CHAPTER 3.1:

LEGAL AND REGULATORY RESPONSES

ABSTRACT

The Covid-19 pandemic posed a unique challenge to legislatures and executives worldwide, necessitating the development of new regulations. This chapter evaluates South Africa's legal and regulatory response to Covid-19 against the values enshrined in section 1 of the Constitution. It considers the options for managing the pandemic provided by the Constitution and ordinary legislation and evaluates the impact of the choice of the Disaster Management Act.

Covid-19 has had a profound impact on and challenged the maintenance of human rights. The chapter reviews issues around human rights and governance within the legal framework, as well as the ethical guidelines that should frame responses to a pandemic. It examines how consideration of the country's constitutional and democratic norms, values, and safeguards (e.g., the rule of law, freedom of expression, and human dignity) were affected with respect to the right to healthcare, education, a safe environment, and the like during the management of the pandemic.

Rather than analysing specific regulations in detail, the chapter focuses on three macro issues: the rule of law, human rights, and freedom of expression. The aim is to provide a broad framework and set out principles with which the law must comply during emergency situations. Note that any conclusions in this chapter on the strengths and limitations of the Covid-19 response are still preliminary and will be refined based on stakeholder consultations and feedback from readers.

DISCLAIMER

This Country Report on the measures implemented by the South African government to combat the impact of the Covid-19 pandemic in South Africa (including individual research reports that may be enclosed as annexures) were prepared by various professional experts in their personal capacity. The opinions expressed in these reports are those of the respective authors and do not necessarily reflect the view of their affiliated institutions or the official policy or position of the South African government.

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ABBREVIATIONS AND ACRONYMS

ASSAf	Academy of Science of South Africa
CoGTA	[Department of] Cooperative Governance and Traditional Affairs
HIV	human immunodeficiency virus
MEC	Member of the Executive Council
NatJoints	National Joint Operational and Intelligence Structure
PCR	polymerase chain reaction
PPE	personal protective equipment
SAHPRA	South African Health Products Regulatory Authority
SAMRC	South African Medical Research Council
WHO	World Health Organization

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INTRODUCTION

South Africa's Constitution, in section 7(2), obligates government to respect, protect, promote and fulfil the rights set out in the Bill of Rights. In some situations, these human rights come into conflict with each other, and government needs to maintain a balance between competing rights.[1] This can be challenging, especially in a country with a socio-economic profile such as South Africa's. In a pandemic, particular circumstances, such as the risk of transmission and the severity of the disease, may require a *rebalancing* of particular rights. However, individual rights cannot be suspended, unless a national state of emergency is declared. Even then, government cannot arbitrarily limit people's rights.[2] A rebalancing of relevant rights simply means that certain rights, such as the right to life and access to healthcare, may temporarily outweigh others, such as freedom of movement and the right to practise a profession.

In emergency situations, the executive is empowered to make regulations, some of which may limit individuals' rights (including their constitutional rights). In these cases, questions may be asked about the source of the power to make such regulations and the limitations on these powers. In a constitutional democracy such as South Africa, a lawmaker needs to ask, 'how can one limit constitutional rights as little as possible, while still protecting the country's people?'[3] Using this question as a guideline, this chapter evaluates the rule of law, human rights issues, and freedom of speech during the pre-lockdown and lockdown phases of the Covid-19 pandemic in South Africa.

Constitutional supremacy is a founding value in the country's Constitution. This is reinforced by section 2 of the Constitution, which expressly proclaims itself the supreme law. Therefore, the Constitution is justiciable, and any law and conduct that is inconsistent with the Constitution will be invalid. Also, when legislation (including legislative choices made during an emergency) is interpreted, it must be read in conformity with the Constitution. This raises the question whether the Disaster Management Act and its regulations are in line with the Constitution, especially the constitutional value of the rule of law.

The Covid-19 pandemic was the first time South Africa's constitutional democracy had been confronted with the question how the state would utilise its emergency powers (in the broad sense) to address a crisis. South Africa was not alone in this regard – political leaders are often unsure how to address a multifaceted and unfamiliar challenge, especially if it is sudden and all-encompassing. The reflex might be to resort to extraordinary powers; although such powers may be warranted in some instances, caution is required (Khakee, 2009:5). Emergency powers (including disaster management) by implication limit individual human rights and often threaten democracy. There is,

[1] A recent and well-known (and non-Covid-19-related) example of this is the Protection of Personal Information Act 4 of 2013, which seeks to balance the interests of society in the free flow of information with privacy interests.

[2] The Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail,* 2005: par. 75 noted that 'it is one of the objects of the Bill of Rights to require those limiting rights to account for the limitations. The process of justifying limitations, therefore, serves the value of accountability in a direct way by requiring those who defend limitations to explain why they are defensible.' See also De Vos, 2020. Furthermore, any limitation of rights must be in accordance with s 36 of the Constitution.

[3] *De Beer v Minister of Co-operative Governance and Traditional Affairs*, 2020: par. 7.19.

therefore, a risk that the state's constitutional order, especially parliament, the judiciary and other oversight bodies, may be undermined. Two specific aspects can be problematic:

- The balance of powers between the executive, parliament, and the judiciary
- Human rights and the rule of law (Khakee, 2009:6).

South Africa is, and remains, a constitutional democracy.[4] Whilst it cannot be disputed that the Covid-19 pandemic must be fought by all means necessary, the Constitution and the Bill of Rights in particular ought to be the touchstone against which the formulation and implementation of regulations are measured. For this reason, the analysis in this chapter focuses strongly on how to handle an emergency situation – in this case by utilising the Disaster Management Act – in a way that ensures a healthy constitutional order.

Note that any conclusions in this chapter on the strengths and limitations of the Covid-19 response are still preliminary and will be refined based on stakeholder consultations and feedback from readers. Also, the chapter focuses on the first and second waves of the pandemic. Legal responses during the further progression of the pandemic will be discussed in the second edition of the Country Report.

THE RULE OF LAW

This section considers the principle of the rule of law in both South African and international law, including emergency legislation. It then assesses the various legislative options available to South Africa for dealing with the pandemic. The choice of the Disaster Management Act, the powers of the minister, and the structures for managing the pandemic are reviewed. This is followed by an assessment of the country's response against the principles of the rule of law.

SOUTH AFRICA AND THE RULE OF LAW

> The essence of the rule of law is that political power must not be exercised in an arbitrary manner, but rather in accordance with the law. Disputes between individuals and the state must also be adjudicated by an independent tribunal (Botero & Ponce, 2011). Substantively, the rule of law requires government to respect the individual's basic rights, especially human dignity, equality and freedom. To this end, laws must be clear and accessible (Currie & de Waal, 2013:13–14).[5]

In South Africa the principle of the rule of law is a constitutional value. Section 1 of the Constitution requires state institutions to act in accordance with the law (Currie & de Waal, 2013:10–14). Everyone, including organs of state, must obey the law; the state cannot exercise more power than is permitted in law; and the law must authorise everything that the state does.[6] This is the *legality* test,[7] which the court expressed as follows in the *Fedsure* case (par. 58):[8]

[4] The pandemic also raised the issue whether authoritarian regimes are better at handling pandemics. The answer is not a simple 'yes' or 'no'; it depends on a wide range of factors. See Kleinfeld, 2020; Flinders, 2020; Kavanagh & Singh, 2020.
[5] *Affordable Medicines Trust v Minister of Health,* 2005: par. 108.
[6] *Minister of Public Works v Kyalami Ridge Environmental Association*, 2001: par. 35.
[7] *Head of Department, Department of Education, Free State Province v Welkom High School*, 2013.
[8] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,* 1998.

> It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.

The Constitutional Court also interpreted the principle of the rule of law as requiring state conduct to be rationally related to a legitimate government purpose – the so-called *rationality* test (the *Fedsure case,* par. 58). If there is no rational connection between conduct and purpose, the relevant legislation will be deemed arbitrary and, therefore, inconsistent with the rule of law.[9] Linked to this, when called upon to give reasons for a decision, the decision-making body must give such reasons; otherwise, the rationality of the decision cannot be tested.[10]

The principle of legality is still developing in South African law, and during the pandemic new issues arose around its application in emergency situations. An example is the Ivermectin case (Thaldar, 2020).

EMERGENCY LEGISLATION AND INTERNATIONAL LAW

In emergency situations, a government still has to act in accordance with the rule of law, even though its actions are governed by the laws that apply in emergencies. These laws must likewise conform to the values and requirements of the country's constitution. States of emergency and states of disaster are provided for in law. When emergencies are declared, the derogation of some rights is permitted. However, the suspension of rights should be avoided if the state can deal with the situation by setting proportionate restrictions or limitations on certain rights (OHCHR, 2020). (Though analogous to emergencies, matters are somewhat different in states of disaster, as discussed below.)

International law requires any derogation of rights to be temporary and as minimally intrusive as necessary. Such a derogation must include safeguards (e.g., sunset or review clauses) to ensure a return to ordinary laws as soon as the emergency is over. States must also ensure that measures are in place to allow affected people to continue enjoying their economic and social rights, such as earning their livelihoods and accessing housing, food, education, social protection, and health. People must also be able to comply with emergency measures (OHCHR, 2020). Legal definitions of emergencies tend to be broad, but they share some characteristics, as discussed in Box 3.1.1.

The International Covenant on Civil and Political Rights (OHCHR, 1966) restricts the extent to which rights may be limited in public health emergencies. It allows the derogation of certain rights only in case of a 'public emergency which threatens the life of the nation'. The derogation is only allowed to the extent required by the situation (art. 4). The Siracusa Principles on the Limitation and Derogation of Provisions in the Covenant (OHCHR, 1984) expanded on these principles. The principles also apply to limitation clauses for public health (art. I B iv). Article I B iv 25 states:

> Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members

[9] *New National Party v Government of the Republic of South Africa*, 1999: par. 24.
[10] *Judicial Services Commission and Another v Cape Bar Council*, 2012: par. 44.

of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

The Siracusa Principles lay down certain important interpretative principles that apply during such times, the gist of which is that states cannot restrict citizens' rights beyond what is strictly necessary for addressing the underlying causes of the emergency.

