

26 Sections 1, 2 and 3 of the State of Emergency Act 64 of 1996.

(b) the declaration is necessary to restore peace and order.

While theoretically a health pandemic might fall within the scope of 'other public emergency' it only does so if the life of the nation is threatened, *and* it is necessary to restore peace and order.[27]

Since the ushering in of the new dispensation in 1994, no state of emergency has been declared. Given the use of states of emergency in the past to oppress legitimate political opposition and the frequent use of detention without trial during the apartheid years, any resort to a state of emergency in a democracy is regarded as a very last option. To this end, the drafters of the Constitution ensured that detailed provisions in section 37 would safeguard the declaration of a state of emergency, the duration of a state of emergency and the extent of the derogation (suspension) of human rights on condition that it is strictly required by the emergency and published in the Government Gazette.

The Constitution further requires consistency with South Africa's obligations under international law applicable to states of emergency and provides for access to court for detainees under a state of emergency.[28] The section dealing with a state of emergency contains a list of non-derogable rights: the right to life and human dignity are protected entirely, whereas five other enumerated rights are protected with respect to certain clauses or subsections only. In other words, other parts of these rights and all non-listed human rights may be suspended. Also significant is that the state, or any person, may not be indemnified in respect of any unlawful action taken during a state of emergency.

Clearly, since in South Africa the state of emergency must threaten the life of the nation *and* its purpose must be the restoration of peace and order, section 37 is not suitable for the current COVID-19 pandemic. Although, South Africa went the route of a national state of disaster, the question remains whether there are lessons to be learned from the constitutional safeguards pertaining to a state of emergency both in terms of the prescribed procedure and substance?

27 There is no South African case law on sec 37. See also J Brickill 'Constitutional implications of COVID-19' (2020) 10 *The Corporate Report* 32; and T Ngcukaitobi 'The rule of law in times of crisis: COVID-19 and the state of disaster' *Mail & Guardian* (Johannesburg) 29 March 2020.

28 Section 37(6) provides for minimum rights for those detained without trial, when the rights of arrested, detained and accused persons have been derogated under a state of emergency, such as publication of where the person has been detained, visit by medical practitioner, legal representative of choice, access to court, appear in person before any court, the duty on the state to present written reasons for continued detention.

In terms of the State of Emergency Act, which was passed to give effect to section 37 of the Constitution, the President may declare a state of emergency by proclamation.[29] However, this proclamation, any regulation, order or by-law made in pursuance of the declaration of a state of emergency must be tabled before Parliament and the National Assembly is given the power to disapprove provisions thereof, in part or in full, or make recommendations to the President in this regard.[30] Furthermore, only the National Assembly may extend a state of emergency by a majority vote and a second extension requires a supporting vote of at least 60 per cent of its members.[31]

Thus, the Constitution and legislation contain detailed safeguards for a state of emergency. This stands in sharp contrast to a state of disaster. In terms of section 23(1) of the DMA, the decision to classify an event as a disaster is reserved for the Head of a Management Centre. Based on this classification, the designated Minister is mandated to declare a national state of disaster in accordance with section 27(1) of the DMA. After consultation with the responsible Cabinet member, the Minister may make regulations or issue directions or authorise the issue of directions on a broad range of matters.[32] These include, inter alia, the release of any available resources, the release of national government personnel, regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area, the suspension or the sale of alcohol, emergency procurement procedures and other steps necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.[33] The High Court of South Africa (Western Cape

29 The State of Emergency Act 64 of 1996.

30 Section 3 of the State of Emergency Act.

31 Section 37(2)(b) of the Constitution of the Republic of South Africa, 1996.

32 Section 27(2) of the DMA.

33 Section 27(2) of the DMA enumerates: '(a) the release of any available resources of the national government; (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 and from or within the disaster-stricken or threatened; (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; (j) the maintenance or installation of temporary lines of communication; (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, alleviate, contain and minimise the effects of the disaster; or (o) steps to facilitate international assistance.'

Division) gave a narrow interpretation of the words 'other steps necessary' in section 27(2)(n), which limits the power of the Minister to steps that are strictly necessary to prevent an escalation, or to alleviate, contain and minimise the effects of the disaster.[34]

Moreover, in terms of section 27(3), these powers may be exercised only to the extent that 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.

The scope of section 27(3)(e) is broad and the inclusion of 'other effects' in subsection (3)(e) renders it almost meaningless were it not for the qualification of the exercise of these powers to the extent 'necessary'. Regulations promulgated in terms of the DMA may prescribe penalties for contraventions of the regulations, including a fine or imprisonment not exceeding six months or both.[35]

There is no doubt that the powers granted to the executive are wide. One of the weaknesses in the current situation is that the DMA allows for monthly extensions of the state of disaster by the designated minister, after the initial first three months, *without* requiring parliamentary approval.[36] The state of disaster has been continuously extended since March 2020. The continuation of rule by regulations is a most undesirable state of affairs in a democracy. But it is constitutional, so the High Court of South Africa (Gauteng Division) held when it dismissed an application dealing with the constitutionality of sections of the DMA. In *Freedom Front Plus v President*[37] the applicants sought to declare sections of the DMA unconstitutional and invalid on the ground that it did not have the same safeguards that apply in a state of emergency under section 37.[38]

The Court dismissed the application and did not grant the relief sought on the ground that the ordinary constitutional safeguards of judicial and

34 *British American Tobacco (Pty) Ltd v Minister of Cooperative Governance and Traditional Affairs* 2021 (7) BCLR 735 (WCC) para 194.

35 Section 27(4) of the DMA.

36 Section 27(5) of the DMA.

37 *Freedom Front Plus* (n 6). The application was brought on an urgent basis by a small political party that is also represented in the National Assembly.

38 *Freedom Front Plus* (n 6) para 16.

legislative overview apply to a state of national disaster. The Court further held, correctly, that a state of emergency as envisaged by section 37 would not have been suitable for the COVID-19 pandemic. The Court concluded that it

> may review a declaration of a state of disaster, any extension of a state of disaster, any regulations enacted under a state of disaster under their ordinary powers to review the exercise of any public power

under the principle of the rule of law entrenched in section 1(c) and other provisions such as sections 33 and 36 of the Constitution.[39]

The Court distinguished between the normal constitutional order, which covers a national state of disaster, and a state of emergency, which permits 'a suspension of the normal constitutional order'. Section 37 safeguards apply only 'to make up for the permissible deviation from the normal constitutional order' under a declared state of emergency.[40] Since section 37 was not applicable, the normal constitutional order was retained, although draconian restrictions were imposed by the COVID-19 regulations and directions, which included extreme encroachment on the freedom of movement. It falls beyond the scope of this chapter to delve into this old distinction between a normal constitutional order and one in which suspension of rights is permitted. Nowadays, even a declared state of emergency is subject to the rule of law. Twenty centuries after the Roman statesman Marcus Tullius Cicero argued '*Silent enim leges inter arma*', a state of emergency is no longer regarded as extra-legal.[41]

Telling in this regard is that the African Charter on Human and Peoples' Rights does not even make provision at all for the derogation of rights in a state of emergency. In any event, South Africa did not declare a state of emergency and there was no formal derogation of rights.

2.2 Oversight over the executive

Importantly, under a national state of disaster, the courts' ordinary powers of judicial review remain 'entirely unimpaired' and the power of Parliament to provide oversight over the executive remains intact.[42] While this is true in principle, in reality, parliament's programme was suspended

39 *Freedom Front Plus* (n 6) para 66.

40 *Freedom Front Plus* (n 6) para 64.

