



**RULE OF LAW
PROJECT**

FREE MARKET FOUNDATION

***CIVIL LIBERTY DURING
A STATE OF DISASTER OR EMERGENCY
IN SOUTH AFRICA***

**THE CASE OF THE
CORONAVIRUS PANDEMIC**

Martin van Staden



FREE MARKET FOUNDATION

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Martin van Staden LL.B.

Head of Legal (Policy and Research)
Rule of Law Project
Free Market Foundation

martinvanstaden@fmfsa.org

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EXECUTIVE SUMMARY

The coronavirus lockdown has brought to the fore of public discourse the question of civil liberty during times of public crisis, particularly regarding the “limitation” and “derogation” (or suspension) of South Africans’ constitutional rights in the Bill of Rights. This paper considers this and other questions.

There is a crucial difference of degree between the limitation and suspension of rights. When a right is limited, its essential nature remains intact. It is exercisable subject to provisos. When it is suspended, its essential nature is extinguished. It is no longer exercisable.

The restrictions on freedom of movement (which in most cases outright prohibits movement except under strictly delineated circumstances) and trade amount to a suspension rather than a limitation of those constitutional rights. The restrictions on freedom of assembly and association (gatherings, funerals, etc.) also get very close to, if not crossing that line already. The lockdown is a very severe incursion on constitutional rights, and goes far beyond what section 36 of the Constitution, which provides for the limitation of rights, contemplates.

It appears, then, that the coronavirus regulations adopted under the Disaster Management Act are being used to respond to what is effectively a *de facto* (factual) but not a *de jure* (legal) state of emergency. In other words, government appears to be operating *as though* there is a state of emergency, with President Ramaphosa’s pre-lockdown speech doubling as a “stealth” declaration of a state of emergency. If this is true, it is highly improper and unconstitutional.

Government seems to be omitting the declaration of a *de jure* state of emergency because there has been no complete breakdown in public order and peace, which is a requirement for a state of emergency to be declared under section 37 of the Constitution.

It is important for government to proceed with its measures in compliance with the Constitution. But it is even more important for civil society and South African citizens to keep a keen and watchful eye on exercises, excesses, and abuses of government power.

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1. INTRODUCTION AND BACKGROUND

In December 2019, there was an outbreak of a novel type of coronavirus in Wuhan, Hubei Province, in the People's Republic of China. Named coronavirus disease 2019 (COVID-19), it is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).¹ Over the next few months, cases of coronavirus would appear all over the world, including South Africa. By 11 March 2020, the World Health Organisation classified the outbreak as a pandemic.² As of 3 April, there had been over 1 million reported cases of coronavirus globally, resulting in more than 53,000 deaths.³

“Liberty is not the means to a higher political end. It is itself the highest political end.”

Lord Acton

On Wednesday, 18 March 2020, the Department of Cooperative Governance and Traditional Affairs promulgated regulations in terms of the Disaster Management Act⁴ to contain the spread of the virus in South Africa. On Monday, 23 March, President Cyril Ramaphosa announced that these regulations would be significantly expanded and supplemented by the involvement of various other government departments.⁵ Throughout the following week many such new regulations were published, most notably the 25 March amendments to the initial 18 March regulations. This brought about a so-called national “lockdown”, severely restricting movement between Thursday, 26 March, and Thursday, 16 April.

More amendments to these regulations were unceremoniously promulgated on 2 April, leading to widespread confusion,⁶ and there has been talk of the lockdown being extended.

The coronavirus regulations encroach significantly on the civil liberties⁷ protected in terms of the Constitution of the Republic of South Africa, 1996.⁸

The purpose of this paper is to review the legal paradigm of states of disaster and of emergency, and how they interact with South Africans' civil liberties. This is done within the context of the regulations proclaimed to combat the spread of the coronavirus.

This paper sets out the legal basis for encroaching on civil liberties as recognised by the Constitution, particularly sections 36 and 37. Alongside this approach, this paper considers the Rule of Law standard set

¹ National Institute for Communicable Diseases. “COVID-19”. (2020). National Health Laboratory Service. <https://www.nicd.ac.za/diseases-a-z-index/covid-19/>.

² International Health Regulations Emergency Committee. “Statement on the second meeting regarding the outbreak of novel coronavirus (2019-nCoV)”. (2020). World Health Organisation. [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

³ Center for Systems Science and Engineering. “Coronavirus COVID-19 Global Cases”. (2020). Johns Hopkins University. Accessed: 3 April 2020. <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.

⁴ Disaster Management Act (57 of 2002).

⁵ Ramaphosa C. “Statement by President Cyril Ramaphosa on escalation of measures to combat COVID-19 epidemic”. (2020). *CapeTalk*. <https://www.capetalk.co.za/articles/378678/president-ramaphosa-s-full-coronavirus-lock-down-speech>.

⁶ Mkentane L. “IFP bemoans ‘frivolous’ amendments to COVID-19 regulations”. (2020). *Business Day*. <https://www.businesslive.co.za/bd/national/2020-04-03-ifp-bemoans-frivolous-amendments-to-covid-19-regulations/>.

⁷ Civil liberty in the context of this paper is taken to refer to the first-generation rights in the Bill of Rights, specifically sections 9(1), 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25(1), 29(3), 30, 31, 32(1)(a), 33, 34, and 35 of the Constitution.