Box 3.1.1: Legal characteristics of emergencies

- A state of emergency creates a legal state that is *different from normal times*. During an emergency (of whatever nature), the state is forced temporarily to change some of its structures to address the situation. The threat must be of a magnitude that would severely harm the state or its people if not treated in a way that would be impossible under the normal legal order. In other words, state structures need to change to address the emergency (Zwitter, 2012). The powers of the state must be precisely defined to deal with the emergency once it is manifested (or concrete).
- An emergency must be *exceptional*. Once the exceptional situation is no longer present, the emergency lawmaking (whether a state of emergency or a state of disaster) should also end and return to normality (Zwitter, 2012).
- A 'state of emergency' may also have a *geographical* element – it would make little sense to place an entire nation under emergency legislation if only a smaller region or city is affected (Zwitter, 2012). That said, most emergency legislation focuses on issues of national security, often leaving a gap in relation to public health emergencies (Cormacain, 2020).
- Emergency situations *do not displace the rule of law*. The law continues, albeit in a different form. Emergency laws should, therefore, not do away with the principles of democracy, but they can lead to temporary changes in the structure of the state. The rule of law requires rule with the law, even in a pandemic (Cormacain, 2020). This might look different during emergency times, but the bare minimum requirements remain.

SOUTH AFRICA'S LEGAL OPTIONS IN THE PANDEMIC

Having been declared a pandemic by the World Health Organization (WHO), Covid-19 is a public health emergency that justifies use of emergency powers. But this raises questions about the balance of power between the executive and the legislature in managing the pandemic. It is often assumed that the pandemic must be managed by an executive that is not overly constrained by the legislature (see e.g., Petrov, 2020; Bâli & Lerner, 2020). However, democratic parliaments have a critical role in policy formulation and in assuring the public that its interests have been prioritised. Participatory processes, such as those facilitated by the legislature, are needed to maximise trust. The question is, what emergency legislative measures are appropriate in such a situation? In South Africa, there were three main options: the Disaster Management Act, the State of Emergency Act, or the National Health Act; these are discussed in turn below.

The disaster management option

A new approach to disaster management

Until the late 1990s South Africa did not have a unified, comprehensive piece of legislation to deal with disasters. A unified approach was clearly needed, which would also enable quick reaction in the various branches and departments of government and harness the help of civil society during

disasters. These principles were explored in a comprehensive Green Paper (DCD, 1998) and White Paper (DCD, 1999) on disaster management, which culminated in the Disaster Management Act and the subsequent policy.

The new legislative framework sought to change disaster management from a reactive to a proactive approach. It had a strong developmental aim – to help reduce communities' vulnerability to disasters. Disasters were no longer seen as isolated events to which a piecemeal response would suffice; instead, the focus was on consistent development to reduce people's vulnerability, prevent hazards from becoming disasters, or minimise the impact of disasters. The Green Paper (DCD, 1998) warned that:

> disasters are often managed haphazardly. The approach taken to disasters may thus be as costly (or even more costly) than the event itself. People are unprepared, and when the event occurs (even slow-onset disasters) it usually triggers haphazard reactions, which often result in crisis management. Awareness of disasters and of one's vulnerability to such events can, however, reduce the impacts of such events.

The Act laid down a new policy framework for a structured approach, with enabling legislation to provide the necessary funding for institutions and personnel to drive the new, proactive approach. It anticipated the involvement of both the private and the public sector in disaster management. Importantly, it envisaged long-term planning for development strategies to reduce vulnerability, with a strong focus on infrastructure development.

The Green and White Papers culminated in the promulgation of the Disaster Management Act in 2002 (RSA, 2003), after four draft Bills. It was followed by a comprehensive policy framework for disaster risk management that incorporated the vision of the two papers and linked it to specific sections in the Act. The provisions of the Disaster Management Act are discussed in more detail in Chapter 2 of the Country Report.

The Disaster Management Act

The Disaster Management Act aims to institutionalise disaster risk reduction in all sectors and spheres of government. A national state of disaster was invoked on 4 March 2020 (CoGTA, 2020a) for the persistent drought conditions in many parts of the country; this ran in parallel with the national state of disaster for the pandemic proclaimed a few weeks later, on 15 March 2020.

The Act defines a disaster as follows:

> natural or human-caused occurrence which (a) causes or threatens to cause – (i) death, injury or disease; (ii) damage to property, infrastructure or the environment, (iii) disruption of the life of a community; (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.

For the Act to be applicable, Covid-19 must comply with these requirements. This cannot simply be assumed, and it has been argued that Covid-19 'has not at any stage grown to the proportion that it is of a sufficient magnitude to warrant the declaration of a disaster' (Klopper, 2020).

When a national disaster is proclaimed (section 26 of the Act), the national executive has the primary responsibility for coordinating measures to respond to the disaster and ensure optimal recovery. A disaster can only be declared when:

> (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or (b) other special circumstances warrant the declaration of state of disaster.

Once a disaster has been declared, the minister may make regulations or issue directions on a range of practical matters, such as releasing resources and personnel, evacuating areas, providing shelter, managing traffic, and buying and selling beverages (section 27(2)). These powers are restricted in that they may only be exercised as far as necessary to assist or protect the public, bring relief to the public, protect property, prevent, or combat disruption, or deal with the effects of the disaster. A state of disaster can be declared for an initial period of only three months, after which it must be renewed every month.

A *strength* of the Disaster Management Act is that it provides the basis for regulating a response to the pandemic through a single set of regulations, issued in terms of the Act. It also allows for the release of funds allocated to disaster relief. A *weakness*, however, is that all the regulations and directives depend on the renewal of the declaration of a state of disaster. Thus, if Covid-19 no longer complied with the definition of a 'disaster', the Disaster Management Act could no longer apply, and all the regulations and directives issued in terms of its provisions would no longer be applicable.

In some ways, the executive has more freedom of action under a state of disaster than under a state of emergency.[11] In the former, the minister may promulgate regulations for purposes set out by section 27 of the Disaster Management Act, and in that sense, her power is limited. At the same time, in terms of the Act, there is no requirement for regulations to be presented to parliament, as would be necessary under a state of emergency. This has led some to argue that the Disaster Management Act is both inconsistent with the Constitution and invalid, insofar as the section does not provide for safeguards found in section 37 of the Constitution (which governs states of emergency). The courts have disagreed;[12] nevertheless, at least one commentator referred to the state of disaster as 'an informal and light version' of a state of emergency (de Vos, 2020).

Evaluation

To evaluate the potential effectiveness of the disaster management option, it is crucial to understand the legislative scheme of the Act and what it seeks to achieve. As noted, the Act not only provides for a reaction to disasters already underway. With the policy framework, it also lays the groundwork for a developmental approach to reduce the risk of disasters and so avoid or limit the impact of

[11] For a discussion of the difference between the state of disaster and a state of emergency, and the minister's powers in the former, see also *Freedom Front Plus v President of the Republic of South Africa,* 2020.
[12] *Freedom Front Plus v President of the Republic of South Africa,* 2020.

occurrences classified as disasters. The declaration of a state of disaster for Covid-19 was more than just a reactive measure; it was also preventative, the first time the Act has been used in this way.[13] A state of disaster and the subsequent regulations and provisions are only needed if the risk reduction measures have been unsuccessful.

Choosing to deal with the initial threat of Covid-19 as a 'disaster' appears to have been a good legislative instrument. The rationale and background to the Act seem to provide for a disaster such as a pandemic. The forward-thinking law and all-encompassing policy, however, had been poorly implemented until 2020 (van Niekerk, 2014; Vermaak & van Niekerk, 2004; Botha & van Niekerk; Botha, et al., 2011:24). This was due both to the placement of the various disaster management centres within government and to the fact that multisectoral disaster risk reduction had not been deemed sufficiently important.

The Green and White Papers on disaster management envisaged disaster management and the disaster management centre being placed within the Presidency, as is done in many other countries. Likewise, provincial disaster management centres would be in the premiers' offices and municipal ones under municipal managers. Being part of the Presidency would position the function well for obtaining decisive and mandated decisions when faced with hazards or disasters. Declaring a state of disaster is an extraordinary power; the Presidency, with its accounting line to the president, seems well placed to make this call. Instead, the National Disaster Management Centre was relegated to the Department of Cooperative Governance and Traditional Affairs (CoGTA), with little power to ensure that the Act would be implemented correctly.

Issues around the National Coronavirus Command Council added to the confusion, as discussed below (see also Chapter 2). Although government has the prerogative to establish such structures,[14] a constitutional democracy requires accountability, transparency, and good governance.[15] The Disaster Management Act, for that reason, gives the president the responsibility for establishing an Intergovernmental Committee on Disaster Management. The policy framework in section 1.1.1 gives further clarity on how this could operate. The idea is that, based on the principles of cooperative governance, the committee would bring together the different spheres of government and other needed role players to address the disaster. It would also report to cabinet to ensure that the country takes a uniform approach to disaster management. The Act requires this structure to meet four times a year, but it has reportedly only ever met once. Had this structure been operational, it would have negated the need for a different structure to be established.

Government should learn from this disaster that a failure to implement the Disaster Management Act continuously and adequately leads to an uncoordinated response to disasters. It should ensure that the structures provided for in the Act are fully functional.

[13] National states of disaster had been declared in 2011 for floods, and 2018 and 2020 for droughts.
[14] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2020. See also Chapter 3.2.
[15] The courts in various cases found the establishment of the National Coronavirus Command Council to be well within the powers of the president and for it to be a lawful structure. See *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2021, and Chapter 3.2.

The state of emergency option

In terms of section 37 of the Constitution, the president can declare a state of emergency if the nation is under threat, and the declaration is necessary to restore peace and order. More precisely, a state of emergency can be declared when '(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order' (Ngcukaitobi, 2020). Such a declaration enables the president to make regulations, but unlike with the Disaster Management Act, these must be tabled in parliament to allow members to give input or make recommendations, or even disapprove the regulations.

A state of emergency can be declared for only 21 days, but the National Assembly can extend it once (to a maximum of three months) with a 50% majority vote. Extending it for a second time requires a 60% majority vote, after a public debate in the assembly. The Constitution also allows courts to decide on the validity of the state of emergency. These provisions notwithstanding, no state of emergency has been declared since the advent of democracy in 1994.

During a state of emergency, most of the rights in the Bill of Rights can be derogated, but only to the extent that this is strictly necessary to deal with the emergency. Such derogation is only temporary, however, and the Constitution itself is not suspended.

In some ways, the constitutionality of a state of emergency is more secure than that of a state of disaster. The legal regime governing emergencies also provides for more input from and oversight by parliament. The Constitution stipulates the rights of the executive and ensures accountability by clearly providing for input from the legislature and oversight by the judiciary. Therefore, the process seems to have more democratic checks and balances. Because a state of emergency cannot be extended indefinitely, government must enact new legislation through a proper legislative process or issue regulations in terms of existing legislation to regulate the disaster and its aftermath.