41 In times of war, the law falls silent.

42 *Freedom Front Plus* (n 6) paras 66-68. Sections 42(3), 55(2) and 99(2) of the Constitution provide for parliamentary oversight of the executive.

during the strict lockdown. It became operational again only after mid-April 2020, and then mainly in the form of committees. According to the Speaker of the House of Assembly and Chairperson of the National Council of Provinces, Parliament's oversight function was fulfilled through various Parliamentary portfolio committees and select committees.[43]

The role of Parliament and the executive was the subject of an application by the *Helen Suzman Foundation v Speaker of the National Assembly*.[44] The applicants sought declaratory relief and a mandamus. The NGO claimed that Parliament had abandoned the power vested in it by the Constitution under sections 43, 44(1), 55(1) and 66 and failed to pass legislation to deal with COVID-19. Further, the applicants argued that the executive had failed to initiate and prepare legislation in terms of section 85(2) and that they had failed to fulful their duties under section 7(2) to respect, protect, promote and fulfil human rights.[45] While the court agreed 'that regulation-making cannot supplant the primary law-making function of Parliament', it held that in this instance Parliament had properly delegated regulation making power and that the DMA did not create an obligation on the legislature and executive to pass new legislation.[46] The court did recognise the importance of 'the values of transparency, accountability and openness which generally are associated with Parliamentary law-making' and which is 'likely to produce better outcomes' but those values could not compel Parliament to pass legislation.[47]

The applicant did not challenge the constitutionality of the DMA and the regulations promulgated in terms thereof, but their argument was that the DMA was a short-term and stop-gap measure until legislation was passed to deal specifically with COVID-19.[48] The High Court (Gauteng Division) held that the DMA was not a short-term measure as it allowed for monthly extensions without a limit. The application was dismissed.

According to the High Court (Gauteng Division) in an earlier case, *Freedom Front Plus*, the existing constitutional safeguards suffice when a

43 Explanatory affidavit filed by the Speaker of the National Assembly and the Chairperson of the National Council of Provinces stating that oversight has been exercised 'through the various portfolio committees and select committees'. *Freedom Front Plus* (n 6) para 69.

44 [2020] ZAGPHHC 574 (5 October 2020). Helen Suzman Foundation is an NGO.

45 *Helen Suzman Foundation* (n 44) para 6.

46 *Helen Suzman Foundation* (n 44) paras 74-75, 104-105.

47 *Helen Suzman Foundation* (n 44) para 75.

48 *Helen Suzman Foundation* (n 44) paras 13-14, 81-83, 103-104.

state of disaster has been declared. Under the national state of disaster anyone may approach a court of law as the powers of the court remain 'unimpaired'.[49] Rautenbach agrees that the Constitution provides adequate oversight of the DMA.[50] Recently, the High Court (Gauteng Division) in *Democratic Alliance v Minister of Cooperative Governance and Traditional Affairs,*[51]reiterated this view. The court dismissed an application by the Democratic Alliance (a political party) but accepted that the regulations give Cabinet members 'far-reaching legislative powers'.[52] The court concluded that section 27 of the DMA is not unconstitutional because these wide powers relate only to COVID-19 matters and remain subject to judicial review.

Nonetheless, some critical points about oversight and accountability may be raised since the effect of the COVID-19 regulations and the restrictions on human rights have been extraordinary and exceptional.

First, it is costly and time-consuming for individuals who wish to challenge government regulations to approach a court of law. Only those who have the means at their disposal can approach a court of law when they are locked up in a quarantine facility against their will as happened to two medical doctors in the Limpopo province.[53] Similarly, during the early lockdown with severe restrictions on the freedom of movement, parents had to apply for a court order to fetch their own children from the grandparents.[54] In another case, a grandson failed to obtain a court order to cross a provincial border to attend a funeral of his grandfather.[55] Many others may not be able to challenge such regulations.

49 *Freedom Front Plus* (n 6) paras 66 & 77.

50 IM Rautenbach 'Unruly rationality. Two High Court judgments on the validity of the COVID-19 lockdown regulations' (2020) *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 825 at 829-830. See for a more critical view M van Staden 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 484.

51 [2021] ZAGPPHC 168 (24 March 2021) para. 19.The normal provisions for Parliamentary oversight such as sec 42(3), 55(2)(b)(i) and 92(2) of the Constitution are adequate. If Parliament would not comply with its oversight role that would be a different challenge. Furthermore, the courts cannot prescribe to Parliament how to exercise its oversight, para.85.

52 *Democratic Alliance* (n 51) para 75.

53 'Forced quarantine of 2 Limpopo doctors causes dismay' *Juta Medical Brief* 8 April 2020 https://www.medicalbrief.co.za/archives/forced-quarantine-of-2-limpopo-doctors-causes-dismay/ (accessed 11 September 2020).

54 *CD v Department of Social Development* (5570/2020) [2020] ZAWCHC 25.

55 High Court of South Africa, Mpumulanga Division. *Ex Parte: Van Heerden* (1079/2020) [2020] ZAMPMBHC 5 (27 March 2020). See also T Madonsela 'More eyes on COVID-19: A legal perspective: The unforeseen social impacts of regulatory

Second, courts tend to defer to the government and are not always inclined to question the government's claim to the public interest.[56] Third, the South African Parliament itself was put on extended recess and thereafter parliamentary work continued for months only through parliamentary portfolio committees.[57] At such a crucial moment, vigorous Parliamentary plenary debates would have enhanced the democratic legitimacy of the COVID-19 measures adopted. By contrast, in countries such as the United Kingdom and the Netherlands, Parliament continued to function well, although the number of Members of Parliament of each political party present at any one-time during debates in the House was limited.

In these two countries, the executive was very regularly called to account to the lower House of Parliament for their handling of the corona crisis and the executive sought support or approval from the representatives of the people. The draft regulations made by the Secretary of State in England in terms of the Public Health (Control of Disease) Act of 1984 were laid before Parliament for approval by resolution of each House of Parliament. Although the regulations, under section 45R of the Act, may come into operation because of urgency *before* Parliament has approved these provided that each House of Parliament approves the regulation within 28 days. In addition, the House of Commons and the House of Lords adopted the Coronavirus Act in March 2020.[58]

Inevitably, most political parties in Parliament also defer to the executive during a large-scale crisis – like courts do – and are willing to give the Cabinet some leeway. Understandably so, but at least, critical questions and deliberations in plenary sessions would provide for a

interventions' (2020) 116 *South African Journal of Science* (2020) Art 8527.

56 *Mohamed v President of the Republic of South Africa* 2020 (5) SA 553 (GP).

57 As above.

58 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 https://www.legislation.gov.uk/uksi/2020/350/made (accessed 10 February 2021). The Coronavirus Act of 2020 https://bills.parliament.uk/bills/2731/publications (accessed 10 February 2021). See also R Cormacain 'Keeping COVID-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation' (2020) 8 *The Theory and Practice of Legislation* 245. In the Netherlands, De Tijdelijke Wet Maatregelen COVID-19 (Temporary Act COVID-19 Measures) of 28 October 2020 came into effect on 1 December 2020. The Temporary Act can be extended by three months and replaced the earlier COVID-19 regulations which had their legal basis in legislation for emergency situations https://www.rijksoverheid.nl/actueel/nieuws/2020/10/27/eerste-kamer-stemt-in-met-tijdelijke-coronawet; https://www.rijksoverheid.nl/publicaties/2020/12/01/tijdelijke-wet-maatregelen-COVID-19 (accessed 10 February 2021).

diversity of opinions being heard in public thereby adding to the quality of measures and enhancing its legitimacy.

Fourth, balancing human rights is a difficult task as the government's claim that it acts in the public interest, in the interest of the right to life, the right to health and access to healthcare, is a most compelling one. However, the high level of generality of the public interest claim makes it more difficult for the court to question the necessity and proportionality of the measures. Fifth, during exceptional circumstances such as a public health emergency, there is a risk of conflicting judgments. Courts at the same level but in different provinces or cities may balance interests very differently specifically as they are approached for an urgent order. The quick succession of regulatory measures and directives, while understandable, also contributed to conflicting judgments.[59]

Sixth, different standards of judicial review have been applied to scrutinise the exercise of public power and encroachment on human rights. Applicants challenging the Ministerial regulations have based their claims on the rule of law and legality, rationality, reasonableness in terms of section 33, the Promotion of Administrative Justice Act (PAJA), or the requirements spelled out in the general limitation clause in section 36(1) of the Constitution.