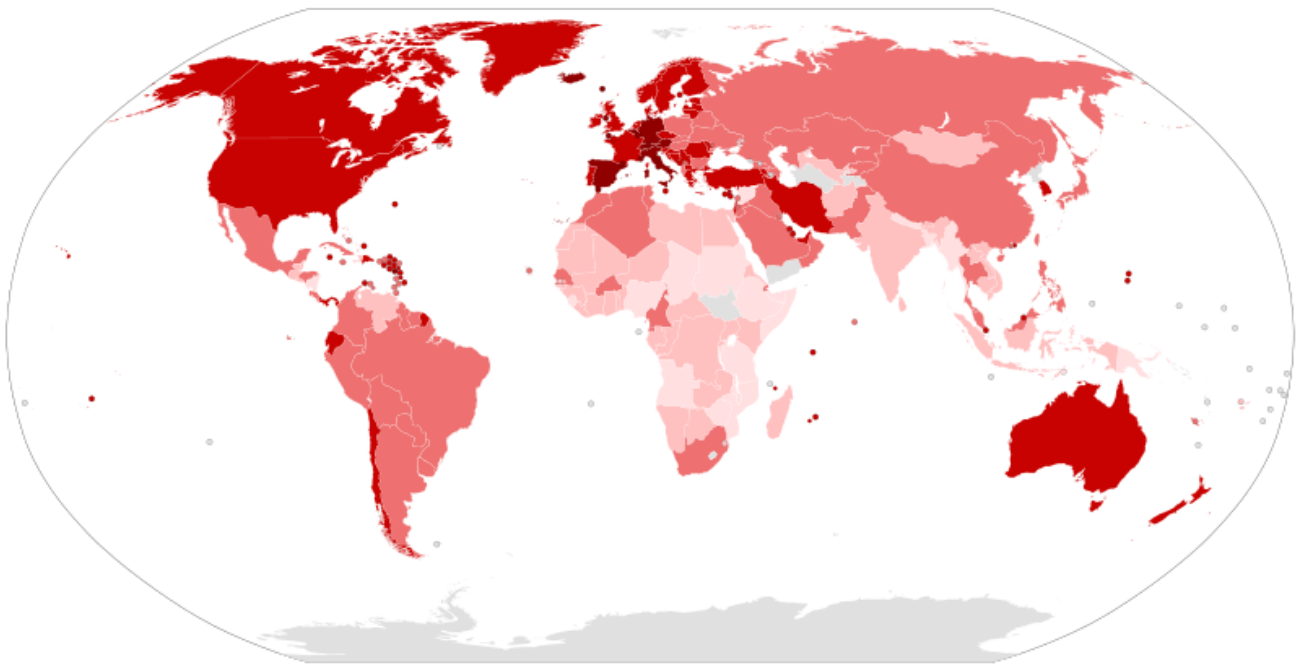
⁸ Hereinafter “the Constitution”.

in section 1(c) of the Constitution and how this standard interacts with civil liberty. The coronavirus regulations themselves, issued under the Disaster Management Act, will be considered within the paradigm of the Rule of Law and the provisions of the Constitution, as will the State of Emergency Act.⁹

2. LEGAL QUESTIONS

The legal questions that are considered in this paper, alongside ancillary questions, are:

- What are the constitutional standards against which states of disaster/emergency must be measured?
- How does civil liberty relate to the Rule of Law as a constitutional standard?
- Do the coronavirus regulations and the State of Emergency Act comply with these standards?



Countries with confirmed cases of COVID-19 as of 3 April 2020.
Raphaël Dumant, Wikipedia.org

⁹ State of Emergency Act (64 of 1997).

3. CONSTITUTIONAL STANDARDS



3.1 Section 1 of the Constitution

Section 1 of the Constitution contains various supreme values that underlie and permeate every aspect of South Africa's constitutional order. These values are not merely explanatory or descriptive, but enforceable and substantive.¹⁰ As such, they must be complied with, and if they are not, the offending conduct, policy, regulation, or legislation, is invalid and unconstitutional.¹¹ Section 1 provides:

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The two section 1 values that are relevant for the purposes of this analysis are sections 1(a) and 1(c). Section 1(a) *inter alia* commits South Africa to the “advancement of human rights and freedoms”, and section 1(c) provides that South Africa is based on the “supremacy of the Constitution and the Rule of Law”. The imperative of observing the Rule of Law cannot be suspended or limited, even in times of crisis.¹²

The Free Market Foundation's Rule of Law Board of Advisors formulated ten imperatives of the Rule of Law as a way to summarise the essential content of this doctrine. The imperatives, briefly, require that the law be clear and accessible; that discretionary powers must be limited by objective criteria; that equality before the law be observed; that the law be applied fairly and impartially; that the legislature alone make substantive law; that the courts' final authority be respected; that property may only be expropriated observing due process of law; that the law protect classical individual rights; that all law be reasonable (rational, proportional, and effective); and that government observe due process in the rational exercise of its authority.¹³

3.2 Limitations: Section 36 of the Constitution

Section 36 is the general limitations provision in the Constitution. It sets out the formula with which government must comply if it wishes to limit the rights guaranteed to South Africans and others in the Bill of Rights.

Pursuant to section 36(2), section 36(1) applies to those situations to which section 37, discussed below, does not apply. In other words, for as long as a state of emergency has not been declared in terms of section 37, any encroachment on constitutional rights must be justified according to section 36(1).

¹⁰ Malherbe EFJ. “Die wysiging van die Grondwet: Die oorspoel-imperatief van artikel 1”. (1999). 2 *Journal of South African Law*. 195.

¹¹ Section 2 of the Constitution.

¹² Ngcukaitobi T. “The rule of law in times of crisis: COVID-19 and the state of disaster”. (2020). *Mail & Guardian*. <https://mg.co.za/coronavirus-essentials/2020-03-29-the-rule-of-law-in-times-of-crisis-covid-19-and-the-state-of-disaster/>.

¹³ Rule of Law Project. “What is the Rule of Law?”. <https://ruleoflaw.org.za/rule-of-law/>.

Section 36 of the Constitution provides as follows:

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

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

3.3 Suspensions: Section 37 of the Constitution

Section 37, which has never been invoked since the Constitution became operative in 1997, provides for and regulates the declaration and handling of states of emergency.

Primarily, this provision puts it beyond doubt that protections for certain rights entrenched in the Bill of Rights may be suspended for the duration of a declared emergency, subject to certain safeguards including parliamentary and judicial oversight. The words “suspend” or “suspension” do not appear in the Bill of Rights. Instead, the constitutional terminology is “derogate” or “derogable”. Section 37(5), in particular, includes a table of non-derogable rights which may not be suspended even during the course of an emergency.