Evaluation

Because a state of emergency is effectively intended for times when national security is at risk, it is not clear whether a health emergency would justify a state of emergency and if so, under what circumstances (Ngcukaitobi, 2020). The courts may well have deemed invalid an emergency declared in the face of the Covid-19 pandemic. This appears to have been the view of Minister of Justice and Correctional Services, Ronald Lamola, who stated that government would rather declare a state of disaster and would use a state of emergency only as a last resort (SAnews, 2020). Thus, while the constitutional framework of a state of emergency would be well suited to managing health emergencies, it would require creative interpretation of section 37(1)(b) to comply with the requirements for declaring a state of emergency, namely, to restore peace and order.[16]

[16] Confirmed in *Freedom Front Plus v President of the Republic of South Africa,* 2020, and interview with senior official, Department of Justice and Constitutional Development, 24 February.

The National Health Act and other legislative options

According to section 27(1) of the Disaster Management Act, a state of disaster may be declared if existing legislation is inadequate to ensure an effective response to a disaster. The key question, therefore, is whether existing legislation would not have been adequate to deal with the pandemic.

The regulations (DoH, 2017) on the surveillance and control of notifiable medical conditions, issued in terms of the National Health Act, provide for testing, quarantine, and isolation for notifiable diseases (regulation 14). This would be subject to the 'full respect for the dignity, confidentiality, human rights and fundamental freedoms of persons' (regulation 2(2)).

The effectiveness of a quarantine depends on whether it is properly implemented. It relies on people's cooperation and requires a careful balancing of the legal and ethical aspects of limiting people's freedom with the public interest (Botes & Thaldar, 2020). It has been noted that the regulations envision managing epidemics, but they are lacking as far as pandemics are concerned (Dhlomo, 2020).

The Act provides for a list of matters pertaining to health, including communicable diseases, and the minister has wide powers to issue regulations. It, therefore, would be suited to regulate quarantine and isolation during a pandemic. Legislation such as the South African Schools Act 84 of 1996, section 16(4), (RSA, 1996) could be used to govern the closure of schools, while the Liquor Act 59 of 2003, section 4, (RSA, 2004b) provides for the regulation of the manufacture and distribution of liquor.

Evaluation

The National Health Act 61 of 2003, section 21(2)(e), places the responsibility for coordinating health and medical services during 'national disasters' in the hands of the director-general of the health department (RSA, 2003). But it does not deal with any other aspects to be managed during a (state of) disaster and is simply not encompassing enough for managing a pandemic. The key challenge to using the National Health Act to manage the pandemic would have been imposing a lockdown, where *healthy* people would be forced to stay at home so that the state could prepare hospitals and slow down the spread of the virus.

Likewise, no other legislation would have been sufficient to call for a complete 'lockdown' of the country. One option could have been combining a state of emergency with other legislation. The first 21 days of hard lockdown (plus the two-week extension) could have been under a state of emergency, with the rest of the pandemic managed in terms of existing legislation, such as the National Health Act, the South African Schools Act, the Liquor Act, and the like.

SOUTH AFRICA'S CHOICE: THE STATE OF DISASTER

Ultimately, government chose the state of disaster route. The Minister of CoGTA declared a state of disaster on 15 March 2020 (CoGTA, 2020c). On the same day the pandemic was classified as a national disaster by the Head of the National Disaster Management Centre under section 23(6) of the Disaster

Management Act (CoGTA, 2020b). In terms of section 27(1), the following 'special circumstances' were cited as necessitating the declaration:

- The WHO declared Covid-19 a pandemic.
- The Head of the National Disaster Management Centre classified Covid-19 as a national disaster.
- It would augment existing measures taken by government.

The declaration of a state of disaster shifted the centre of power for managing the disaster to the executive, with the support of the structures created in terms of the Act, as discussed below.

Ministerial power under a state of disaster

From a rule of law perspective, section 27(2)(n) gives the minister wide-ranging powers (Box 3.1.2 overleaf).[17] However, these powers are constrained in various ways:

- They can be exercised 'only to the extent that this is necessary for the purpose of assisting and protecting the public; providing relief to the public; protecting property; preventing or combating disruption; or dealing with the destructive and other effects of the disaster' (section 27(3)).
- The declaration of a state of disaster lapses automatically after three months and needs to be renewed every month.
- The powers can be exercised only as long as urgent lawmaking is needed, and there is no other way to deal with the disaster. Thus, as soon as parliament and the national executive can resume their normal roles, they ought do so by promulgating legislation that specifically deals with the state's response, ending the need for the minister to exercise quasi-emergency powers in terms of the state of disaster.

The minister exercised this power by issuing regulations on 18 March (CoGTA, 2020e) and amending these on several occasions. These regulations were later effectively replaced by regulations on a risk-adjusted strategy for managing the pandemic, as discussed in more detail later on.

Structures for managing the disaster

The Disaster Management Act creates various structures to help manage the disaster and reduce the risk (Hunter, 2020). Section 4 of the Act establishes the Intergovernmental Committee on Disaster Management, comprising cabinet members involved in disaster management, the Members of the Executive Council (MECs) of each province, and municipal councils (section 4(1)(c)). This committee 'must give effect to the principles of cooperative government' (section 4(3)(a)); report to cabinet on the coordination of disaster management among the different spheres of government; and make recommendations to cabinet on various issues (section 4(3)(c)). Section 5(1)(a–c) creates the National Disaster Management Advisory Forum, comprising the head of the National Disaster Management

[17] This section has also been the subject of litigation on Covid-19, as per Chapter 3.2. See *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*, 2020; *British American Tobacco South Africa (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs*, 2020; *One South Africa Movement v President of the Republic of South Africa*, 2020.

Centre, senior officials of certain national departments, and certain senior representatives of provincial departments.

Box 3.1.2: Ministerial power under section 27(n)(2) of the DMA

Once a state of disaster has been declared, the CoGTA minister has the power to make regulations or issue directions on topics such as:

(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 …;
(d) the evacuation to temporary shelters of all or part of the population …;
(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
(f) the regulation of the movement of persons and goods …;
(g) the control and occupancy of premises …;
(h) the provision, control or use of temporary emergency accommodation;
(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages …;
(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, or to alleviate, contain and minimise the effects of the disaster; or
(o) steps to facilitate international assistance.

As noted, it is unclear what role these structures played and whether they were functioning properly, especially the Intergovernmental Committee on Disaster Management. Had this committee been functioning as it should have in terms of the Act, would establishing the National Coronavirus Command Council and its provincial and local counterparts still have been necessary?

The National Joint Operational and Intelligence Structure (NatJoints) seems to have been the first committee to advise on the regulations, because it was tracking the Covid-19 pandemic. This is curious, as the NatJoints coordinates security and law enforcement. While it has a role in managing a pandemic, the Disaster Management Act and the National Disaster Management Centre should play more prominent roles in disaster management. Security clusters have a different role during disasters than in normal times – a caring role, not a defending one. Again, an optimally functioning disaster management system under the Disaster Management Act, with structures (specifically the National Disaster Management Centre) situated in the Presidency, would negate the need for such a strong reliance on the security cluster.

The NatJoints seems to have played a significant role in making the regulations. Many departmental inputs went first to the NatJoints, which then reported to the National Coronavirus Command Council. Recommendations then went to cabinet for debate and endorsement, before being promulgated as regulations.[18] While the courts have upheld this process so far,[19] there is a danger of effectively leaving

[18] Interview with senior official, Department of Justice and Constitutional Development, 24 February.
[19] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2021.

the deliberation of the regulations to a security cluster (especially during a health pandemic that requires a different focus) instead of the structures created by the Disaster Management Act. The process is also not open and transparent, and it is unclear where accountability lies.

ASSESSING THE STATE'S RESPONSE

Against this backdrop, this section considers the principles and guidelines for maintaining the rule of law in a state's response to pandemics (Grogan & Weinberg, 2020) and evaluates the South African state's response against these principles. Given the nature of this report, such an evaluation cannot be complete. Rather, the chapter sets out the principles and provides examples of where they have been upheld or disregarded.

Ensure legal certainty and clarity in public communication

Regulations, rules and restrictions must be clear and certain in their meaning and consistent in their application. The justification for the rules should be communicated clearly. Any changes to existing rules must be announced in advance, giving those affected time to prepare.

In South Africa's response to the Covid-19 pandemic, there are a number of cases where *regulations were not clear*. The Minister of Small Business Development, for example, established two funds to assist small business –the Debt Finance Scheme and the Business Growth Resilience Fund (see also Chapter 6.5). The funds were not dispensed based on objective criteria, such as need. Rather, government used criteria such as race, gender, age, and disability to allocate funds. In some instances, no guidance was given how these criteria were to be assessed and weighed. This is an example of vagueness – as confirmed by the court, neither the applicants nor those administering the schemes had any guidance on how the criteria should be weighed.[20]

Examples of regulations and directions whose *justification was not clearly communicated* included the ban on supermarkets selling hot food,[21] the ban on selling open-toed shoes and other clothing (DTIC, 2020b), the three-hour exercise window under alert level 4,[22] and the ban on the sale of tobacco (Chapter 6.5).[23]

In most cases, the president *announced the regulations in advance*, but the details only followed later in the regulations and directions. This created confusion when, for example, the president announced that the tobacco ban would be lifted, only to be contradicted a few days later when the regulations were passed (eNCA, 2020).

[20] *Democratic Alliance v President of the Republic of South Africa*, 2020: par. 31: 'Such a broad phrase without any guidance as to what weight is to be given to these criteria simply cannot pass muster in our constitutional democracy. The ostensible criteria fall foul of basic principles of the rule of law that such the requirement that the exercise of a public power must be certain, even, if as obvious is the case in these circumstances, discretion to allocate the funds is permissible.'
[21] Business Insider SA, 2020; declared invalid in *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2021.
[22] Declared invalid in *Esau*, 2021, as per footnote 21.
[23] Declared unconstitutional in *British American Tobacco South Africa (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs*, 2020.

Ensure decision-making is transparent

The rule of law requires high levels of transparency about who makes decisions and on what basis. An effective response to Covid-19 requires public support and compliance, which is less likely when there are questions about the democratic legitimacy of decisions (e.g., rules are made by the executive rather than the legislature). This is even more complex when technical advisors provide guidance to government, sometimes in fields beyond their apparent expertise (Grogan & Weinberg, 2020:11). 'Knowing the rationale for decisions increases motivation to follow them' (WHO, 2020c:22). To this end, government needs to communicate the reasons behind decisions, acknowledge the limits of science and government, share the uncertainty, and take responsibility. Any unwillingness to share the reasons for actions allows misperceptions to flourish and conspiracy theories to gain traction. Fostering trust requires government to be open and honest with the public (Cormacain, 2020). Government also needs to be transparent about who the decision-making bodies are and who is consulted for advice, as well as the evidence on which its decisions are based. The right to information is vital to building public trust in decision-making (OHCHR, 2020). This applies equally to the rationales – scientific or otherwise – of regulatory steps, which should be easily accessible to the public. Even more transparency and clarity are needed when restrictions are severe (SPI-B, 2020).