For these reasons, the adoption of specific legislation to deal with a public health crisis of this scale and nature or an amendment to the DMA is recommended. It would have the advantage of preventing the arrogation of all-encompassing powers by the executive. It would strengthen Parliament to fulfil its constitutional role in holding the executive to account in times of a public health emergency and guide the executive in the exercise of its powers. The argument is made notwithstanding the High Court's judgment in the *Helen Suzman Foundation* case.[60] The court's judgment was limited to the question of legal necessity and does not deal with the question of what is desirable. Indeed, nothing in the law requires the court to direct the legislature and executive to pass new legislation in the absence of a challenge to the DMA itself. But the claim made here is a different one: that it would make for better law to ground far-reaching executive powers in legislation that is tailor-made for pandemics. The new Act would then have the benefit of public consultation, extensive deliberation in the National Assembly and the Council of Provinces, and members of Parliament could take on board the current experience with

59 *De Beer v Minister of Cooperative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP) para 3.4.

60 *Helen Suzman Foundation* (n 44).

COVID-19 and consider best practices elsewhere. It would put executive action on a firmer and more specific footing.

Interestingly, Judge Matojane, in a minority judgment in *Democratic Allian*ce, expressed very similar concerns about

> the excessive regulation-making powers to legislate, interpret and execute legislation that has wide-ranging limitations on the fundamental rights of all citizens without requiring such legislation to be first tabled in Parliament to ensure accountability and openness of Government.[61]

Matojane, J emphasised that this together with the scope and open-endedness of the discretion, which does not provide sufficient guidance on how the power should be exercised, would have led him to declare section 27(2) of the DMA unconstitutional.[62] In the words of the judge 'the Minister of CoGTA continues to run the country without any parliamentary input.'[63] The minority judgment goes further to conclude that the delegation of delegated power to other Cabinet Ministers to issue directions is unlawful delegation as every other Minister can make directions without oversight by parliament or the designated Minister.[64]

The options are: (i) an amendment to the DMA; or (ii) separate legislation for public health emergencies, either a framework law for pandemics or a specific piece of legislation for a specific public health emergency, for example, in this case, a Temporary COVID-19 Act; or (iii) a constitutional amendment. It is posited that a constitutional amendment is neither necessary nor desirable. New legislation or an amendment to the DMA should guide all branches of government on what is expected in a pandemic and provide for timelines. Questions to the President and Ministers and public debates in the National Assembly augment transparency and legitimacy. These additional safeguards on the exercise of power would provide better protection against the sweeping powers granted to the designated Minister than currently is the case under the DMA.

Furthermore, the National Assembly should be involved in extending the state of disaster. While no government should be restricted in taking immediate and decisive action at the beginning of a pandemic, but soon thereafter, the National Assembly should be involved in extending the state

61 *Democratic Alliance* (n 51) para 92.

62 *Democratic Alliance* (n 51) para 91 & 117.

63 *Democratic Alliance* (n 51) para 104.

64 *Democratic Alliance* (n 51) para 105. *Delegatus non potest delegare,* paras 98 & 100.

of disaster. The temporary nature of the exceptional measures should be emphasised. For instance, England adopted special temporary legislation, the Coronavirus Act of 2020, although they also had the possibility of making regulations under the Civil Contingencies Act of 2004, which according to Cormacain, had been 'specifically designed for this type of emergency'.[65] Blick and Walker argued that the Civil Contingencies Act of 2004 was the product of prolonged consultation and had more important safeguards than the Coronavirus Act of 2020.[66]

The Dutch government was taken to court over the legal basis of the curfew which was a measure not included in the new Act of Parliament (The Temporary Act COVID-19 Measures), but which was issued under legislation for emergencies.[67] In both the Netherlands and the United Kingdom, the temporary nature of the COVID-19 laws and regulations was underlined and so was the continuous involvement of Parliament to approve COVID-19 measures.

Ideally, the proposed new rules would include a requirement of a human rights impact assessment of regulations as some of the regulations have had a deleterious effect on the poor and vulnerable in society, who have been disproportionally affected by the scale of the crisis. For those without a regular source of income, or those without running water, or living in townships without the possibility of social distancing, the impact of the regulations was devastating. While the South African government provided a very small grant for those who had no income and did not qualify for any other grant to sustain themselves, undoubtedly, the poor were far worse off than the middle classes during the lockdown.[68] The South African government also made disbursements to workers under the temporary employer/employee relief scheme.[69] A human rights impact

65 Cormacain (n 56), quoting A Blick & C Walker 'Why did government not use the Civil Contingencies Act?' (Law Gazette) at 253 https://www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingenciesact/5103742.article (accessed 10 February 2021).

66 Blick & Walker (n 60).

67 The first court ruled in favour of the applicants, but the decision was overturned ten days later on appeal by the High Court (Gerechtshof Den Haag), 26 February 2021 https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:285. See also Advice of the Raad van State regarding the validity of the legal basis of the curfew https://www.raadvanstate.nl/adviezen/@124197/w16-21-0019-ii/#highlight=avondklok (accessed 10 March 2021).

68 The Special COVID-19 Social Relief of Distress Grant of R350 (equivalent of approximately 20 euro) per month. 'Social grants – Coronavirus COVID-19 | South African Government' www.gov.za (accessed 5 October 2020).

69 On 13 August 2020 R40 billion on disbursements had been made. SA Government 'Employment and labour on Unemployment Insurance Fund disbursing R40-billion

assessment would require the Minister to consider and address the unequal impact of measures. A case in point, is the South African government's failure to provide for school meals during the closing of schools depriving millions of children access to one nutritious meal per day leading to hunger and malnutrition.[70]

2.3 A review of the conceptual framework of the Disaster Management Act

There is another reason why this chapter argues for a new enabling law for public health emergencies, which relates to the conceptual framework and purpose of the DMA. Although other South African courts have not drawn the same conclusion, Davis, J in *De Beer v Minister of Cooperative Governance and Traditional Affairs*, contends that it 'is clear from a reading of the enabling provisions, that disasters other than the one currently facing us as a result of the COVID-19 pandemic, were contemplated by the DMA'.[71] This statement by the judge is not correct though as the Green Paper on disaster management actually does include within its ambit epidemics and other health disaster.[72] Yet, it is unlikely that the drafters would have foreseen a pandemic such as the current one.

Looking at the history and conceptual framework underpinning the DMA as set out in Green Paper on disaster management,[73] the drafters of the precursor to the policy and Act referred to natural environmental

during Coronavirus COVID-19 lockdown' (13 August 2020) https://www.gov.za/speeches/employment-and-labour-unemployment-insurance-fund-disbursing-r40-billion-during-coronavirus (accessed 5 October 2020).

70 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP). Discussed in part 3 below.

71 *De Beer* (n 59) para 4.14. The Minister lodged an appeal, and the regulations remain constitutionally valid until after the appeal. It is likely that the judgment, in which the lockdown regulations for level 4 and 3 were declared unconstitutional and invalid, will be overturned on appeal due to errors in the application of the standard of review and the declaration of invalidity of level 3 regulations that had not even been challenged. See paras 9.2 & 11.1-3.