States of emergency are inherently temporary and must be directed at safeguarding the continued existence of the State in response to public disorder. Crucially, states of emergency are a last resort that may only be invoked in the event that the ordinary law of South Africa cannot adequately “guarantee the continuation of the basic order on which liberty depends”.¹⁴

¹⁴ Devenish GE. “The demise of *salus reipublicae suprema lex* in South Africa: Emergency rule in terms of the 1996 Constitution”. (1998). 31(2) *Comparative and International Law Journal of Southern Africa*. 142.

Section 37 of the Constitution provides as follows:

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

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

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

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; or

(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

(a) the derogation is strictly required by the emergency; and

(b) the legislation—

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: <ul style="list-style-type: none"> — subsection (1)(d) and (e); — the rights in subparagraphs (i) and (ii) of subsection (1)(g); and — subsection 1(i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: <ul style="list-style-type: none"> — subsections (1)(a), (b) and (c) and (2)(d); — the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.



(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

- (a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
- (b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
- (c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
- (d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
- (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
- (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
- (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
- (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

3.4 States of disaster versus states of emergency¹⁵

The concept ‘state of disaster’ is not a constitutional concept, but is instead found in the Disaster Management Act, where it is also left largely undefined. Its definition would have to be derived from the definition of ‘disaster’ as well as the requirements for the declaration for a state of national disaster set out in section 27 of the Act.

The term ‘disaster’ is defined in section 1 of the Act as follows:

disaster means a progressive or sudden, widespread or localized, natural or human-caused occurrence which –

(a) causes or threatens to cause –

(i) death, injury, or disease;

(ii) damage to property, infrastructure or the environment; or

(iii) disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.

Section 27 requires that a state of disaster be declared if existing legislation and contingency arrangements do not adequately provide for government to deal effectively with the disaster, or other special circumstances warrant the declaration of a state of disaster.

In summary, the following would be an appropriate definition of a state of disaster:

A situation where there is a progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause death, injury, or disease; damage to property, infrastructure, or the environment; or disruption of the life of a community, which is of such a magnitude that it exceeds the ability of those effected to cope with its effects using their own resources, and existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster.

The term ‘emergency’ is, furthermore, not defined either in the Constitution or in the State of Emergency Act. One must refer to the requirements set out for the declaration of a state of emergency in section 37 of the Constitution to define an emergency.

Section 37 of the Constitution lays out two requirements for a state of emergency to be declared: The life of the nation must be under threat by war, general insurrection, disorder, natural disaster or other public emergency; *and* the declaration must be necessary to restore peace and order.

¹⁵ I thank Jacques Jonker for contributing the bulk of this section.

From this, it can be deduced that an 'emergency' is defined roughly as follows:

A situation where an event such as war, invasion, general insurrection, disorder, natural disaster or other public emergency threatens the life of the nation, and where a declaration of a state of emergency is a prerequisite for the restoring of peace and order.

There are various differences between a state of disaster and a state of emergency.

Geographically, a state of disaster can be declared either nationally, provincially, or locally. The requirements are the same with the only obvious difference being a change in terminology related to geography where applicable. A state of emergency can be declared on the national level or in any other area of South Africa. The crucial difference is that the first requirement for a state of emergency is that the life of the *nation* (South Africa as a whole) must be under threat.

There is a different effect on rights when either a state of disaster is declared, on the one hand, or a state of emergency, on the other hand.

In a state of disaster, constitutional rights may only be limited in terms of section 36(1) of the Constitution by a law of general application. In a declared state of emergency, certain rights may be entirely suspended, subject to the list of non-derogable rights set out in section 37(5) of the Constitution.

Temporally, a state of disaster lapses after three months, or before that through ministerial decree. It may be extended one month at a time. It seems that such extension can continue indefinitely. A declared state of emergency lapses after 21 days, unless extended by the National Assembly, but such extensions may not be in effect for more than three months at a time. It also seems as if it can be extended indefinitely. However, there is a supermajority requirement included in section 37, which states that the first extension must be adopted by a majority, whereas any subsequent extension requires at least a 60% majority in order to be adopted. This is, however, a weak supermajority requirement, as it does not escalate from the second extension onwards.

Different functionaries are also responsible for regulation under states of disaster versus states of emergency. Under a declared state of disaster, it is the Minister on a national level, the Premier on a provincial level, or the municipal council locally who enacts regulations in terms of the declaration. Under a declared state of emergency, it is the President who enacts regulations in terms of the declaration.

3.5 Analysis of limitations (section 36) and suspensions (section 37) of rights

Rights in South Africa are always *limited* by operation of section 36(1) of the Constitution. But rights may only be *suspended* (or derogated) after a state of emergency has been declared, as contemplated in section 37 of the Constitution.

The difference between the limitation and suspension of a right is a matter of degree. According to Erasmus:

“A limitation may only be applied in so far as is necessary for preserving the values enumerated in the limitation clause. It may not be applied in a manner resulting in the complete suppression of the right or freedom”.¹⁶

Erasmus further notes that, “The basic core of a right must always remain.” This respect for the essential content of rights amounts to “a final boundary for limitations” which, if crossed, “will result in denial of a right”.¹⁷ In other words, when the essential content of a right has been extinguished, it has been suspended (section 37) and not limited (section 36). For a suspension to be valid, a state of emergency must have been officially declared and all the requirements of section 37 satisfied.

“In our judgment the principle of the rule of law is fundamental to freedom, and freedom is fundamental to the good life.”