Government has a mixed record in this regard and has faced several legal challenges:

- The role of the National Coronavirus Command Council in decision-making was challenged in court, as discussed in Chapter 3.2 and Box 3.1.3. The Command Council was set up as a committee of cabinet, and the courts found that it was a legitimate structure.[24] However, cabinet meetings are not open, and there is little insight into deliberation on the matters before it; this meant that decision-making on the council has not been transparent.
- In the *Fair-Trade Independent Tobacco Association* case,[25] the tobacco industry had to litigate to obtain the information on which the decision for the tobacco sales ban had been based (Chapters 3.2 and 6.5). The court applied the rationality test and found that even the scant evidence provided by the minister met that requirement. Arguably, especially when assessing executive decision-making that severely affects rights, the rule of law should not be reduced to a mere rationality test. Instead, a reasonableness test should also be used to ensure that the impact of the regulations is proportional.
- In several cases, government failed to convince the court (or parts of the general public) about the rationale for its regulations. In the *De Beer* case,[26] the court listed regulations that it found irrational, such as the restricted hours of exercise (par. 7.8), allowing people to run on the promenade but not the beach (par. 7.9), and the ban on hairdressers working while taxis were allowed to operate (par. 7.3). As discussed in Chapter 3.2, the Supreme Court of Appeal[27] declared

[24] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2020: par. 54.
[25] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*, 2020.
[26] *De Beer v Minister of Co-operative Governance and Traditional Affairs*, 2020.
[27] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2021.

regulation 16(2)(f) of the alert level 4 regulations invalid to the extent that only three forms of exercise were permitted, for a limited period, and in a specific location. It also declared invalid the prohibition on the over-the-counter sale of hot food.[28]

Box 3.1.3: The role of the National Coronavirus Command Council

Initial public statements on the role of the National Coronavirus Command Council in decision-making were confusing. In May 2020 the presidential spokesperson, Khusela Diko, explained that the Command Council is not a constitutional body, but rather a coordinating structure of cabinet that makes recommendations to cabinet on its Covid-19 response. The Command Council was subsequently expanded to include all members of cabinet, leading to the comment that 'it looks like the cabinet is making recommendations for the cabinet that the cabinet, acting as cabinet, may or may not adopt' (de Villiers, 2020).

Concerns were soon raised about the NatJoints and the National Command Council, as it was then known. Both these structures were deemed 'opaque and without a clear legal basis'; it was also hard to find information on how the National Command Council was constituted, its membership, and the source of its authority (Haffajee, 2020). In a media article in May, Pitjeng (2020) suggested that it 'consists of about 20 ministers; the representatives of the NatJoints; and the directors-general of the 20 departments'. The article also noted that the president said the function of this council is 'to coordinate' the country's response, but the Presidency later said the council 'leads' the response.

In June 2020 opposition parties asked for clarity on the role of the council and how it was constituted. The president responded to written questions explaining that the Command Council is 'a committee of Cabinet' that 'coordinates government's response to the coronavirus pandemic [and] makes recommendations to Cabinet on measures, [who] makes the final decisions' (Mkhwanazi, 2020).

It took further litigation to get more information on how the council was formed and its legal source of authority. The courts found that the Command Council was a legitimate structure constituted in terms of section 85(1) of the Constitution.[29] However, as discussed in Chapter 3.2, decision-making on the council was not particularly transparent.

An early sign of government adhering to the principle of transparency came on 13 April 2020, when Professor Abdool Karim, the chair of the Ministerial Advisory Committee on Covid-19, made a public presentation on the science behind the decision-making and efforts to curb the spread of the virus (Abdool Karim, 2020).

Another element of clarity and transparency is a plan that indicates what individuals and businesses may and may not do and when, which is updated as new information becomes available. A staged approach also indicates the circumstances under which the rules will change (Grogan & Weinberg, 2020:10). South Africa moved to a staged approach on 7 August 2020 (DoH, 2020a), with different alert levels (Table 3.1.1). Government explained that the alert levels would be adjusted on the advice of the Ministerial Advisory Committee to the Minister of Health. This would include which alert level should be declared nationally, provincially, in a metropolitan area, or a district, taking into account epidemiological trends, the health system's capacity to respond, and any other relevant factors, such as hospitalisation and mortality rates (see also Table 3.1.2 later on). In that sense, government provided more clarity on its plan.

[28] Table 1, Part E, items 1 and 2, read with regulation 28(3) of the alert level 4 regulations.
[29] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2020: par. 54.

Table 3.1.1: Alert levels during the national state of disaster

Alert level	Covid-19 spread	Health system readiness
1	Low	High
2	Moderate	High
3	Moderate	Moderate
4	Moderate to high	Low to moderate
5	High	Low

Source: DoH, 2020b

Act in compliance with international law and human rights norms

Any measures taken must be necessary, proportionate, and temporary, and all must respect human rights and the principle of legality. For emergency laws, the shift of legislative power to the executive should be only to the extent that is necessary and no more than proportional to the threat (Zwitter, 2012). Emergency powers should be invoked for no longer than is necessary to deal with the crisis. Underpinning these principles is another: states should respond to emergencies within the constraints of normally applicable power as far as possible, and rights should be limited only if there are good reasons for doing so.

In responding to Covid-19, these principles imply that new powers should be used and restrictions on existing rights imposed only to the extent necessary and justified by scientific and medical evidence. Actions taken merely to be 'seen to be doing something', for example, would be impermissible (Cormacain, 2020). This requires both a robust engagement with the scientific evidence and an open conversation to ensure accountability.

Linked to this, new laws or regulations can only be made if they are necessary for responding to the pandemic. In that sense, should any less draconian measures achieve the goal, those should be preferred (Scheinin, 2020). That said, South African law has not yet incorporated a reasonableness test (which includes proportionality) into the principle of legality; the latter only requires only a rational connection between the ends sought and the means deployed. A more robust understanding of the rule of law ought to require that the least invasive measure be taken (Cormacain, 2020).

All of this applies to the practice of democracy and the role of the legislature in a democracy: although an emergency justifies a state temporarily becoming authoritarian, the country remains a democracy and the legislature must act in accordance with that. This issue was litigated by the Helen Suzman Foundation, who argued that the legislature abdicated its duties during Covid-19.[30] The court disagreed, but the case raised pertinent questions about the role of parliament during a pandemic (Chapter 3.2).

[30] *Helen Suzman Foundation v The Speaker of the National Assembly*, 2020.

The rule of law requires states to guard against the arbitrary or discriminatory application of emergency measures and to avoid criminalising breaches of these measures. This issue was raised in the *Khosa* case,[31] where the court warned that 'it is apparent from newspaper reports that almost 20 000 persons on day 42 of the lock down have been made criminals. The consequences thereof have perhaps not been sensibly considered.'

Government must also ensure that vulnerable populations are not disproportionately affected, but South Africa again had a mixed record in this regard. Covid-19 measures significantly affected vulnerable groups, such as elderly people, prisoners, migrants, detainees, and refugees (Chapter 5.3). Job losses were particularly severe among part-time, low-income, and informal workers. The closure of schools and early childhood development centres had a disproportionate impact on mothers. Women and children were also more at risk of domestic violence during lockdown (Grogan & Weinberg, 2020:15; Chapter 5.4). Regulations restricted access to detention facilities, and visits to nursing homes were carefully regulated. Regulations that provided relief to refugees excluded asylum seekers.[32] The exclusion of informal traders from essential services also had a disproportionate effect on this vulnerable group (Wegerif, 2020; Chapter 6.2), as did the failure to include waste-pickers as 'essential service workers' (Krige, 2020).

Another important right that should be guarded in this time is access to the media. Government advice and guidance should be freely available in the media and should not be behind paywalls. Access to accurate and independent information should be encouraged. Journalists should be free to write about government's handling of the pandemic without fear of persecution. The same is true for doctors and scientists in engaging with the media. This is important to counter false or misleading information (Grogan & Weinberg, 2020:15; Zappulla, 2020). More controversial is the criminalisation of the spreading of misinformation (Labuschaigne, 2020; Grobler, 2020). While this is laudable in principle, care should be taken not to silence people who might hold different scientific opinions.

Lastly, after the pandemic, the state should not continue to use surveillance technologies deployed during the disaster. Digital tracing and the use of other data require the consent of individuals, the information should be kept anonymous, and its use should be subject to judicial or political oversight (Grogan & Weinberg, 2020:15). South Africa initially fared poorly in this regard, but the regulations were changed quickly to provide for digital contact tracing with the oversight of a retired Constitutional Court judge, as discussed in the section on information and privacy below.

Deliver rapid, coordinated, and collective action

Countries that responded sooner to the pandemic performed better than those that delayed their response (Harris et al., 2020). Plans must be coordinated at national, regional, and local level to ensure collective action that is adapted to local conditions. The precautionary principle is important here.[33]

[31] *Khosa v Minister of Defence and Military Veterans*, 2020.
[32] *Scalabrini Centre of Cape Town and Another v Minister of Social Development*, 2020. See also Chapter 3.2.
[33] *One South Africa Movement and Another v President of the Republic of South Africa,* 2020. See also Meßerschmidt, 2020.

The Green and White Paper on the Disaster Management Act recognise this. For this reason, the Act establishes various committees to facilitate communication and cooperation between different levels of government. However, as noted, these institutions and committees were not functioning optimally, if at all. This paved the way for the establishment of coronavirus command councils at different levels, with the NatJoints providing advice. Thus, South Africa's response complies with this requirement, but not because it was strictly in terms of the Disaster Management Act. Instead, the executive established what seems to be a structure that usurps some of the roles of the institutions established by the Act.

Ensure that emergency measures focus on the crisis only, not on other policy goals

Non-pharmaceutical interventions should aim only to address the crisis and not to further policy goals unrelated to the emergency.

While government generally adhered to this principle, it has been violated in some instances. This issue was raised in various court cases on section 27(2)(n) of the Disaster Management Act, which confers fairly wide powers on the minister to take 'other steps that may be necessary to prevent the escalation of the disaster'. The Western Cape High Court[34] interpreted the word 'necessary' narrowly – as 'strictly necessary'. In the *BATSA* case, it found the tobacco sales ban was not a 'strictly necessary' response to the pandemic (Chapter 6.5). In contrast, the Gauteng High Court[35] opted not to limit the powers of the minister unduly.

Two other cases[36] questioned whether the state could pursue its transformation policies by applying particular criteria to the allocation of resources during the disaster. In both cases the court found it acceptable, because addressing the pandemic by focusing on the indigent is in line with the Constitution. It is likewise in line with the developmental principles enshrined in the Disaster Management Act.