72 Green Paper on Disaster Management para 4.1.6, page 34.

73 The Green Paper on Disaster Management (1998) is a discussion document emanating from government departments together with other stakeholders and experts with the aim to provide a 'broad framework and principles that will give an indication of the direction government policy on disaster management is likely to take' at 10. After consultation with the public, a White paper is drafted that contains government policy on the topic and subsequently legislation is adopted. The disaster management principles set out in this Green Paper are reflected in the DMA of 2002. In other words, the DMA was adopted after extensive consultation. Principles such as prevention and reduction of the severity of the disaster; preparedness; effective response; providing for the recovery of the community after the disaster were all canvassed in the Green Paper.

disasters that had occurred, in particular, floods, fires and drought, and also mentioned possible future events such as major oil spills, pollution of rivers, tornadoes and earthquakes.[74] International developments such as the United Nations International Decade for Natural Disaster Reduction, world conference on disaster reduction held in Yokohoma in 1994 and the Rio Earth Summit of 1992 also had a bearing on the need to develop a disaster management policy in South Africa and shaped its conceptualisation.[75] Notwithstanding the predominant focus on natural and environmental disasters, the legislative history of the DMA reveals that public health emergencies are mentioned, albeit briefly, and fall within its scope. Although pandemics are thus included within the ambit of the DMA, it is argued here that the Act is not made-to-measure for public health emergencies of this scale. A pandemic differs significantly from other types of natural or environmental disasters such as floods, fires, earthquakes, and oil spills and require different interventions.

In summary, two points have been made in this section. The first deals with the lack of tailor-made safeguards and control over the sweeping powers granted to the Minister in terms of section 27(2) of the DMA. The procedure of declaring a state of disaster was correctly adhered to in terms of sections 23, 26 and 27(2) of the DMA and, so far courts, have not found the DMA or the COVID-19 regulations (save a limited number of impugned provisions) unconstitutional or invalid.

Notwithstanding its constitutionality, there are main weaknesses in the DMA, to wit: (i) the delegated executive powers are very broad; (ii) there is no prior or subsequent engagement or approval by Parliament of these regulations; and (iii) it allows for unlimited monthly extensions of the state of disaster without approval by Parliament. The second point made in this section, is that the predominant focus of the DMA is on managing natural and environmental disasters and although public health disasters are included within its scope it is not the main purpose of the legislation. Both points underscore the need for legislation that deals specifically with a pandemic given its magnitude and unprecedented impact on society.

3 Balancing human rights

3.1 The limitation clause

Whereas the above section examined the limited role of the legislature in a state of disaster, this section deals mainly with the role of the judiciary

74 Green Paper (n 72) 11-12.

75 Green Paper (n 72) 13.

in controlling executive power and human rights restrictions during a pandemic. The safeguards on the exercise of power are to be found in the Constitution, specifically, in the general limitation clause in section 36 that authoritatively imposes a limit on the violations of constitutionally protected rights, whether the infringements originate in legislation or regulation. Moreover, there are international rules and standards to be found in international human rights law.

The *Siracusa Principles* on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (ICCPR) restate the requirements of necessity, proportionality between limitation and purpose, the use of the least restrictive means to achieve the purpose, and an interpretation of a limitation that does not jeopardise the essence of the right.[76] However, the *Siracusa Principles* are applicable in a state of emergency. Moreover, the interpretive criteria are not expressly part of South African law, and the Constitutional Court has been reluctant to read an obligation to protect the minimum content of a right into the Constitution.[77] South Africa has ratified the ICCPR. In addition, section 39(1)(c) of the South African Constitution imposes an obligation to consider international law in the interpretation of the Bill of Rights.

International treaty law binding on South Africa at the international level, includes the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). But in terms of section 231(4) of the Constitution, only treaties that have been enacted into law are part of domestic law. However, international human rights law standards guide in the interpretation of the Bill of Rights.

Freedom of movement may be restricted for reasons of public health in conformity with article 12(3) of the ICCPR.[78] Guidance in the interpretation of this article is found in General Comment 27 on the freedom of movement which cautions against nullifying the principle of freedom of movement:[79]

76 Articles 2, 10 & 11.The International Commission of Jurists 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) http://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf (accessed 2 September 2020).

77 The Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 para 32-33.

78 UN Human Rights Committee (HRC), CCPR General Comment 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 (1999) paras 13 &14.

79 As above.

> In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

The restrictions on rights should be imposed only in exceptional circumstances and the law has 'to specify the legal norms upon which restrictions are founded'.[80] A mere reference to the general limitation clause of the South African Constitution would not suffice. International human rights law standards require that the law that frames the restrictions itself must respect the principle of proportionality and reasons must be provided for the restrictive measures.[81]

The South African Constitution of 1996 is the supreme law of the land, and law and conduct inconsistent with it is invalid. Constitutionally protected rights may be restricted by way of internal modifiers or internal limitations that qualify or demarcate the scope of a right or supplant or modify the limitation within the right. Besides these internal modifiers within the text of the constitutionally protected right, and the derogation clause in section 37, human rights may only be restricted by the criteria set out in the general limitation clause in section 36 of the Constitution.

For ease of reference, section 36 of the South African Constitution is produced in full below:

> (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;

80 As above.

81 General Comment 27 (n 78) para 15.

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

A general limitation clause acknowledges that sometimes rights must 'give way to overridingly important social concerns'.[82] The general limitation clause in section 36 requires a two-stage enquiry.

The first stage of the inquiry, called the threshold enquiry, is aimed at establishing whether the disputed law limits a constitutionally guaranteed right. This, according to the Constitutional Court, entails the following stages: (a) examining the content and scope of the relevant right protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b).[83]

The second stage of the inquiry, called the justification stage, will come into play when the answer to the first question is affirmative, which will then trigger the court to determine whether the infringement is justifiable and permissible. The constitutionally protected right may only be limited by (a) a law of general application and the limitation must be (b) reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

3.2 Different standards of judicial review

A limitations analysis involves an inquiry into the proportionality of the challenged measure. In the case of *De Beer v Minister of Cooperative Governance and Traditional Affairs*, the Director-General of the government department provided insight into the motivation of the CoGTA Minister, when she contended that the regulations cannot be set aside 'on the basis that they are causing economic hardship as saving lives should take precedence over freedom of movement and the right to earn a living'.[84] The Director-General on behalf of the Minister asserted that the action taken is rational 'as the end justified the means' and presented a simplified dichotomy between, on the one hand, 'the crippling of the economy' and, on the other hand, 'the loss of lives' thereby overlooking the polycentric

82 I Currie & J de Waal *The Bill of Rights Handbook* (2016) 151 footnote 2.

83 *Ex Parte Minister of Safety and Security: in Re S v Walters* 2002 (4) SC 613 (CC) paras 26-27. P de Vos & W Freedman (eds) et al *South African constitutional law in context* (2014) 354-387.

84 *De Beer* (n 59) para 6.7-6.9.

nature and long-term effect of decision-making that underestimates the role of the economy in sustaining life and healthcare.[85]

Moreover, the Machiavellian 'the end justifies the means' rhetoric would make section 36(1) of the Constitution meaningless. Whilst saving lives, the right to life, and access to healthcare are of vital importance, the government still has the onus to justify the proportionality and necessity of the infringements. This must be done in accordance with South African law. Similarly, international human rights law standards require any limitation to be necessary and proportional. No unfettered power may be conferred. In the above case, the government's justification presented in court raises the question whether the Minister considered any alternative and less restrictive means to achieve the objective? Even two months after the regulations had been made, the Minister was still unable to present a detailed justification of the regulations to the court.

Consequently, this lack of transparency on *how* the executive weighed up the extent of the infringements on some human rights for the purpose of protecting other human rights provides an additional argument for the development of greater normative guidance for governments, even at an international level, in the case of pandemics. Generally, there has been great sympathy for the government, especially in the first few months. There was great awareness of the difficulties the government faced (like governments across the globe) in taking decisions on an unknown virus that wreaked havoc everywhere, but greater transparency would give credence to government decisions. It strengthens the legitimacy of the measures and ensures the necessary buy-in from the population. Whilst there have been very similar approaches adopted by governments in many countries, there also have been marked differences, which lends credibility to the possibility that alternative and less restrictive means would have been available in certain instances.