**EH Brookes and
JB MacAulay**

Section 36 does not *empower* the State to limit rights. Instead, it recognises that rights are always, inherently, limited by any government conduct, and *limits the State in how it may do so*. In other words, section 36 forms a crucial part of the *protection* of constitutional rights and liberties, and is not a party to their infringement.¹⁸ It narrows and controls the scope of limitation, which in the absence of a limitations provision, like in the United States, would have to be determined through judicial discretion.¹⁹

Section 36 has often been utilised as a “weasel” or “ah-hah” provision that, usually in the public discourse but also among the legal community, is invoked to justify any manner of State infringement of constitutional rights. But the provision does not avail itself to such invocation: According to Erasmus:

“The power to limit and balance rights does not give an unfettered discretion. It has to result in a finely balanced exercise that permits the unfolding of these rights in a manner that will result in their optimal application in society. A limitation clause is necessary in order to ensure the meaningful enjoyment of fundamental rights and freedoms, not to create a new source of power for the state to be used for curtailing them.”²⁰

In the case of both limitation and suspension of rights, such measures must be construed and applied *in favorem libertatis* – strictly.²¹ In this respect, the courts will have regard to substance and not merely form.²² In the case of limitations under section 36(1), the courts have to test every instance of an alleged infringement of a constitutional right against the formula set out in that provision.²³

In times of emergency, per section 37(4)(a), rights may only be suspended if it is *strictly necessary* to bring about an end to the emergency. This, according to Erasmus, means a proportionality test may be conducted by the courts, requiring the State to justify its measures.²⁴ In this respect, section 36(1) might still provide guidance during times of a declared state of emergency.

¹⁶ Erasmus G. “Limitation and suspension” in Van Wyk D, Dugard J, De Villiers B, and Davis D (eds). *Rights and Constitutionalism: The New South African Legal Order*. (1996). Oxford: Clarendon Press. 642.

¹⁷ Erasmus (footnote 16 above) 650.

¹⁸ Erasmus (footnote 16 above) 640.

¹⁹ Erasmus (footnote 16 above) 641.

²⁰ Erasmus (footnote 16 above) 640.

²¹ Erasmus (footnote 16 above) 629.

²² Erasmus (footnote 16 above) 633.

²³ Erasmus (footnote 16 above) 640.

²⁴ Erasmus (footnote 16 above) 657.

Indeed, proportionality “is the main substantive criterion to assess the legality of the suspension measures taken by the state”. Such measures “must be proportionate to the threat”.²⁵ Erasmus cites various principles regarding proportionality analysis when rights have been suspended, including the following:

- Not every derogation from established rights is allowed, even if those rights are not contained in the table of non-derogable clauses. “Each measure of derogation taken in a lawfully declared emergency should be necessary and proportionate to the threat”.
- There must be a relationship between the suspension and the threat.
- The suspension “should potentially be able to overcome the emergency”.
- Less restrictive means that were available in the place of a suspension of rights must be had regard to.²⁶

Government only recognises and protects, but does not grant, the rights listed in the Bill of Rights. Because these rights pre-exist the Constitution and government, it makes sense that any limitation of such rights must be interpreted strictly (*in favorem libertatis*). Indeed, government “is obliged to restrain itself when regulating” the exercise of rights.²⁷ “The general rule”, writes Erasmus, “is the protection of the right or freedom; the limitation is the exception”.²⁸ Indeed, one of the Siracusa Principles (internationally-accepted guidelines for limitation provisions) is that, “All limitation clauses shall be interpreted strictly and in favor of the rights at issue”.²⁹

Any contemplated limitation of a right must have a constitutional purpose as its objective. Extra-constitutional, that is constitutionally trivial, objectives would not suffice to justify the limitation of a right guaranteed in the Bill of Rights.³⁰ Proportionality analysis is also central to section 36(1)’s legs. Erasmus quotes the Canadian Supreme Court case of *R v Oakes* to set out what proportionality in a limitations provision entails:

“First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question: *R v Big M Drug Mart Ltd*. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of ‘sufficient importance’.”

It is further noted, again with reference to *Oakes*, that, “The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”³¹

Section 37 controls the whole area of states of emergency. There are no implied powers or common law or other grounds for exercising additional emergency powers.³² It is in light of this fact that the

²⁵ Erasmus (footnote 16 above) 662.

²⁶ Erasmus (footnote 16 above) 662.

²⁷ Erasmus (footnote 16 above) 640.

²⁸ Erasmus (footnote 16 above) 642.

²⁹ Erasmus (footnote 16 above) 644.

³⁰ Erasmus (footnote 16 above) 647.

³¹ *R v Oakes* [1986] 1 SCR 103 as quoted in Erasmus (footnote 16 above) 649. *Oakes*’ emphasis.

³² Erasmus (footnote 16 above) 651.

constitutionality of the Disaster Management Act, or at least the way the Act has been invoked in the present crisis, might be questioned.

In cases of suspension of rights under section 37, Erasmus writes:

“Suspension of rights should be interpreted strictly and the formalities and requirements should always be adhered to. The ultimate aim remains the protection of society by safeguarding fundamental rights, constitutionalism, and democratic government. The purpose is never to protect the government of the day.”³³

Crucially, Erasmus writes that limitations provisions (in our case, section 36) “will not provide adequate legal guidance in times of a public emergency.” In other words, “A limitation clause authorizes restrictions on fundamental rights under ‘normal’ conditions”.³⁴ This means when there is, in fact, a time of public crisis, government must either declare a state of emergency, or continue to deal with society normally. It cannot try to use section 36(1) in a way it cannot be used, which is to say: To deprive South Africans so radically of their rights to combat a public emergency that there is nothing left. For this, a state of emergency must be declared.

But an emergency must be imminent or already in progress. Declaring an emergency to *prevent an emergency* is not contemplated by section 37.³⁵

The requirement that the “life of the nation” be threatened means the organised existence of society, which underlies the State, must be at risk.³⁶

Erasmus writes that, “A state of emergency must be a measure of last resort”. In other words, after there has *already* been a breakdown in peace and public order. Until such a time, ordinary law must be utilised.³⁷

States of emergency must be officially declared – they may not be implied or implicit in other declarations or announcements. “A *de facto* state of emergency is not permitted”, and, “No rights may be suspended unless a state of emergency is first proclaimed”.³⁸ When declared, the courts have an important – and arguably activist – role to play to ensure that the declaration and subsequent government conduct complies fully with the Constitution.³⁹

³³ Erasmus (footnote 16 above) 651.