Contained in this is the requirement that *the measures must be non-discriminatory and protect vulnerable groups*, as noted. There were some concerns, however. The *Scalabrini* case[37] dealt with the exclusion of special permit holders and asylum seekers with valid permits from receiving the Covid-19 social relief of distress grant. Finding that the directions violated sections 9 (equality) and 10 (dignity) of the Constitution, the court ordered the Minister of Social Development to amend the directions to include these vulnerable groups (Chapters 3.2 and 5.3).

Another group of vulnerable people affected by the lockdown was so-called waste-pickers (Krige, 2020). Although they perform the valuable function of removing waste for recycling, they were not allowed to operate during the lockdown; this prohibition caused extreme hardship in this community (Samson, 2020). The Minister of CoGTA described their request to be deemed an essential service as

[34] *British American Tobacco South Africa (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs,* 2020.
[35] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*, 2020.
[36] *Solidarity obo Members v Minister of Small Business Development; Afriforum v Minister of Tourism,* 2020; *Democratic Alliance v President of the Republic of South Africa*, 2020.
[37] *Scalabrini Centre of Cape Town and Another v Minister of Social Development*, 2020. See also Chapter 3.2.

'opportunistic' because their work does not entail waste and refuse removal 'in the conventional sense' but is rather an economic activity involving the collection and sale of abandoned material. When waste-pickers were allowed to operate under alert level 4, they were required to have permits. This requirement was unnecessarily onerous and not related to the emergency itself; instead, it stemmed from a desire to formalise and regulate this activity. Security forces harassed some waste-pickers who operated without permits; some were arrested and detained, in certain cases for months without access to their medication (Venter, 2020).

Similarly, the Minister of Small Business Development issued a directive that informal traders could continue trading provided they had permits in terms of the Business Act 71 of 1991 (de Visser, 2020; LRC, 2020). Again, formalising traders under this legislation is not connected to managing the pandemic and its economic consequences. The issuing of permits to informal traders should not be enforced by emergency legislation.

Equally important are that the rules must be applied equally and consistently. Government and other state officials should lead by example, modelling good behaviour. If they fail in this regard, they must face the consequences to avoid creating the perception of double standards. In South Africa, some leaders did model the desired behaviour. When Health Minister Dr Zweli Mkhize and his wife tested positive for the virus in October 2020, he stated in a press release that they had alerted their contacts. They both quarantined at home (Mkhize, 2020). Other officials failed to adhere to the rules, but some faced consequences in line with this principle. For example:

- Early in the pandemic, the Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams, violated lockdown regulations by visiting a friend for lunch. This was prohibited at the time, and pictures of the lunch were widely circulated on social media (Gilili & Feltham, 2020). The minister apologised but was placed on special leave for two months, one of which was unpaid. The president publicly condemned her behaviour (The Presidency, 2020). The minister also paid an admission of guilt fine, which attracted a criminal record for violating lockdown regulations.
- Mpumalanga Premier Refilwe Mtsweni-Tsipane made headlines when she attended the funeral of the Minister in the Presidency, Jackson Mtembu. Police Minister Bheki Cele called for an investigation, with other ministers condemning her conduct. The premier admitted guilt, said she 'should have known better as a public figure', and paid an admission of guilt fine (Bhengu, 2021).

Protect oversight mechanisms

Legislative oversight

Parliament delegates some of its powers to the executive (Box 3.1.4) but retains the responsibility for overseeing how these powers are exercised. In the pandemic, parliament delegated the power to make regulations to the minister responsible for the Disaster Management Act. As noted, the Act

confers wide-ranging powers on the minister to make intrusive laws.[38] This arrangement did not allow for a deliberative process, as the Constitution requires.[39] This does not mean that the minister's exercise of power was necessarily unlawful; rather, compliance with the principle of the rule of law requires that:

- The minister acts only in terms of the powers conferred and not outside their scope.
- The provisions of the Disaster Management Act are lawful and constitutional, in that the powers are not too wide or vague, or vest too much power in the executive.[40]

Box 3.1.4: Original and delegated legislation

Section 43 of the Constitution vests legislative authority in parliament, the provincial legislatures, and municipal councils. All these bodies are democratically elected to pass legislation based on careful and open deliberation; such legislation is 'original'. Delegated legislation refers mostly to regulations (and directives, insofar as these are classified as quasi-legislation)[41] that regulate in more detail the issues outlined in the legislation, for reasons that include the following:

- The regulations may deal with very specialised and/or technical matters.
- The original legislative bodies are not in continuous session, and do not have the time to pass all the legislation.
- Powers are needed to cope with emergencies.
- The regulations might deal with peculiar local matters.

Delegated legislation is a form of delegation of power from the legislative authority to the executive. Not all matters need to be dealt with in elected, deliberative legislatures; in some circumstances the executive might well be better placed to deal with specific matters. It is important, however, for the legislative authority to set the parameters for the exercise of this power within the empowering, original legislation. Delegated legislation must be authorised by original legislation – it must be enacted in terms of the original legislation that authorises it. Delegated legislation exists and has authority because the original legislation empowers it. That said, once the power has been delegated, it is important to ensure that the relevant functionary acts within these delegated powers.

Parliament suspended its activities in March 2020, with the last sitting of the National Assembly on 18 March and that of the National Council of Provinces the next day. The Chief Whips Forum announced on 14 April 2020 that the Speaker of the National Assembly, Ms Thandi Modise, had asked certain parliamentary committees driving the Covid-19 response to intensify their oversight activities during the lockdown. New rules were framed to enable virtual meetings to be held (Parliament, 2020). On 17 April 2020, parliament's presiding officers announced the resumption of parliamentary business (Mputing, 2020). New rules were framed on the sitting of the two Houses of Parliament.[42]

In the *Helen Suzman Foundation* case[43] (Chapter 3.2), the foundation argued that the legislature bears primary responsibility for lawmaking, even during disasters (as per section 37 of the Constitution, which governs states of emergency). As noted, it would have been challenging to meet the threshold

[38] *De Beer v Minister of Co-operative Governance and Traditional Affairs*, 2020.
[39] *Doctors for Life International v Speaker of the National Assembly*, 2006: par. 110–111.
[40] *Freedom Front Plus v President of the Republic of South Africa*, 2020.
[41] *Ahmed and Others v Minister of Home Affairs*, 2018.
[42] This seems consistent with the Constitutional Court reasoning in 1995. *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*, 1995.
[43] *Helen Suzman Foundation v The Speaker of the National Assembly*, 2020.

requirement for a state of emergency during a health disaster; thus, government probably has to rely on the Disaster Management Act in health emergencies. It is, therefore, advisable that oversight mechanisms, like those in section 37 of the Constitution, be added to the exercise of powers of the minister in terms of this Act.

Note that the minister's powers in terms of the Disaster Management Act are vague because the Act provides for different kinds of disasters. The *Helen Suzman Foundation* argued[44] that once the immediate threat of the pandemic has been addressed, legislation that deals with the specific challenges of Covid-19 should be passed. It similarly argued that section 27(1) only allows the declaration of a state of disaster in exceptional circumstances – namely, when there is no ordinary way of dealing with a disaster. Although the court did not agree, parliament would do well to assess its role as lawmaker in the pandemic.

There is a strong argument that the legislature should continue with its ordinary functions as far as possible; it also needs to scrutinise the executive's application of its delegated powers to help ensure that legislative measures are in line with the rule of law. Legislation could and should provide for this oversight function, and the South African parliament can justifiably be criticised in this regard.

Judicial oversight

The other important check on executive power lies with the courts, whose function remains critical to the rule of law. They must scrutinise the most serious limitations on human rights, and their process must facilitate quick decision-making (CoE, 2020:5). In times of emergency, government makes decisions rapidly, and mistakes are inevitable. More so even than in 'normal' times, such decisions must be reviewable by the courts, and individuals must be able to challenge these decisions (Cormacain, 2020).

Although the courts did operate in the pandemic, access was initially restricted. Two days after the declaration of the state of disaster, Chief Justice Mogoeng issued directives to curb the spread of Covid-19 in the courts. The regulations restricted attendance at court hearings and imposed various safety measures (Brickhill, 2020). The Chief Justice later clarified that the courts would remain partially operational (Mncube, 2020). To this end, the Minister of Justice and the Heads of Courts issued extensive regulations and directives to govern court proceedings. On 17 April 2020 the Chief Justice issued new directives, asking for the postponement of most criminal and civil matters, and restricting the courts to 'urgent matters and urgent applications arising from the activities associated with disaster management'. Power was delegated to the Heads of Court to issue their own directions.

These directives limited the right of access to courts fairly dramatically, along with the right to a fair criminal trial (section 35 of the Constitution). It affected the requirements that (especially criminal) proceedings be concluded without unreasonable delay and that proceedings be held in open court

[44] *Helen Suzman Foundation v The Speaker of the National Assembly*, 2020.

(most were now held online). This was not a problem at the beginning of the pandemic but may become one later on (Brickhill, 2020).

Also, in some cases, human rights organisations had difficulty monitoring the enforcement of the regulations. And where cases did go to court, there was heightened deference to executive decisions, which deserves more scrutiny and research.[45]

Another concern was that Legal Aid South Africa, which represents indigent persons in some cases, closed its offices on 26 March 2020. Non-governmental, public interest organisations providing similar services did not close their offices. Still, only the physical offices were closed, and Legal Aid set up a joint national hotline with non-governmental organisations to assist people whose rights were violated during the lockdown.

Independent oversight

As for the application of emergency measures, their enforcement, especially by the police and military, must be subject to proper oversight. The use of force should be monitored, and accountability ensured for any disproportionate use thereof. Here, an independent oversight body could be an important check; indeed, the court ordered such mechanisms in the *Khosa* case.[46]

Engage with external (scientific) expertise and stakeholders

As a novel virus, Covid-19 brought with it an unpredictability. Initially there was little evidence to steer decision-making; the virus mutated over time (Makou, 2021), and the effectiveness of the various vaccinations was not clear. *Governments had to make short-term decisions that could have long-term effects and needed the flexibility to change when more data became available. There would simply not be a perfect response to the pandemic, although some would be better than others. Along with the need for immediate emergency responses came the need for ongoing review to enable governments to assess the latest information and make any necessary changes. They also had to engage with the international experience and adopt strategies to improve the quality of domestic laws.*

Even though the WHO recommendations are not binding, they are expected to steer countries' legal response to the virus. The organisation draws on a variety of experts; South Africa welcomed WHO experts in August to support its Covid-19 response management. The press release stated that the 'team will work closely with the Department of Health at a national level and with senior staff of Provincial Departments of Health' (Mahlehla, 2020).