The High Court of South Africa (Western Cape Division) in *Esau v Minister of Cooperative Governance and Traditional Affairs*, also showed itself to be reluctant to 'prescribe' to the executive, notwithstanding the detailed constitutional prescripts on restrictions. It held the COVID-19 regulations should be proportional based on weighing 'saving lives' with the 'inconvenience and discontent' of a few individuals.[86] Without any doubt,

85 *De Beer* (n 59) para 6.7-6.9. While the concept of polycentricism is often used to claim that polycentric disputes are less suitable for adjudication and require judicial constraint, as governments may want to argue, it should not be used to justify almost unfettered executive powers. Governments should remain cognisant of the effects of polycentricism in their own decision-making.

86 *Esau v Minister of Co-operative Governance and Traditional Affairs* 2020 (11) BCLR 1371 (WCC) para 254.

saving lives should prevail above inconvenience, but is that the question that the court was asked to engage in? One of the challenges pertained to the very detailed restrictions on buying clothing. Is a prohibition on buying listed items such as open summer shoes necessary to achieve the objectives of saving lives and preparing the healthcare facilities to deal with the pandemic?[87] How does restricting exercise to a period between 06h00 and 09h00 in the morning contribute to the objectives? It is fair to state though that the court considered the prevailing scientific expertise available at the time about the link between the restrictions on the freedom of movement, in particular, the curfew, and flattening the curve.

But the question remains which level of generality is acceptable. If the court accepts the government's justification at a high level of generality (saving lives as a collective good or general interest), it runs the risk of dismissing any challenge to the proportionality of measures, whereas the court is expected to weigh up the 'nature and importance' of a right that is being restricted and the extent of such a restriction against the 'importance and purpose' of the restriction with regard to all the factors listed in section 36(1).[88]

The appellants in the *Esau* case appealed the judgment but the Supreme Court of Appeal (SCA) dismissed the application save for aspects of two regulations pertaining to the hours, means and location of permitted exercise and the prohibition of over-the- counter sale of hot cooked food, which it found to be unconstitutional and invalid.[89] Other than these two aspects of the regulations, the SCA found the challenged level 4 COVID-19 regulations to be justifiable.

Interestingly, because of the uncertainty about the designation of the COVID-19 regulations (delegated legislation) as either administrative action or executive action, the SCA considered both possibilities in its judgment. The SCA first considered whether the regulations were promulgated in a procedurally fair manner, which is the applicable standard

87 The publicly ridiculed detailed clothing directions, such as the prohibition on the sale of summer shoes and short-sleeved knit tops (unless they were sold as clothing to be worn underneath a cardigan) were withdrawn by the Minister of Trade and Industry on 11 June 2020.

88 *Ex Parte Minister of Safety and Security* (n 79) para 27. See also *S v Manamela* (Minister of Justice Intervening) 2000 (3) SA 1 (CC) paras 32 and 33; and *Brummer v Minister for Social Development* 2009 (6) SA 323 (CC) para 59 – these cases were mentioned by the High Court (Western Cape Division) in the *BATSA* case (n 34) paras 159-160 on the interpretation of justification within the limitation clause in section 36(1).

89 *Esau* (SCA) (n 24) paras 142-143. The challenge to the clothing regulations was moot para 158.

if the regulations are regarded as administrative action in terms of section 33 of the Constitution (which deals with the right to just administrative action) and the PAJA. In the alternative, so the SCA proceeded, *if* the making of regulations is viewed as executive action and not administrative action, the appropriate test to be applied is the principle of legality. Either way, the SCA found the regulations constitutional save for the impugned provisions and held that the means chosen by the CoGTA Minister were rational and proportional.[90]

Ironically, earlier at about the same time as the *Esau* judgment was being delivered by the Western Cape Division of the High Court in Cape Town, the Gauteng Division of the High Court in Pretoria was faced with a challenge brought *against* the government's easing of the lockdown restrictions. In the case of *One South Africa Movement v President of South Africa*,[91] the applicants argued that the government should not move South Africa to level 3, but the country should remain at the higher level 4 to prevent more COVID-19 deaths from occurring. The first challenge was that the government action of easing the lockdown threatened the right to life, the right to dignity, right to equality, child rights, the right to bodily integrity and health. The second was a legality/rationality challenge and the third one focused on unfair discrimination against the poorer, and black learners, who would be at higher risk if schools re-opened.[92]

The applicants' argument was that the re-opening of schools was irrational and unconstitutional unless certain conditions were met including detailed plans on protective equipment, social distancing plans in overcrowded schools, plans to prevent direct and indirect discrimination of vulnerable learners, and 'risk-mitigation strategies for teachers, parents, and other school staff who will come into contact with learners'.[93] The court did not agree with the assertion that the rights to life and dignity are paramount rights and its infringement can never be justified.[94] The move to alert level 3 was made at a time of increasing infections and ran counter

90 *Esau* (SCA) (n 24) paras 76, 142-143. The Constitutional Court had earlier in 2005 considered whether the making of subordinate legislation should be regarded administrative action. The then Chief Justice Chaskalson asserted that it was administrative action *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC) paras 113, 121.

91 *One South Africa Movement* 2020 (5) SA 576 (GP). The first applicant is an NGO and the second applicant a former Member of Parliament.

92 *One South Africa Movement* (n 91) paras 4, 75-76. Interesting in this case, the High Court did not pronounce on the meaning of 'necessity' in the interpretation of sec 27(3) of the DMA when it considered the legality/rationality challenge.

93 *One South Africa Movement* (n 91) para 4.

94 *One South Africa Movement* (n 91) para 86.

to the government's own stance and justification in other cases. However, the court accepted the government's defence of a risk adjusted strategy of balancing lives and livelihoods as the negative effect of the lockdown on employment as well as on other aspects of healthcare became evident. The court was reluctant 'to usurp the role of the decision-maker' especially where there were competing interests to be balanced and the decision was made by a person or institution with specific expertise.[95] The High Court (Gauteng Division) refused the declaratory relief sought and dismissed the application.

Although the lawyer for the government in *Mohamed v President of the Republic of South Africa* initially argued that the lockdown decision is a political decision and is only subject to a rationality test, the court inquired into the question whether it is reasonable and justifiable for the State 'to refuse to allow an exemption to permit congregational worship'.[96] In this case, the validity of Regulations 11B(i) and (ii) read with the definition of the word 'gathering' was challenged as unconstitutional.[97] According to the applicants, who sought permission to move between the residence and the places of worship, the measure is an unreasonable and non-justifiable limitation on their freedom of movement, freedom of religion, freedom of association and right to dignity.[98] The government conceded that the regulations did infringe on constitutional rights but argued that the limitations are both reasonable and necessary given the threat that COVID-19 poses to human life, dignity and access to healthcare and thus permissible under section 36 of the Constitution.[99]

In this case, the court relied heavily on the Constitutional Court's remarks in *Minister of Home Affairs v NICRO* that in the justification stage relevant considerations involve facts and policy; the court in this case recognised that it is not always possible to prove that the policy is

95 *One South Africa Movement* (n 91) paras 96, 102, 104. The government was guided by the views of the Ministerial Advisory Committee (MAC) which included prominent epidemiologists, other medical scientists, academics from various disciplines and members of the department of Health. The MAC Memorandum of 18 May 2020 'The Path forward in the National COVID-19 Response: Concurrently Saving Lives and Livelihoods' pointed out that the lockdown had successfully delayed the peak of the infections and had provided time for the preparation of the health facilities, but that there were negative effects of the lockdown on healthcare, especially on missed childhood vaccination, on the treatment of HIV and other diseases, 'massive underdiagnoses of TB cases', delayed surgeries and health care for pregnant women, and increased levels of poverty and insecurity. Paras 58-59.

96 *Mohamed* (n 56) paras 43.2 & 55.