³⁴ Erasmus (footnote 16 above) 652. Citations omitted.

³⁵ Erasmus (footnote 16 above) 653.

³⁶ Erasmus (footnote 16 above) 653.

³⁷ Erasmus (footnote 16 above) 655.

³⁸ Erasmus (footnote 16 above) 655-656.

³⁹ Erasmus (footnote 16 above) 657.

4. CIVIL LIBERTY AND THE RULE OF LAW

LIBERTY

4.1 Overview

As set out above, the Rule of Law is a fundamental postulate of South Africa's constitutional order, as contemplated in section 1(c) of the Constitution. There it is declared to be co-equally supreme alongside the Constitution itself. The implications of this are explored elsewhere.⁴⁰

Because of this elevated status of the Rule of Law, it is worth considering, within the context of deviations from civil liberty, whether and to what extent the Rule of Law *per se* recognises or protects civil liberty, and how. To this end, works by Brookes and MacAulay, Cowen, and Mathews, in chronological order in South African history, are consulted.

4.2 Brookes and MacAulay: *Civil Liberty in South Africa* (1958)

Brookes and MacAulay define civil liberty as “the possession by the individual within a political community, of those natural rights essential to the free development of personality, under the guarantee of law”. This identification of liberty with law, to the authors, crystallises into the Rule of Law, which is distinguished from “rule of individual Ministers or officials” or even “any and every statute or regulation that has force”. Instead, the Rule of Law comprises “basic principles of right”,⁴¹ and even where *benevolent* discretionary government is allowed to replace the Rule of Law, it “would mean the end of civil liberty”.⁴² This resounds quite closely with Hayek's conceptualisation of the Rule of Law:

“The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal.”⁴³

In other words, the Rule of Law does not amount to rule *by* the law, rules of the law, or to *a* rule of the law. The Rule of Law is a doctrine or set of principles that concern the elevated status of The Law (as an abstract, normative concept, rather than a set of statutes, regulations, or precedents) over and above the whims, discretions, or interests of the government of the day or its servants.

While limitations on freedom are expected in any political community, these limitations must be to protect the freedom of others. And in this enterprise of limiting freedom, the State must itself be limited by checks and balances.⁴⁴ Brookes and MacAulay emphasise the fact that any powers the State takes for itself are difficult to roll back over time, due to public complacency. In particular, they write that, “Those who feel for civil liberty must surely accept the obligation to defend it from encroachments by their political friends, no less than by their political enemies”.⁴⁵ Moreover, they note pertinently:

“It is difficult for those who have not themselves lived through the gradual establishment of a tyranny to understand the subtle dangers of the ‘softening-up’ process, the effect on all but very strong personalities of intimidation. [People] take for granted interventions in private life which they still dislike but to which they are becoming conditioned.”⁴⁶

Brookes and MacAulay identify another phenomenon that often causes confusion. Where one is, indeed, merely *allowed* freedom by officials, one cannot talk of “liberty secured by law” (i.e., civil liberty). Instead,

⁴⁰ Van Staden M. *The Constitution and the Rule of Law: An Introduction*. (2019). Johannesburg: FMF Books. <https://ruleoflaw.org.za/the-constitution-and-the-rule-of-law/>.

⁴¹ Brookes EH and MacAulay JB. *Civil Liberty in South Africa*. (1958). Cape Town: Oxford University Press. 1.

⁴² Brookes and MacAulay (footnote 41 above) 13.

⁴³ Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: The University of Chicago Press. 206.

⁴⁴ Brookes and MacAulay (footnote 41 above) 1.

⁴⁵ Brookes and MacAulay (footnote 41 above) 11.

⁴⁶ Brookes and MacAulay (footnote 41 above) 168

this is the “benevolent exercise of discretion by a despotic government”.⁴⁷ The law must itself protect liberty and not allow officials, in their discretion, to determine the extent of freedom. This is particularly pertinent within the context of the coronavirus regulations discussed below.

4.3 Cowen: *The Foundations of Freedom* (1961)

Cowen writes that there is a “fundamental antithesis between government under law [the Rule of Law] and government by arbitrary will[, ...] sheer domination of man over man, of arbitrariness and caprice”. Observing freedom, human dignity, and achieving prosperity, is only possible where government is limited by law.⁴⁸

Civil liberty, that is liberty as recognised and protected by law, is preferable to naked freedom, which Cowen argues descends into “licence or anarchy”. Instead, “power tamed by law guarantees true freedom”.⁴⁹

Cowen also observes that no constitutional protections for rights will be effective unless it is in the character of the population whose rights are protected to insist upon it. Individual South Africans have the responsibility to be eternally vigilant on excesses and abuses of government power.⁵⁰

4.4 Mathews: *Law, Order and Liberty in South Africa* (1971) and *Freedom, State Security, and the Rule of Law* (1986)

Mathews (1971) opens with a profound thought:

“The high importance of that complex of values, principles and techniques collectively known as the Rule of Law is hardly open to doubt. The terms ‘just’ and ‘free’, as descriptions of society, would not nowadays be applied to a community in which the Rule of Law does not enjoy substantial acceptance.”⁵¹

To Mathews, limited government and Rule of Law are two sides of the same coin.⁵² Indeed, Mathews (1986) goes as far as to say that, “There is an intimate and permanent relationship between freedom and the rule of law”.⁵³ The Rule of Law’s purpose is “the legal control of the government in the interests of freedom and justice”.⁵⁴

Mathews notes what the constitutional drafters much later embodied in section 1 of the Constitution. He writes that, “The Rule of Law is an aspect of the broader notion of constitutionalism” and “constitutionalism is one of the essential characteristics of what we call the free society”. Individual liberty – “that the individual has an area of freedom in which he is sacred and inviolable”⁵⁵ – is inconceivable without constitutionalism.⁵⁶

⁴⁷ Brookes and MacAulay (footnote 41 above) 13.