Drawing on external expertise is also essential to ensure adherence to the rules. A WHO study explored ways of addressing non-compliance with Covid rules (especially around 'pandemic fatigue'[47])

[45] See for instance *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*, 2020 and *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2020.
[46] *Khosa v Minister of Defence and Military Veterans*, 2020.
[47] The WHO (2020c:7) describes pandemic fatigue as 'demotivation to follow recommended protective behaviours, emerging gradually over time and affected by a number of emotions, experiences and perceptions'. Initially people tap into

and made specific policy recommendations (WHO, 2020c). Adherence to the measures is higher where members of the public participate in making them. By engaging target groups, governments help ensure that the rules are responsive to their needs (Moloi, 2021). This taps into people's need to feel autonomous and in control of their own lives (WHO, 2020c). Civil society groups have an essential role to play here. The Disaster Management Act (section 5) provides for a National Disaster Management Advisory Forum involving various role players. Again, it not sure what role this forum played during the Covid-19 pandemic.

International experience can provide information on the effectiveness of both pharmaceutical and non-pharmaceutical interventions. It can also inform policy and legislation, not only at the start of the pandemic but also during the subsequent recovery. South Africa's regulations for the hard lockdown appeared to follow the European pattern. In general, it seems that on the health side at least, South Africa did draw on experience from other countries in handling the pandemic (Umraw, 2020).

The initial decision-making on the Covid-19 pandemic primarily involved politicians, virologists, and epidemiologists, but more inclusive, multidisciplinary decision-making is needed (Rajan et al., 2020). Covid-19 is not simply a health problem; it is also a societal one. Civil society, non-governmental organisations, and academia play a vital role in asking questions in response to policy and other developments. When government responds to this external engagement, especially criticism, with strong, evidence-based research and proposals, this both creates better policy and law and fosters transparency and accountability. South Africa's response is lacking in this regard. Early on, the presentation by the chairperson of the Ministerial Advisory Committee helped clarify the state's approach to the pandemic (Abdool Karim, 2020). However, government's tone of engagement is cause for concern.

At the beginning of the pandemic, an attorney acting on behalf of two advocates raised concerns about the National Coronavirus Command Council's constitutionality and statutory authority (Jordaan, 2020b). Little information about the council was available in the public sphere. The lawyers sought clarification from the president, and the Presidency, but their letter was met with a hostile reply and a condescending tone (Haffajee, 2020). The advocates were accused of insisting 'on putting in jeopardy all measures taken to save South African lives and ensure security of public health', which is 'not commensurate' with their 'positions as officers of the court'. Government's response did, however, set out the position of the Presidency and the justification for the National Coronavirus Command Council.

The concern here is that information was often only forthcoming when litigation was threatened; even then, government did not always provide coherent, well-reasoned responses. The WHO (2020c) stressed that when questioned, governments must avoid judgment and blame and reply with empathy and understanding. Ideally, government should have recognised that:

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their short-term survival strategies to deal with the new threat, but in situations of prolonged stress, fatigue and demotivation set in, and a different way of coping is required.

- The situation is new.
- There are fears of executive overreach.
- People want to be sure the response and the creation of the National Coronavirus Command Council are indeed within constitutional bounds.

In the *Skole-Ondersteuning* case,[48] the Minister of Social Development was reprimanded for how she and her legal team approached the litigation. The court remarked that 'in constitutional litigation, which after all concerns the rule of law and the principle of legality, the state should be held to a higher standard than an ordinary [litigant]. A court can expect compliance with the relevant Rules of Court, as well as openness, transparency, accountability …' The court also noted that the minister appeared to think laws could be made by letters indicating future intentions.

Protect freedom of expression

During a pandemic, the public interest in receiving accurate information is more acute than ever. Government has a legitimate interest in countering fake news, provided this is done in line with the values and rights in the Constitution. It can take measures in this regard, including:

- Appointing only certain official spokespersons on the pandemic
- Proactively communicating directly and regularly with the public, using all available media
- Reacting to fake news by communicating directly and regularly with the public.

Is government always right, whether factually correct or taking the best course of action? The answer is clearly no. However, fallibility should never preclude government from fulfilling its mandate to govern or from seeking to govern in a rational, scientifically informed way. The best way to ensure this is through transparency and freedom of expression. This means that while government can – and should – be an active disseminator of scientifically accountable and accurate information, it should never position itself as the only disseminator of information.

Scientists have special knowledge and skills to investigate, analyse, and find solutions for an epidemic. Yet, they are only human, and humility and a lack of hubris should be hallmarks of scientific activity. Still, the influential position that scientists occupy in society places a special *ethical responsibility* on them. This entails, inter alia, integrity and courage to speak up in pursuit of the rational decision-making to which democracy aspires, even at the risk of offending or upsetting others. From a legal perspective, freedom of scientific research is recognised as a special instance of freedom of expression. Freedom of scientific research (scientists' special right) includes freedom of thought, freedom to disseminate information, and freedom to conduct physical activities entailed by scientific research (e.g., performing experiments). Freedom of scientific research serves various purposes at the core of the constitutional value system: promoting individual autonomy, facilitating the search for truth, and supporting democracy.

[48] *Skole-Ondersteuningsentrum NPC v Minister of Social Development*, 2020.

Government crackdown on dissent is not the only enemy of freedom of expression. In the context of a pandemic, when there is naturally a feeling of solidarity and unity of purpose among government officials and scientists to fight the spread of the pandemic, self-censorship by scientists might be an even greater enemy of freedom of expression. In this light, the fact that transparency and freedom of scientific research are part of the Constitution is insufficient; for these values to truly be alive in practice – especially in times of crisis – they must *permeate and define South African culture*.

How strongly does the ethos of freedom permeate contemporary scientific culture? Is the South African science community prone to self-censorship? This is a complex question, but there are possible pointers in this regard:

- *Legislation:* Although Acts of Parliament typically recite the constitutional rights they intend to promote, not a single Act (apart from the Constitution) refers to 'freedom of scientific research'.
- *Ethics guidelines:* The country's main ethical guide for health research, *Ethics in health research: principles, processes and structures* (DoH, 2015), does not mention the constitutional right to freedom of scientific research. It lists 'academic freedom' (which is not the same) in its definition section but fails to mention academic freedom in the text itself. The absence of academic freedom and freedom of scientific research from the main text of the ethics guidelines is not the only problem. The definition given for 'academic freedom' refers to it as a 'collective freedom',[49] whereas the Constitution clearly envisions academic freedom as an individual right. This is cause for concern, as the ethics guidelines can be read as implying that an individual academic can only exercise academic freedom collectively with other academics; this would effectively silence individual dissent.
- *Self-censorship:* A 2018 Academy of Science of South Africa (ASSAf) report on the genetics and genomics regulatory environment makes the following recommendation (ASSAf, 2018:12&66): 'Researchers should not report their research findings in ways that may be, or may be perceived to be, harmful or offensive.' The problem with this recommendation, especially where it is not well explained or limited to specific contexts (e.g., race and gender), is that it promotes a general culture of self-censorship whenever there may be an interested party (e.g., government officials) who may take offence.

Promoting a culture of self-censorship is clearly contrary to the values of the Constitution. All the rights in the Constitution are interlinked and interdependent. For instance, the right to freedom of scientific research is linked to the right to life, because scientifically informed decision-making during a pandemic saves lives. The opposite is also true: a culture of self-censorship among scientists can contribute to a loss of life. This leads to a possible (but perhaps outdated) counterpointer to the three examples listed above, namely, the history around the Mbeki government's denial of the link between HIV and AIDS. Had South African scientists with integrity and courage not spoken up in pursuit of

[49] The definition of 'academic freedom' reads as follows: 'Academic freedom – the collective freedom of researchers, including students, to conduct research and to disseminate ideas or findings without religious, political or institutional restrictions; it includes freedom of inquiry and freedom to challenge conventional thought. Academic freedom does not mean freedom to ignore ethical issues.'

rational, science-based decision-making – even if the facts *offended* political sensibilities – how many more lives would have been lost? The activism surrounding access to HIV treatments should serve as a powerful example to inspire new generations of scientists. Box 3.1.5 discusses a particular example of freedom of scientific expression during the pandemic.

Box 3.1.5: Freedom of expression during Covid-19

Professor Glenda Gray, the current president of the South African Medical Research Council (SAMRC), is a scientist who has done pioneering research on mother-to-child transmission of HIV. She is also one of the 51 scientists serving on the Covid-19 Ministerial Advisory Committee. Gray became an outspoken critic of government's handling of the pandemic, resulting in a sharp written rebuttal from the Minister of Health (Mkhize, 2020). However, the situation escalated beyond a spirited debate when, a day after the minister released his rebuttal, the Acting Director-General of the Department of Health sent a letter to the chairperson of the SAMRC Board demanding that Gray's conduct be investigated because, as he claimed, her statements caused 'harm' to government's response to Covid-19 (Pillay, 2020). The chairperson apologised for Gray's comments and undertook to institute an investigation into the 'damage' the comments may have caused. Furthermore, the Board instructed Gray not to talk to the media until all issues relating to the comments had been resolved (Herman, 2020).

These events received much publicity in the popular media. Soon, supporting Gray against this overreach became a national *cause célèbre*. Academics from around the country took up the banner for scientists' freedom of expression (Dell, 2020). Soon the SAMRC Board released a statement indicating that Gray had not transgressed any of its policies and that it would not be investigating further (Dell, 2020). ASSAf also came out in support of Gray, noting the importance of scientists' freedom of expression (ASSAf, 2020):

> As the Academy of Science of South Africa, we believe that freedom of scientific enquiry is fundamental to the health of our constitutional democracy. Academics and researchers need the space to undertake independent research in an environment that is free from fear, intimidation and political interference. To threaten researchers and to muzzle their voice would have a chilling effect on creativity, innovation and experimentation.

These words ought to inform and define scientific culture; in these values lie the next generations' hope of dealing with future disasters.

Reform the law based on best practices locally and abroad

As the crisis abates, it provides an opportunity for states and international bodies to examine and review the effect the legal response had on the constitutional and legal framework. This will require a review of emergency legislation, health legislation relating to pandemics, and actions taken by all the actors during the pandemic. This is exactly what this report seeks to do, and government should be commended for inviting such a review.

HUMAN RIGHTS AND LEGAL IMPLICATIONS

The South African government already faced significant economic, infrastructure and development challenges before the pandemic. These were complicated by a general lack of trust in government among businesses and civil society, as demonstrated by numerous public protests. The lack of trust stemmed from perceptions of corruption, incompetence, indifference, and the like. Despite these challenges, government acted swiftly and decisively in the face of the pandemic and enjoyed initial support for the lockdown regulations. However, as the lockdown continued, the public became increasingly polarised along socio-economic and political lines, in part because government appeared

to lack understanding of how poor people access food, housing, transport, and employment. The most prominent effects of the pandemic on human rights, and government response to these, are briefly discussed below. Detailed discussions of the sector-specific effects are contained in later chapters.