97 *Mohamed* (n 56) para 22.

98 *Mohamed* (n 56) paras 31-32, 39.

99 *Mohamed* (n 56) paras 31-32, 39.

effective.[100] The limitation analysis calls for proportionality between the extent of the limitation and the purpose, importance and effect of the infringing provision, and consideration of less restrictive means. However, it was apparent in this case that the bar was not set very high. The court emphasised that it would be enough to establish that the concerns are sufficiently important, the risks sufficiently high, and 'there is sufficient connection between means and ends' to meet the standard.[101] Accordingly, the court found in favour of the government.

Human rights are fragile but even in a pandemic the state's obligation to respect, protect, promote and fulfil human rights remains standing.[102] The supremacy of the constitution and the rule of law, human dignity, the achievement of equality and the advancement of human rights and freedoms are among the founding values in South Africa.[103] Regulations have deeply impacted on the ability of people in informal settlements to make out any living at all, with the risk of starvation, and the closing of business and factories which resulted in huge unemployment. These and other regulations on the closing of schools, limitations on the freedom of movement and expression, and preventing smokers from buying cigarettes, all demand a proper justification and an assessment of the availability of less restrictive means to achieve the same goals in terms of section 36(1).[104]

In December 2020, the Western Cape Division of the High Court showed much less deference to the government in the case of *British American Tobacco v Minister of Cooperative Governance and Traditional Affairs* (BATSA) when it ruled that Regulation 45 that prohibited the sale of tobacco products, e-cigarettes and related products, except for export, did not withstand constitutional scrutiny.[105] The applicants sought to declare the regulation an unjustifiable infringement on the freedom of trade,

100 *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) para 37.

101 *Mohamed* (n 56) para 62.

102 Section 7(2) of the Constitution

103 Section 1 of the Constitution.

104 The prohibition on the sale of cigarettes was controversial and the scientific evidence remains disputed about the effect of immediate stopping of smoking on the development and severity of the coronavirus by smokers. There were less than a handful of countries that prohibited alcohol and smoking as a tool to combat the pandemic. It has been alleged that the unintended consequence of the ban is a blooming illegal trade in cigarettes.

105 *BATSA* (n 34) para 221. Regulation 45 (Government Gazette No 480) was promulgated on 29 April 2020 in terms of section 27(2) of the DMA, amended on 28 May (Government Gazette No 608) and later amended again on 12 July 2020 continued to prohibit the sale of cigarettes to the public and to retailers, but now permitted the sale of tobacco from farmers to local processors and to local manufacturers.

occupation and profession; on the right of consumers of tobacco and vaping products to dignity, privacy and bodily integrity; and an arbitrary deprivation of the right to property of participants in the supply chain of tobacco and vaping products, and thus unconstitutional.[106] The court acknowledged that the CoGTA Minister has been granted 'sweeping powers with huge consequences to the applicants' and that previous case law suggests that 'guidance should be provided to administrative functionaries when a wide discretionary power has been conferred' as to the manner in which those powers are to be exercised.[107]

Unlike in most other COVID-19 court cases, several expert witnesses, both for the tobacco industry and for the Minister, testified at the hearing. Notwithstanding these and detailed responses submitted by the Minister, the court was not persuaded that the Minister had discharged her duty to justify the infringements on the constitutional rights. The court held that the Minister had not provided evidence that stopping smoking prevented a more serious progression of COVID-19 infection and thus the objective of the measure of the prohibition would not be achieved.[108] Based on the facts presented to the court by the respondents, the Minister failed to convince the court that the advantages outweigh the disadvantages of the ban.

Significantly, in this case, the High Court asserted its authority to engage the respondents whether alternative less restrictive means would have been available to achieve the objective and the court was not swayed by the claim that this was a terrain of policy-making exclusive to government. On the contrary, the court held this question to be 'central in determining both the proportionality and legality' of the action taken.[109] Clearly, the approach taken by the court differs from the judicial deference seen in other COVID-19 judgments. Furthermore, the court concluded that Regulation 45 is not necessary (as the Minister did not show that the ban reduced the strain on the health care system) as is required by section 27(2)(n) of the DMA. The court held Regulation 45 therefore *ultra vires.*[110]

The court in the *BATSA* case was not only critical of the tobacco ban, but also refused to accept government's regulation on the face of it. In this case a full proportionality analysis was demanded from the government, in the absence thereof, the ban could not pass constitutional scrutiny. The

106 Sections 22; 10, 14, 12 & 25 of the Constitution.

107 *BATSA* (n 34) para 27.4

108 *BATSA* (n 34) para 169.

109 *BATSA* (n 34) para 185. In para 174 the court refers to an assessment based on 'proportionality which calls for a balancing of different interests'.

110 *BATSA* (n 34) para 206.

judgment is not the end of the road yet as the same court has granted the government leave to appeal and the Supreme Court has yet to decide on the matter, and possibly thereafter the Constitutional Court.[111]

On appeal, the bone of contention will be whether the word 'necessary' in section 27(2)(n) of the DMA should be given a narrow or wide interpretation. The High Court of South Africa, Western Cape Division, in its judgment, gave a narrow interpretation, thus limiting the exercise of executive power in terms of the DMA to what is 'strictly necessary' whereas the High Court, Gauteng Division, in the *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa* (*FITA*) judgment gave the word a wide interpretation.[112] The Gauteng Division of the High Court did so on the basis that it was not bound by an earlier Constitutional Court judgment and argued that the threshold is met once the Minister can show that the enactment of regulations was 'reasonably necessary' to prevent a COVID-19 disaster.[113]

Thus, two Divisions of the High Court of South Africa decided very differently on the same subject matter of the COVID-19 regulations, which was the prohibition on the sale of cigarettes and tobacco products. This was in the first place due to the way the applicants framed the constitutional attacks on the regulations. The outcome was two diametrically opposed judgments. Not only were the standards of judicial review and level of scrutiny by the two divisions of the High Court different, so was the court's take on separation of powers and judicial deference. Whereas the Gauteng High Court inquired into compliance of the regulations with the rule of law and applied a rationality test, the Western Cape High Court applied a proportionality test in terms of section 36(1) of the Constitution. The latter, by its clinical dissection of the Minister's arguments and

111 *BATSA* (n 34) para 6. There are two judgments regarding the prohibition on the sale of cigarettes: one from the Gauteng Division of the High Court of South Africa (the *FITA* case) and one from the Western Cape Division (the *BATSA* case). In the *FITA* case, the basis of the challenge by the applicants was non-compliance with the rationality/legality standard, whereas in the *BATSA* case the applicants raised the issue of the constitutionality of Regulation 45 in terms of a sec 36(1) analysis that questioned the proportionality of the government action. Two weeks after reservation of the judgment in the Western Cape High Court, the Minister repealed Regulation 45.

112 *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa* (*FITA*) [2020] ZAGPPHC 246 (26 June 2020).

113 *FITA* (n 112) para 87. In *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), the Constitutional Court held that 'necessary' means strictly necessary. But the Gauteng High Court found that the *Pheko* decision was not applicable in this instance as the court distinguished, probably erroneously, a local disaster from a national disaster despite that the wording of the provisions in the DMA is the same (except for the words local/national) para 86.

consideration of less restrictive means available to the Minister to achieve the same purpose, came to a different conclusion. Moreover, the court examined section 27(2)(n) of the enabling legislation, the DMA, and concluded that the Minister had acted *ultra vires* as the ban on the sale of tobacco products was not strictly necessary. Accordingly, this court's approach is in line with international human rights law standards that emphasise legality, necessity, and proportionality for encroachments on human rights in times of emergencies and disasters.

3.3 The impact of the regulations on the most vulnerable

It cannot be gainsaid that the government's regulations have had an unequal impact. The most vulnerable were affected the most. The homeless, persons living in informal settlements, those without access to water, those who had to use public transport all had to carry an unequal share of the burden. The number of incidences of domestic violence and child abuse has been on the increase. On top of it, police brutality added to the woes of residents of townships.