⁴⁸ Cowen DV. *The Foundations of Freedom: With Special Reference to Southern Africa*. (1961). Cape Town: Oxford University Press. 197.

⁴⁹ Cowen (footnote 48 above) 197.

⁵⁰ Cowen (footnote 48 above) 234.

⁵¹ Mathews AS. *Law, Order, and Liberty in South Africa*. (1971). Cape Town: Juta. 1.

⁵² Mathews (footnote 51 above) (1971) 6.

⁵³ Mathews AS. *Freedom, State Security, and the Rule of Law: Dilemmas of the Apartheid Society*. (1986). Cape Town: Juta. xxvii.

⁵⁴ Mathews (footnote 53 above) (1986) xxix

⁵⁵ Mathews (footnote 51 above) (1971) 274.

⁵⁶ Mathews (footnote 51 above) (1971) 267-268.

To an extent repeating what Brookes and MacAulay noted earlier, Mathews writes that the view “that constitutionalism is a necessary foundation of liberty flows from a cautious, if not pessimistic, view of man as a wielder of power”. In other words, people are imperfect and corruptible, and because people have to govern over people, the scope and exercise of that government power must be limited. This in turn limits the damage that people in power can do to their fellows and to society.⁵⁷

Pertinently, Mathews notes that in times of crisis or emergency, there is not *necessarily* a breakdown in public order, and as a result, “may be successfully controlled without a total suspension of all rights and procedures”. In other words, there must be a rational link between the limitation or suspension of rights and achieving the objective of emergency powers: Restoring order. Where there are limitations or suspensions of rights, “they must not be allowed to degenerate into excesses and abuses”.⁵⁸ Indeed, in a free society:

“Freedom and authority, justice and order, are bound to each other in a complex relationship. The liberal-democrat values them all – but he sees authority and order (or security) as instrumental, freedom and justice as ultimate.”⁵⁹

4.5 The Rule of Law and civil liberty

The *raison d'être* of the Rule of Law is the protection of civil liberty. It achieves or attempts to achieve this by curbing arbitrariness in government conduct and policies through a set of limitations on government's power. Some of these limitations are practical – such as the separation of powers between legislature, executive, and courts – but others are theoretical – principles of legislative drafting, clarity, legal certainty, reasonableness in government conduct – and require a vigilant citizenry to work effectively.

As a foundational value in South Africa's constitutional order, said to be as supreme as the Constitution itself, it is imperative that the Rule of Law, as a “complex of values, principles and techniques”, be guarded and observed in the same way the provisions, spirit, and purport of the Constitution are guarded and observed.

“But it is necessary to recall that although some of the rights we enjoy under the Constitution may be suspended, the Constitution itself is not suspended. The government and its agents remain bound by law.”

Tembeka Ngcukaitobi

⁵⁷ Mathews (footnote 51 above) (1971) 268.

⁵⁸ Mathews (footnote 51 above) (1971) 41.

⁵⁹ Mathews (footnote 51 above) (1971) 284.



5. CORONAVIRUS REGULATIONS



5.1 Responses to coronavirus around the world⁶⁰

Below follows a very brief survey of coronavirus regulations found around the world at the time of writing.

5.1.1 China

In the People's Republic of China, the Hubei Province was strictly locked down, but regulations have since been eased.⁶¹ The city of Wuhan, where the coronavirus originated, was locked down until 7 April, down from an initial lifting date of 8 May 2020.⁶²

5.1.2 England

In England (not the entirety of the United Kingdom), the public has been instructed to remain home except for essential work, exercise once per day, or to purchase essential goods. Non-essential business and locations have been mandatorily closed. Weddings and baptisms, but not funerals, are also prohibited. Public gatherings of more than two persons have been prohibited except if those persons ordinarily reside together.⁶³ Government has directed that there will be mandatory quarantine and testing of those reasonably suspected of being infected by the coronavirus. Public health officials may vary the requirements imposed by the regulations as they deem fit.⁶⁴

5.1.3 Italy

The Italian government has mandated that all citizens remain home. Large gatherings have been prohibited. Grocery stores and pharmacies remain open, but all other businesses have been directed to close. Permission to travel is required from the police, and only travel for essential services or goods, and family-related travel, is allowed. Healthcare workers have been forced to cancel their vacations. Prison visits have been limited and, in some cases, suspended. Repayments of mortgages have also been suspended.⁶⁵

5.1.4 South Korea

In South Korea, there was extensive production of testing kits by medical and pharmaceutical companies, which resulted in widespread testing for the coronavirus as it started spreading throughout that country. Contact tracing plays a large part in South Korea's response, with cellphone and car GPS systems, CCTV

“South Africans, Covid-19 or not, cannot simply and blithely forfeit their freedoms and liberties to the state without questioning every detail of how and what it is going to do with it, especially after the last decade of corruption, mismanagement and criminality.

Pieter du Toit

⁶⁰ I thank Jacques Jonker for contributing the bulk of this section.

⁶¹ Wang V and Wee S-L. “China to ease coronavirus lockdown on Hubei 2 months after imposing it”. (2020). *New York Times*. <https://www.nytimes.com/2020/03/24/world/asia/china-coronavirus-lockdown-hubei.html>.

⁶² Alam S. “China to lift Wuhan lockdown on April 8”. (2020). *Anadolu Agency*. <https://www.aa.com.tr/en/asia-pacific/china-to-lift-wuhan-lockdown-on-april-8/1776890#>.

⁶³ Bienkov A. “The UK is also going into COVID-19 lockdown, with bans on leaving home without good reason”. (2020). *Business Insider*. <https://www.businessinsider.com/coronavirus-uk-lockdown-public-ordered-stay-at-home-covid-19-2020-3>.