HEALTH

Before the pandemic, South Africa's healthcare services were systematically underperforming (Chapter 5.1), for reasons such as poor management of health facilities, the inadequate maintenance of health infrastructure, 37 000 vacant posts in the system, a lack of equipment, drug stock-outs, and severely strained emergency medical services. Social inequalities, deepened by the Covid-19 crisis, resulted in widely differing levels of health responsiveness – the areas serving the most vulnerable communities had the weakest systems and the least capacity to secure personnel and equipment.

Under the lockdown regulations, South Africans were required to stay home from 27 March to 16 April 2020. They could only leave to obtain food, medicine, fuel or other essential services. Also, the sale of tobacco and alcohol was banned to reduce the number of trauma visits to emergency rooms. As noted, the evidence supporting these bans has been questioned (Chapters 6.2 and 6.5).

On 1 April 2020 government deployed 67 mobile testing units and 10 000 community health workers to conduct community screening for Covid-19 and to increase testing six-fold to 30 000 tests per day by the end of that month. In addition, the Department of Science and Innovation, the SAMRC and the Technology Innovation Agency awarded R18 million to local companies, organisations, and researchers to ramp up the production of polymerase chain reaction (PCR) reagents and point-of-care test kits. Fearing that Covid-19 cases could overwhelm local hospitals at the peak of the pandemic, numerous field hospitals (including at Nasrec) were hastily erected to manage patients with moderate to severe Covid-19.

Several key concerns soon emerged:

- *Degraded management of non-Covid-19 health challenges:* Rates of HIV and tuberculosis testing fell significantly during lockdown, as did access to primary healthcare – both because facilities were not operating and because transport was limited. In this regard, the health minister announced in October 2020 that the department had formulated an aggressive catch-up strategy (Kamnqa, 2020). Until that is achieved, however, experts advised that increasing self-administered treatment, improving treatment literacy, using shorter regimens, and scaling up counselling, screening, and testing would be crucial for the proper management of tuberculosis and HIV.
- *Poor quality and limited availability of personal protective equipment (PPE) for healthcare workers:* Only 28% of protective equipment suppliers were licensed by the South African Health Products Regulatory Authority (SAHPRA), the country's quality assurer for medical devices, PPE, and related products. Extensive and largely unchecked corruption in the healthcare sector added insult to injury in this regard. To help mitigate this problem, the president announced a new initiative across the African continent – the Africa Medical Supplies Portal would be a continental online portal that would help African countries access critical medical supplies (Chapter 7).

- *Slow turnaround times for community testing and screening:* Long delays reduced the efficacy of tests and encouraged people to abandon self-isolation. Despite the early implementation of a national lockdown and other non-pharmacological interventions, the virus continued to spread in densely populated communities; this may have contributed to the observed decline in the epidemic curve through 'herd immunity'. This finding, if replicated, is of critical importance for informing policy and mitigating against further waves of infection.

The WHO (2020b) Covid-19 Strategy Update document aimed to guide countries' public health response to Covid-19. In line with these guidelines and the global strategic objectives of mobilisation, control, suppression, reduction, and development, CoGTA (2020e) proposed a National Action Plan for South Africa in the form of a risk-adjusted health prevention strategy. This involves a formalised five-level response framework to govern epidemics (Table 3.1.2). The lowest level would be activated when an epidemic risk has been identified, which would trigger a set of prepared responses. A lockdown would only be considered as a last resort.

Table 3.1.2: Proposed risk-adjusted health prevention strategy

Level	Trigger	Action
0	No threats	Identify quarantine sites, maintain contact-tracing machinery, and prepare a legislative framework for infectious disease outbreaks.
1	Highly infectious disease with significant morbidity and mortality identified	Implement a central response platform for government, develop tests, identify possible shortages in testing equipment, prepare treatment facilities, maintain basic border surveillance, identify high-risk transport routes, implement mandatory testing and quarantining for people from high-risk zones, establish testing machinery for persons presenting with symptoms, and coordinate with the private health sector.
2	Imported infections identified, together with first community-based infections	Begin border closures, together with mandatory, across-the-board testing and quarantining of travellers entering the country; mandate the wearing of masks; implement health protocols in workplaces, at transport hubs and on bulk transport; temporarily close schools and universities; prohibit mass meetings; and expand the testing framework to detect community-based infections.
3	Significant increase in community-based infections, but below 100	Further attend to mass testing and contact tracing, and quarantine suspected cases and those identified as positive.
4	Community-based infections increase exponentially	Begin general lockdowns in areas with identified disease clusters, and close non-essential businesses and bulk transport systems.

Source: Adapted from van den Heever, 2020

Vaccines are a vital tool in the fight against the Covid-19 pandemic. Since 2020 the South African government, the national Department of Health and the Ministerial Advisory Committee have held discussions with potential vaccine suppliers, including Pfizer, AstraZeneca, Johnson & Johnson, Moderna, Cipla, and vaccine producers in China and Russia. For its part, the COVAX facility focused mainly on vaccines that are suitable for developing nations with limited (or no) ultracold storage facilities. The Biovac Institute, a South African public-private partnership, started negotiations for the

possible local manufacture of up to 30 million doses of Covid-19 vaccines per year, depending on the required technology (Chapter 2).

South Africa has developed an incremental roll-out plan for vaccines (Figure 3.1.1), and government identified six criteria for the selection of a vaccine:

- Availability
- Safety, efficacy and quality as determined by SAHPRA
- Ease of use and number of doses required
- Stability during storage and distribution
- Supply and sustainability
- Costs.

Figure 3.1.1: Vaccine roll-out plan

Source: DoH, 2021

The Pfizer and AstraZeneca vaccines became available first. However, an analysis of the B.1.351 coronavirus variant first identified in South Africa in mid-November 2020 found that that the two-dose regimen of the ChAdOx1 nCoV-19 (AstraZeneca) vaccine provided minimal protection against mild to moderate Covid-19 infection, although it had a high efficacy against the original coronavirus non-B.1.351 variants in South Africa (Wits University, 2021). This meant that the AstraZeneca vaccines that arrived in South Africa early in February 2021 could not be used.

Government urgently had to procure the Johnson & Johnson vaccine, which protects against severe Covid-19, including the South African variants. It soon secured 500 000 doses of this single dose vaccine for use in its *Sisonke* ('Together') programme, a clinical trial. As the vaccine had not yet been registered as a commercial medicine, Johnson & Johnson had a so-called rolling application with SAHPRA to allow the long-term effects of its vaccine to be assessed. Because its safety and efficacy have already been proven, the vaccine could be rolled out under the Sisonke Open Label Programme. The programme is an 'open label, single-arm Phase 3b vaccine implementation study of the

investigational single-dose Janssen Covid-19 vaccine candidate [that] aims to monitor the effectiveness of the investigational single-dose Janssen vaccine candidate at preventing severe Covid-19, hospitalisations and deaths among healthcare workers as compared to the general unvaccinated population in South Africa'. It is co-hosted by the SAMRC and the Department of Health.

According to Professor Glenda Gray, president of the SAMRC and principal investigator of the Ensemble study (Cullinan, 2021) in South Africa, SAHPRA was only likely to decide on an emergency use licence for the vaccine in late March or April 2021.[50] The Sisonke programme allowed government to make this vaccine immediately available to healthcare workers, while waiting for SAHPRA to process its licence. The focus was on frontline healthcare workers because they are three to four times more likely than the general population to contract Covid-19. Before the start of the Sisonke programme, about 40 000 health workers had contracted Covid-19, 6473 had been hospitalised, and 663 had died. Under the programme, in March 2021 an initial 80 000 doses of the Johnson & Johnson vaccine were administered to healthcare workers.

INFORMATION AND PRIVACY

Shortly after the start of the lockdown in March 2020, an urgent application was brought directly to the Constitutional Court on the grounds that the country was not facing an emergency situation and that Covid-19 was not harmful to Africans; Covid-19, it was claimed, was a 'self-healing disease for Africans' (Jordaan, 2020a). The court dismissed the application, finding it to be premised on misinterpreted information obtained from both credible and dubious sources. The case demonstrated that scientific falsehoods were being peddled and that such information was or could be misused for misguided political and ideological ends.

In an effort to stop the circulation of fake news about Covid-19, government criminalised 'publishing any statement through any medium including social media with the intention to deceive any other person about measures by the government to address Covid-19'. Although some viewed this approach as an overzealous limitation of the freedom of expression, especially after a number of people were arrested, government received support when a man who distributed a fake 'contaminated Covid-19 test kits' video on social media was arrested and charged (Grobler, 2020). Actions such as these were publicly welcomed, as the spread of this fake information created difficulties for health workers of the Gauteng Department of Health who tried to introduce community testing initiatives.

Balancing the right to privacy with other constitutional rights while engaged in a vast programme of tracking and tracing is not easy. The Electronic Communications, Postal and Broadcasting Directions (DTPS, 2020) allowed electronic communication network service and electronic communication service licensees (the Internet and digital sector in general) to track and trace people who were infected or might have been in direct contact with infected persons, via their private cell phones. This

[50] The Johnson & Johnson vaccine has since been registered by SAHPRA (SAnews, 2021).

directive triggered concerns about the potential for these capabilities to be abused and South Africa gradually becoming a surveillance state.

With the Protection of Personal Information Act not yet fully enacted when lockdown was announced, the Information Regulator (South Africa) (2020) issued a guidance note on the processing of personal information in the management of the pandemic. The regulator emphasised that regulations issued in terms of the Disaster Management Act should comply with the provisions of the Protection of Personal Information Act to ensure the right to privacy is respected. Justice Kate O'Regan, a retired Constitutional Court judge, was appointed to oversee the electronic contact tracing database to ensure the protection of people's privacy and information.

FINANCIAL AND ECONOMIC IMPLICATIONS

Social distancing regulations, together with limitations imposed on the movement of people and goods by the closure of national and international borders, led to extraordinary economic difficulties in every country. However, uncertainty around the trajectory and duration of the pandemic made it very difficult for policymakers to design appropriate interventions.

South Africa's economy had already been in a deepening recession before the pandemic and rising levels of debt meant that government had very limited fiscal space. The country's economic response under these conditions is discussed in Chapter 6.1. In general, though, the response can be divided into three phases, as set out in Table 3.1.3.