The impact of lockdown regulations on children has been most distressing because of the closing of schools for three months, school children did not have access to daily school meals. The Minister of Basic Education and the education MECs (members of the provincial executives) were taken to court by a non-governmental organisation and two schools, for failure to reinstate the National School Nutritious Programme (NSNP) immediately from the moment the schools reopened in June 2020. The applicants in the matter between *Equal Education v Minister of Basic Education*, sought not only a declaratory order from the High Court of South Africa for breach of the respondents' constitutional and regulatory duty, but also an order to implement the NSNP and a supervisory interdict for judicial oversight on the implementation of the order.[114]

In this case, the High Court (Gauteng Division) found in favour of the applicants – and held that the constitutional duty to provide basic education, which in the South African Constitution is not qualified or dependent on the available resources, includes the duty to provide NSNP to learners whether they are physically attending school or not. The main aim of the NSNP is to improve the quality of education by enhancing learning capacity, school attendance and general health by alleviating hunger.[115] The non-action by the Department of Basic Education in

114 *Equal Education* (n 70) paras 2-4.

115 See para 17 of the judgment (n 70) on the introduction of the NSNP. The court summarised it as 'a life saving programme for the poorest of the poor child' at para 19.

rolling out the programme after the lockdown had a devastating impact. The Seekings Report, referred to in the judgment, concluded that the suspension of the NSNP has been 'a colossal' disaster preventing the distribution of food to the poor.[116] The evidence of the *amicus curiae*, the Child Law Centre, specified that 30 per cent of the population experience severe levels of food insecurity.[117] Without hesitation, the court held the Minister to account.

In the enforcement of the COVID-19 regulations, members of the South African Police Services (SAPS) and the South African National Defence Force (SANDF) displayed at times a brutality that foisted public fear. Individuals in townships were humiliated and at times frogmarched on the streets of the townships.[118] In the first week of the lockdown, more than two thousand people were arrested for allegedly breaching the regulations. Worse still, members of the SANDF tortured and killed a young man, Collins Khosa, for having an alcoholic drink in his own yard.[119]

One is reminded of the stark warning by Lord Acton that 'power tends to corrupt and absolute power corrupts absolutely', when reading the shocking account of the flagrant abuse of power by defence officials in *Khosa v Minister of Defence and Military Veterans.*[120] In this case, the family of

116 J Seekings Report on Social Grants and Feeding Schemes under the COVID-19 Lockdown in South Africa quoted in the *Equal Education* judgment (n 70) para 26. Seekings (Director of the Centre for Social Science Research at the University of Cape Town).

117 *Equal Education* (n 70) para 30.

118 I Mugabi 'COVID-19: Security forces brutalizing civilians' *DW* 20 April 2020 https://www.dw.com/en/COVID-19-security-forces-in-africa-brutalizing-civilians-under-lockdown/a-53192163 (accessed 3 September 2020); Human Rights Watch 'South Africa: Set Rights-centred COVID-19 measures' https://www.hrw.org/news/2020/04/07/south-africa-set-rights-centered-COVID-19-measures# (accessed 3 September 2020); 'Minister of Defence and Military Veterans, Ms Nosiviwe Mapisa-Nqakula, condemns any abuse from the SANDF against citizens and calls upon citizens 'to desist from provoking any of the law enforcement officials' Media Statement by the Department of Defence, issued on 30 March 2020 https://allafrica.com/view/resource/main/main/id/00121928.html. https://www.sanews.gov.za/south-africa/over-2000-arrests-non-compliance-COVID-19-rules (both accessed 3 September 2020). Within seven days, law enforcement officials had arrested 2 289 suspects for non-compliance of regulations. At the time, 2 April 2020, there were 1 462 corona cases with five deaths.

119 *Khosa v Minister of Defence and Military Defence and Military Veterans* 2020 (7) BCLR 816 (GP)

120 *Khosa* (n 119). Lord Acton wrote in the same paragraph about power that 'there is no worse heresy than that the office sanctifies the holder of it': OLL 'Lord Acton writes to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included, especially since "Power tends to corrupt and absolute

Mr Collins Khoza sought a declaratory order for the tragic killing of their son, partner and brother at the hands of the national defence force who had assaulted him, after finding a half full cup of alcohol in his own yard. This case was not about the rationality or reasonableness of the regulations but about the 'lockdown brutality' by public officials for purposes ulterior to the lockdown. The Minister of Defence failed in the first instance to impose internal remedies on the transgressors. In a scathing judgment, Fabricius J, reiterated that the right to human dignity, right to life, the right not to be tortured, the right not to be treated or punished in a cruel, inhuman or degrading way are rights that even in a state of emergency could not be taken away from the individual. Although section 37 was not applicable, the same applies *mutatis mutandis* to a state of disaster.

At least, 11 more members of the public were reported to have been killed by law enforcement officials during the first two months of the first lockdown.[121] The poor in the townships were more at risk of police brutality or excessive use of force by army personnel than those living in the suburbs. By mid-August 2020, almost 300 000 arrests had been made for violations of lockdown regulations.[122] In many other countries, including Uganda, Nigeria, Kenya, and China, heavy-handed responses by security forces has led to killings, arbitrary arrests and detention as

power corrupts absolutely'' (1887)' https://oll.libertyfund.org/quote/lord-acton-writes-to-bishop-creighton-that-the-same-moral-standards-should-be-applied-to-all-men-political-and-religious-leaders-included-especially-since-power-tends-to-corrupt-and-absolute-power-corrupts-absolutely-1887 (accessed 20 January 2021).

121 F Haffajee 'Ramaphosa calls 11 lockdown deaths and 230 000 arrests an act of ''overenthusiasm'' – Really?' *Daily Maverick* (Johannesburg) 1 June 2020 https://www.dailymaverick.co.za/article/2020-06-01-ramaphosa-calls-11-lockdown-deaths-and-230000-arrests-an-act-of-over-enthusiasm-really/ (accessed 5 September 2020). IPID briefing to Parliament in May. See also an earlier report by the South African Human Rights Commission: SAHRC 'Soldiers and police face the heat over lockdown brutality' (5 April 2020) https://www.sahrc.org.za/index.php/sahrc-media/news/item/2322-soldiers-and-police-face-the-heat-over-lockdown-brutality, 5 April 2020 (accessed 5 September 2020).

122 On 14 August 2020, the exact number was 292 252. United Nations High Commissioner for Human Rights, Michelle Bachelet, expressed concern about the use of excessive force to enforce COVID-19 lockdowns E Farge 'UN raises alarm about police brutality in lockdowns' *Reuters* 27 April 2020 https://www.reuters.com/article/us-health-coronavirus-un-rights-idUSKCN2291X9 (accessed 5 September 2020). South Africa was among the countries reported in this regard to the Office of the High Commissioner for Human Rights (OHCHR). The Institute for Security Studies reported that during the first three months of the lockdown, crime was down by 34.2 per cent: ISS 'SA crime reductions during COVID-19 lockdown may be short lived' 14 August 2020 https://issafrica.org/about-us/press-releases/sa-crime-reductions-during-COVID-19-lockdown-may-be-short-lived (accessed 6 September 2020).

both Amnesty International and Human Rights Watch have reported.[123] On another continent, the Inter-American Commission on Human Rights observed the increasing militarisation of law enforcement in the region.[124]

In Europe, marginalised and racialised groups suffered disproportionally by coercive measures adopted to enforce the COVID-19 measures.[125] Public health strategies to change behaviour involving communities to limit the spread of the virus are more successful than criminalisation and militarisation.[126] The coercion and increased militarisation in the wake of the public health pandemic is a worrisome trend. This development prompted the Secretary-General of the United Nations to caution against the 'pandemic of human rights abuses' due to the COVID-19 pandemic.[127] According to Guterres the pandemic has 'morphed into an economic and social crisis'.[128]

4 Conclusion

The general limitation clause in section 36(1) of the South African Constitution requires that limitations of rights are reasonable and justifiable, which may be read 'conjunctively as shorthand for proportionality'.[129]

123 G Simpson 'UN should speak up on COVID-19 "pandemic of human rights abuses"' *Human Rights Watch* 24 February 2023 https://www.hrw.org/news/2021/02/24/un-should-speak-COVID-19-pandemic-human-rights-abuses; 'Governments and police must stop using pandemic as pretext for abuse' *Amnesty International* 17 December 2020 https://www.amnesty.org/en/latest/news/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/; COVID-19 crackdowns: Police abuse and the global pandemic'- 'Europe: Policing the pandemic: Human rights violations in the enforcement of COVID-19 measures in Europe' *Amnesty International* 24 June 2020 https://www.amnesty.org/download/Documents/EUR0125112020ENGLISH.PDF (accessed 19 January 2021).