⁶⁴ Health Protection (Coronavirus) Regulations 2020. <http://www.legislation.gov.uk/uksi/2020/129/introduction/made/data.pdf>.

⁶⁵ Mahbubani R. “Coronavirus: Italy enters its first day of a nationwide lockdown – it is the worst-hit country outside China”. (2020). *Business Insider*. <https://www.businessinsider.com/italy-prime-minister-extends-coronavirus-restriction-zone-entire-country-2020-3>.

cameras, and card transactions being used to plot infected people's movements and their interactions with others. Civil society has largely accepted this loss of privacy. Government sends emergency alerts to citizens when cases of the coronavirus appear in their districts. A cellphone app was also developed that warns users when they are within 100 metres of an area where an infected person was. Voluntary self-isolation is extensive.⁶⁶ Foreigners who enter South Korea are subjected to a 14-day quarantine in government facilities.⁶⁷

5.1.5 United States of America

As of the end of March, about 251 million people, spread over 30 states, the capital Washington DC, and the territory of Puerto Rico, have been forced to remain home but for excursions for essential goods. While the definition of what is "essential" differs by state, non-essential businesses have likewise been forced to close. At least 31 cities have implemented lockdowns.⁶⁸ President Donald Trump has extended social distancing guidelines until the end of April 2020.⁶⁹ Travel from various countries, including the United Kingdom, has been banned, and travel across the US-Canadian border has been restricted to essential travel.⁷⁰

5.2 Overview and analysis of South African regulations

Various departments and agencies have issued their own coronavirus regulations. There is, however, a set of 'main' regulations, published on 18 and 25 March respectively by the Department of Cooperative Governance and Traditional Affairs. A set of amendments were published on 2 April.

These regulations were all promulgated in terms of section 27(2) of the Disaster Management Act.

Section 27(1) of the Disaster Management Act obliges the Minister to declare a national state of disaster if:

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

Section 27(2) empowers the Minister to make regulations for a long list of matters, but pertinently of which is section 27(2)(n), which empowers the Minister to make regulations concerning:

other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.

In tension with the precepts of the Rule of Law, neither of these provisions contain criteria or guiding provisions that materially limit or circumscribe the declaration of a disaster or the issuing of regulations.

⁶⁶ Fisher M and Sang-Hun C. "How South Korea flattened the curve". (2020). *New York Times*. <https://www.nytimes.com/2020/03/23/world/asia/coronavirus-south-korea-flatten-curve.html>.

⁶⁷ Rich M. "Why Asia's new wave of virus cases should worry the world". (2020). *New York Times*. <https://www.nytimes.com/2020/03/31/world/asia/coronavirus-china-hong-kong-singapore-south-korea.html>.

⁶⁸ Secon H and Woodward A. "About 95% of Americans have been ordered to stay at home. This map shows which cities and states are under lockdown". (2020). *Business Insider*. <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3>.

⁶⁹ New York Times. "Trump extends social distancing guidelines to April 30 as U.S. cases top 140,000". (2020). *New York Times*. <https://www.nytimes.com/2020/03/29/world/coronavirus-live-news-updates.html>.

⁷⁰ Wilson A. "Coronavirus travel updates: which countries have restrictions and FCO warnings in place?" (2020). *The Guardian*. <https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place>.

On 26 March, the Department of Communications and Digital Technologies issued regulations in terms of reg 10(8) of the 18 March regulations, “to provide for measures necessary to manage COVID-19”.⁷¹ The 18 and 25 March regulations and the ICT regulations are the focus of this paper.

Only notable matters directly affecting civil liberty and the Rule of Law will be mentioned. In other words, this paper does not contain a comprehensive or exhaustive analysis of all the different aspects of the regulations.

5.2.1 *Gatherings*

Reg 3 of the 18 March regulations prohibited gatherings of more than 100 persons, and gatherings of more than 50 persons where liquor is sold and consumed. Falling foul of these regulations could entail a fine and/or imprisonment, for a period of no longer than six months. Reg 3 of the 25 March regulations amended the earlier regulations to prohibit gatherings outright, but for, in reg 11B, daytime funerals with 50 people or less.

This regulation, particularly after 25 March when the lockdown began, cannot be said to limit the section 17 right to assembly, the section 18 right to freedom of association, or the section 21(1) right to freedom of movement. No such freedoms exist under the regulations, as gatherings but for funerals have been absolutely prohibited. It is therefore not unreasonable to argue that these three rights have been categorically suspended.

5.2.2 *Patient self-determination*

Reg 4 of the 18 March regulations prohibits those infected by the coronavirus, or who are suspected of being infected, or even those who have had contact with an infected person, from “refusing consent” to be examined, admitted to a health facility, isolated, quarantined, or treated. If such consent is refused, that “person must be placed in isolation or quarantine for a period of 48 hours”. Enforcers of this regulation are exempted from providing compensation for causing loss or damage, if they acted or failed to act, in good faith. Reg 5 of the 25 March regulations made immaterial amendments to reg 4.

Reg 4 appears to comply with the section 36(1) formula for justifiably limiting the section 12 right to freedom of the person. However, the provision that enforcers are exempt from providing compensation for loss or damage stands in stark contrast with the imperative of the Rule of Law that the law, including the common law of delict, shall apply equally to both governed and governors. When ordinary persons cause damage, even if in good faith, they remain liable to provide compensation. This must apply *mutatis mutandis* to *bona fide* regulatory enforcers.

Reg 11 of the 18 March regulations prohibits the intentional false representation that one or another is infected by the coronavirus. Doing so entails a fine and/or imprisonment of up to six months. This provision also prohibits one from intentionally infecting another with the coronavirus, which carries liability for assault, attempted murder, or murder.

Reg 11 appears to comply with the section 36(1) formula for justifiably limiting the section 16(1) right to freedom of expression. The second part of the provision which prohibits the intentional infecting of

⁷¹ Hereinafter “the ICT regulations”.

another is consistent with government's obligation to safeguard the lives and liberty of South Africans in terms of sections 11 and 12 of the Constitution.