Table 3.1.3: Phases of the economic response

Phase	Focus	Measures	Examples
From mid-March	National disaster	Relief measures to mitigate the immediate economic effects on businesses, communities and individuals	Tax relief, the release of disaster relief funds, emergency procurement, wage support through the Unemployment Insurance Fund, and funding for small businesses
From 21 April 2020	Stabilise economy	Social and economic support package of R500 billion (10% of gross domestic product)	• Redirect resources to fund the health response. • Provide direct support to households and individuals to alleviate hunger and social distress. • Assist companies in distress and seek to protect jobs.
Emerging from the pandemic	Drive economic recovery	Stimulate demand and supply through interventions for inclusive growth	Substantial infrastructure build programme, the implementation of economic reforms, and the like

Given the protracted nature of the pandemic, it is critical to examine the viability of a risk-based strategy that combines a health-supportive approach with maintaining a viable economy. The trade-offs are complex and cannot be reduced to a simple choice between saving lives and sustaining economic activity.

Regulations issued in terms of the Disaster Management Act (section 27) allocated powers to the Minister of Trade and Industry to protect consumers from excessive and unreasonable pricing of goods and services and to maintain the security and availability of such goods and services during the national state of disaster (DTIC, 2020a). These powers must be exercised effectively to ensure the availability and affordability of food and other critical household goods (e.g., soap and sanitary products), in addition to the social relief provided by distress grants and food packages in terms of the 2004 Social Assistance Act.

GENDER-BASED VIOLENCE

Many worried that potential victims of gender-based violence would be stuck indoors with their abusers during the lockdown; these concerns were not unwarranted. Government's gender-based violence and femicide command centre alone recorded more than 120 000 cases in the first three weeks of lockdown, whereas a single call centre in Tshwane received between 500 and 1000 calls a day. Trends in gender-based violence in different phases of the pandemic are discussed in more detail in Chapter 5.4.

Government had been engaged in a range of policy development processes to help reduce the very high levels of gender-based violence in the country. These efforts were disrupted by Covid-19 to the extent that most of the planned interventions and structures were not yet fully functional. However, government proposed amendments to critical pieces of legislation to close loopholes and made R1,6 billion available for the Emergency Response Action Plan to combat gender-based violence and femicide. For example:

- The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* now creates an offence of sexual intimidation, extends the ambit of the offence of incest, and extends the reporting duty of persons who suspect that a sexual offence has been committed against a child.
- The *Criminal and Related Matters Amendment Bill* tightens the granting of bail to perpetrators of gender-based violence and femicide and expands the offences for which minimum sentences must be imposed.
- These and other proposed amendments also oblige the departments of *Social Development, Basic Education, Higher Education, and Health* to provide certain services to survivors where needed and to refer them for sheltering and medical care.

Unfortunately, the reality remains that many survivors of gender-based violence have lost faith in the criminal justice system, have difficulty obtaining protection orders, suffer because of lax bail conditions for suspects, find that the police do not take domestic violence complaints seriously, and are concerned about light sentences given to perpetrators.

EDUCATION

Covid-19 exposed a deep divide in digital access and literacy (Chapter 5.2). In the lockdown, the education sector had to stop all face-to-face activities and find novel ways to continue educating South

Africa's learners and students. This proved impossible, however, because only 37% of households have consistent access to the Internet through cell phones or computers. Although private schools could quickly move teaching online, this was not the case for most public schools; their learners often had to rely only on radio or television broadcasts or on textbooks and worksheets distributed to them. Most historically disadvantaged schools do not have ready *access to resources* such as textbooks.

Parental supervision was another concern. Parents in 'advantaged' positions and contexts may be able to work from home and have some of the required academic skills to oversee their children's studies. However, the majority of the workforce is unskilled; most of these parents are unlikely to have either the skills or the time to oversee their children, and many are absent from home for work purposes.

Another obstacle to extending e-learning platforms to disadvantaged schools is the *cost of data* and *curriculum content*. Mobile communication providers can greatly assist by granting free access to e-learning platforms (e.g., Google Classrooms) to help these learners benefit from digital classrooms. Also, schools that already have the necessary curriculum content can share such content to assist other schools.

In the thick of a recession, lockdown and pandemic, government did not necessarily prioritise *early childhood development*. With childcare and early education facilities closed, children were deprived of social and cognitive stimulation outside their homes. Since the country's educational outcomes were already very poor in comparison to its peers, the impact of the epidemic on early learning will likely have adverse educational consequences for some time. This will also undermine South Africa's pursuit of the United Nations Sustainable Development Goals.

CONCLUSIONS AND RECOMMENDATIONS

This chapter was written with the benefit of hindsight, whereas government had to make decisions swiftly in response to Covid-19. With advice from the WHO on managing the health response, South Africa utilised the powers conferred on it by the Disaster Management Act to protect the health of its residents, including by imposing strict measures to curb the transmission of the virus. Having reviewed some of the legislative responses and those pertaining to human rights, the chapter concludes with lessons learnt and makes recommendations for the management of future disasters.

THE DIFFERENCE BETWEEN EMERGENCY LEGISLATION AND ORDINARY LEGISLATION

It is accepted that when the state exercises emergency powers, some individual human rights might be affected. Emergency powers may be necessary to secure the state. However, since the South African Constitution creates a democratic state, *care must be taken to ensure that the constitutional and democratic order is not undermined* and the role of parliament, the judiciary and oversight bodies is preserved (Khakee, 2009).

The rule of law requires that to the extent emergency powers are required, those powers must not become the norm. Stated differently, *legislation that gives extensive powers to the executive to*

manage emergencies should not outlive the emergency itself. Apart from anything else, such legislation is generally not made in an open and deliberative forum. During the pandemic, for example, the lockdown regulations were formulated by various committees within the executive branch.

The effects of the emergency legislation can be constrained in various ways, including the use of sunset clauses, using a single legislative vehicle to manage the emergency, non-textual amendments, not fitting into the normal legislative processes, using words that make the temporary nature of the legislation clear, limiting the powers to exceptional cases, and indicating in the title that the legislation has limited application.

Evaluating the effectiveness of using the Disaster Management Act

The Disaster Management Act provides for both a reaction to disasters and for a developmental approach to reduce the risk of disaster (by avoiding them and by limiting their impact). A state of disaster, and the regulatory regime that this unlocks, only materialises if such risk reduction measures were not successful.

If the Disaster Management Act were used only as a tool to *respond* to disasters, it would fail as a legislative instrument, because its purpose is to promote development initiatives that reduce the risk of occurrences becoming 'disasters' (van Niekerk, 2014). If, on the other hand, the Act were properly implemented and used to *reduce the risk of disaster*, the focus would shift to vulnerable communities and to the development of plans to reduce their vulnerability. Should a disaster then occur, its impact would be less severe; this would, in turn, reduce the need for invasive post-disaster interventions.

Choosing a disaster option to deal with the initial threat appears to have been appropriate. A health emergency does not meet the requirement of section 37(1)(b) of the Constitution, which stipulates that an emergency can be declared only to restore peace and order. Ordinary legislation would also not have been sufficient to empower government to impose a lockdown.

A lesson for government to learn, however, is that a failure to implement the Disaster Management Act fully before the pandemic (e.g., because some structures had not been properly created) led to an uncoordinated response. Government should ensure that the structures that are provided for in the Act are functioning as they should.

A state of disaster itself should be *limited in duration* to ensure that the different arms of government return to their normal functions as soon as the immediate threat has been addressed.

Revisiting the health strategy for future pandemics

A proper health strategy is critical for limiting the impact of the pandemic and must be aimed at ensuring a safe reopening of the economy as quickly as realistically possible (Parsons, 2020). For example, a generalised lockdown in the South African context may protect relatively affluent communities, even as it accelerates infection in communities living in overcrowded conditions and where people are dependent on social grants and food parcels (for which queuing is necessary), or in

which they share ablution facilities. Such conditions make these areas effectively 'un-lockdownable' (Smart et al., 2020). Therefore, different approaches must be followed for different contexts. South Africa should develop a risk-based strategy that is fully compatible with its socio-economic context, while actively pursuing the safe reopening of the economy (Kantor, 2020). The strategy should also allow for any resurgence of the pandemic to be managed effectively.

Covid-19 has been a protracted and complex pandemic. It brought border closures, restricted movement, and closed businesses, all of which will have significant long-term effects on the economy. While economic considerations should not be given precedence over health risks, adverse economic effects (including mass unemployment) will have serious short- and long-term consequences and affect human rights. Government attempted to alleviate some of the economic disruption of the pandemic by providing social protection grants to the poorest people, but it also needs to provide support to those at the borderline of poverty, such as the vulnerable middle class, to reduce their likelihood of slipping into poverty (UNDP South Africa, 2020).

Further strategic objectives include (UNDP South Africa, 2020):

- Suppress transmission of the virus through the implementation of effective and evidence-based infection prevention and control measures, such as testing, tracing, quarantine of contacts, isolation of probable and confirmed cases, measures to protect high-risk groups, and vaccination.
- Reduce exposure by enabling communities to adopt risk-reducing behaviours and practise infection prevention and control, including avoiding crowds, social distancing, hand hygiene, masks, and improved indoor ventilation.
- Counter misinformation and disinformation by managing the 'info-demic' through communication, engagement and enriching the information ecosystem online and offline through high-quality health guidance that is accessible and appropriate to every community.
- Ensure vaccine deployment readiness in all areas and among all populations by communicating, implementing, and monitoring Covid-19 vaccination campaigns.
- Reduce mortality and morbidity by promoting early diagnosis and ensuring that health systems can meet the increasing demand for care.
- Accelerate equitable access to Covid-19 vaccines, including diagnostics and therapeutics.

TRUST AND TRUSTWORTHINESS

A major lesson from this pandemic is that amidst the hype and fear of the devasting effects of Covid-19, the public was eager to obtain information from reliable sources about various aspects of the pandemic and to hear government speak with one voice. As the lockdown restrictions were lifted and the country moved from alert level 5 to level 3, several issues reduced trust and confidence in government decision-making. These included the bans on the sale of tobacco, alcohol and precooked food; the regulation of public transport; and the use of force by the security forces and the lack of respect they showed to some members of the public. Attempts to silence critical voices, including those of some scientists, also affected public trust, as did mixed messages from government

representatives in the media. Freedom of expression is a fundamental human right and has to be managed to facilitate better relations between government and all forms and methods of representations of the public voice.

STRENGTHEN THE CULTURE OF FREEDOM OF SCIENTIFIC RESEARCH

Freedom of scientific research is a fundamental right enshrined in the Constitution, similar to the right to life, the right to access to healthcare, and the right to dignity. As such, the right to freedom of scientific research should receive more explicit recognition by government, civil society, and the scientific community. All too often, the right to freedom of scientific research can be dismissed as being subject to limitations, such as ethics oversight. This is true: every right can be limited, and no right is absolute. But constant emphasis on the limitations on a right rather than on its substantive content renders such right culturally powerless. Rights need to be seen on their own merit and on their own context. Every scientist has the right to freedom of scientific research.

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