124 Inter-American Commission on Human Rights 'La CIDH llama a los Estados de la región a implementar políticas de seguridad ciudadana democráticas y participativas centradas en la protección de la persona' (25 September 2020) http://www.oas.org/es/cidh/prensa/comunicados/2020/231.asp# 82 quoted in the above Amnesty International Report (n 123) 21 (accessed 5 October 2020).

125 'Europe: Policing the pandemic: Human rights violations in the enforcement of COVID-19 measures in Europe' (n 123) 5.

126 See also C Staunton, C Swanepoel & M Labuschaigne 'Between a rock and a hard place: COVID-19 and South Africa's response' (2020) 7 *Journal of Law and Bioscience* 1 at 8, 12.

127 A Guterres 'The world faces a pandemic of human rights abuses in the wake of COVID-19' *The Guardian* 22 February 2021 https://www.theguardian.com/global-development/2021/feb/22/world-faces-pandemic-human-rights-abuses-COVID-19-antonio-guterres (accessed 7 March 2021).

128 As above.

129 De Vos & Freedman (n 83) 363.

International human rights law standards require legality, proportionality, necessity and non-discrimination.[130] But in several of the earlier court cases in South Africa dealing with the COVID-19 regulations, there was no comprehensive inquiry into the justification stage of the limitation clause. It is accepted that the proportionality test is a 'more stringent test than the rationality test'.[131] Instead, a rationality test of judicial review, which merely inquired into the rational connection between the limiting measure and its purpose, was applied. Thus, without evaluating the proportionality and necessity of the restrictions both in terms of national and international human rights law standards.[132]

Indisputably, judgments are shaped by the formulation of the claims submitted by the applicants.[133] But also by the level of judicial deference. What should the standards of judicial review of public power be when the purpose of saving lives and access to healthcare in a public health emergency is a very legitimate one? The doctrine of separation of powers requires that the executive in an emergency must be able to act promptly, but at the same time, both the judiciary and legislature must fulfil their function and remain vigilant against the exercise of wide discretionary powers that have been conferred on the executive to make subordinate legislation that severely curtails human rights. The executive must account to Parliament. There is a fine line between respect for a margin of appreciation, and deference or, what may be called, Parliamentary and judicial underreach.

In terms of section 7(2) of the Constitution, the state is under an obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights. The Bill of Rights applies to all law and binds the legislature, the executive, judiciary, and all organs of state according to section 8(1). Consideration must be given to the impact and effect of COVID-19 regulations as the restrictions laid bare the deep fault lines of economic inequality and the historical legacy of colonialism and apartheid. The

130 Office of the High Commissioner for Human Rights (OHCHR) Emergency Measures and COVID-19: Guidance, 27 April 2020.

131 *BATSA* (n 34) para 157.

132 The cases are discussed in detail in part 3. According to Konstant, the Constitutional Court has since *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) positioned 'the principle of legality as a weaker and less invasive form of review' than an administrative law review; A Konstant 'Administrative action, the principle of legality and deference – The case of *Minister of Defence and Military Veterans v Motau'* (2018) *Constitutional Court Review* 68 at 76, 90.

133 In South Africa, specific legislation such as the Promotion of Administrative Justice Act (PAJA) which is intended to give effect to sec 33 of the Constitution, is the basis of judicial review of administrative action. On the question whether the DMA regulations are administrative or executive acts, see the Supreme Court of Appeal in *Esau* (n 89).

result was that the indigent and vulnerable, without access to water, sanitation, and adequate housing, were most negatively affected by the lockdown and the economic downturn.

The prospect of serious illness and death, fear, quarantine and isolation, the exponential rise in daily infections, the growing number of deaths, the lockdown, curfews all threw society back on itself and struck at the core of existence. Consequently, the foundation of the modern condition based on the malleability of life became shaky.

If indeed, strict measures, such as national lockdowns, are more successful in preventing the uncontrolled spread of the virus or delaying the onset of the spread of the virus, the government would surely be able to justify the imposition of drastic measures violating human rights in name of the right to life, dignity, and access to healthcare. This should be done transparently. But the arrogation of wide discretionary powers by government ministers hampers collective efforts required to control the pandemic and the long-term sustainability of the programmes. It requires a fine balancing act. The criticism expressed in this chapter on some of the measures and action adopted by the executive in South Africa must be viewed in this light. By demanding that the limitations meet the criteria of reasonableness, proportionality and necessity, the government is held to account and must abide by the standards thus set in line with both the rights and values expressed in the South African Constitution and international human rights law.

Admittedly, this take is not undisputed. It could be argued that the courts should defer to the executive in a pandemic. It is entirely possible to interpret the legislation as being adequate for the pandemic. Certainly, there rests, under the existing law, no constitutional or legal *obligation* on the Cabinet to initiate legislation and Parliament to pass specific COVID-19 legislation.[134] But this chapter makes suggestions to improve the regulatory framework of a public health emergency to prevent the exercise of unprecedented and overbroad executive powers becoming the 'new normal'.

Libertarians challenge governments and the lockdown measures based on perspectives that foreground the individual and her private domain. Clearly, their philosophy based on individual freedom is not the one that informs this article. The assertions made in this article foreground solidarity, responsibility and the democratic space of deliberation and emphasises transparency and accountability as principles of human rights

134 *Helen Suzman Foundation* (n 44).

standards. Even in a pandemic, the executive is expected to account to Parliament in a public forum. It has been maintained that the South African Constitution must bring about a 'culture of justification – a culture in which every exercise of power is expected to be justified'.[135] Legitimacy requires a relationship and connection between those who govern and the governed. The pandemic has changed the role of the state to the extent that the realisation of solidarity entails moving forward with even more consideration of the plight of the poor and the most vulnerable.

While this chapter has argued that an amendment to the DMA or temporary legislation specifically designed to deal with a pandemic is desirable, this does not imply that South Africa fell short of national and international standards in the procedure followed in the declaration of a state of disaster. Since South Africa did not declare a state of emergency, and did not derogate from any rights, but only limited human rights, it was thus under no legal obligation in terms of article 4.3 of the ICCPR to notify the UN Secretary-General. With a few exceptions, the Ministerial COVID-19 regulations in South African were held to be constitutional thus far. Nonetheless, the pandemic has highlighted the lack of specific human rights guidance on public health emergencies.

Hence, this chapter recommends strengthening accountability, transparency, legal certainty, and oversight on the exercise of executive powers during a public health emergency. To this end, two suggestions are made. It is recommended that (i) governments present a human rights impact assessment prior to the adoption of regulations; and (ii) the African Union considers drawing up a soft law instrument in the form of a *Declaration on Human Rights in Times of Public Health Pandemics*, which would guide African governments in this and future pandemics.

135 E Mureinik 'A Bridge to where? Introducing the Interim Bill of Rights' 1994 10 *South African Journal on Human Rights* 31 at 32.

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