5.2.3 Access to inmates

Reg 7 of the 18 March regulations suspends visits by the public to inmates in prisons or jails for the duration of the disaster. This regulation does appear to comply with the section 36(1) test, as (involuntarily) dense prison populations must be protected from infection, and this cannot be done any less restrictively than cutting off outside access. It is hoped, however, that allowances are being made for inmates to easily communicate with family, friends, and legal practitioners on the outside.

5.2.4 Consumer rights

Reg 8 of the 18 March regulations closed establishments and eateries where liquor can ordinarily be consumed, unless they could limit their custom to no more than 50 adequately separated people at a time. In any case, these establishments had to be closed between 18h00 and 09h00 on weekdays and Saturdays, and from 13h00 on Sundays and public holidays. This applied *mutatis mutandis* to liquor stores. The granting of liquor licences for events has been suspended for the duration of the disaster.

The 25 March regulations, by operation of other provisions, rendered these restrictions redundant, as all "non-essential" businesses, including eateries and establishments selling liquor, were decreed closed. The new regulations also clarified that non-compliance with these provisions renders one guilty of an offence.

Reg 11A of the 25 March regulations introduces the concepts of "essential goods" and "essential services" into the coronavirus regulations. Essential goods are listed in paragraph A of Annexure B to the regulations, and are broadly divided into food, cleaning and hygiene products, medical products, fuel, and "basic goods, including airtime and electricity". Paragraph B lists 28 categories of essential services.

These encroachments on civil liberty effectively suspend the section 22 right to freedom to choose one's trade, profession, or occupation freely. As written elsewhere:

"In this respect, section 22 of the Constitution, which guarantees the freedom to choose one's profession, trade, or occupation freely, subject to regulation, is relevant.

As my colleague, Jacques Jonker, notes, section 22's internal logic does not allow the practice of a profession to be proscribed entirely. Provision is made for the regulation of a profession, but if practicing that profession is categorically prohibited, nothing remains to be regulated. The lockdown's wide-ranging restrictions on business operations, in other words, appears to amount to a wholesale suspension of section 22 rather than a mere limitation, as the essential content of the right has been extinguished."⁷²

In other words, the prohibition on business operations cannot succeed under a section 36(1) test, because freedom of trade has been extinguished *in toto* for the majority of South Africans who cannot work from home.

It is also noteworthy that the distinction between so-called "essential" and "non-essential" goods and services is arbitrary and not reflective of reality. It is trite that only people themselves can decide what is

⁷² Van Staden M. "Die COVID-19-afsondering: juridies en prakties gedoem". (2020). *Koronavirus Krisisentrum*. <https://corona.org.za/die-covid-19-afsondering-juridies-en-prakties-gedoem/>.

and what is not essential to and for them – it cannot be determined by committee or government. It would have been preferable for government to have used the term “designated” goods and services instead, to avoid confusion.

5.2.5 *Ministerial diktat*

Reg 10 of the 18 March regulations gives the Minister of Health the power to “issue directions to address, prevent and combat the spread of COVID-19 in any area of the Republic”. The powers granted to other ministers are qualified as to the nature and type of regulations that may be issued, however this power bestowed on the health minister is unbridled.

Furthermore, the Minister of Trade and Industry is empowered to “issue directions to protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services”. Whereas all other ministers, except the Minister of Health, are allowed to make such directions within the narrow confines of their mandate and within their departments, the trade minister is empowered, without limit or criteria, to “protect consumers” in this manner. The Minister is also, bizarrely, as is the case with the Minister of Health, bestowed with a general power to “issue directions to address, prevent and combat the spread of COVID-19”.

It is unclear why the Minister of Health and the Minister of Trade and Industry specifically are given such extreme powers – greater than all their colleagues, including the Minister of Cooperative Governance and Traditional Affairs who issued the regulations, and the President – during the disaster. The uncircumscribed and unguided nature of these powers, and their seemingly arbitrary assignment, do not comport with the imperative of the Rule of Law that discretionary and regulation-making powers be strictly and clearly defined.

5.2.6 *Freedom of expression*

Reg 11 of the 18 March regulations prohibited the publication of any statement that (attempts to) intentionally deceive anyone about COVID-19, the infected status of another person, or “any measure taken by the Government to address COVID-19”. Doing so makes one liable for a fine and/or imprisonment of up to six months.

In one known case, four South Africans were arrested in terms of this provision (“and crimen injuria”) on Monday 30 March.⁷³ The group circulated videos of themselves refusing to comply with the lockdown regulations, before the lockdown began, and drinking alcohol in public. They made direct reference to the Minister of Police, who felt insulted, and as a result directed the police to intervene. They were later released on R1,000 bail each.⁷⁴

Reg 11, particularly the relevant reg 11(5)(c) which prohibits the intentional misrepresentation of government’s response to the coronavirus, falls foul of the section 16(1) constitutional right to freedom of expression. **Furthermore, it does not appear to comply with either the section 16(2) nor the**

⁷³ Moloko G. “WATCH: Youngsters drink and taunt Bheki Cele. Then they get arrested”. (2020). *The Citizen*.

<https://citizen.co.za/news/south-africa/crime/2262933/watch-youngsters-drink-and-taunt-bheki-cele-then-they-get-arrested/>.

⁷⁴ Reporter. “Four people who insulted Cele in video granted R1K bail each”. (2020). *The Citizen*. <https://citizen.co.za/news/south-africa/crime/2264795/four-people-who-insulted-cele-in-video-granted-r1k-bail-each/>.

section 36(1) test for justifiable limitations on rights, as less restrictive means are available, and the police response has been very disproportionate. Civil disobedience against such invasive measures as the coronavirus regulations is to be expected, and government is obliged to approach the matter with sensitivity and a measure of deference. As Hjul notes:

“Now is the time for government to promote responsible and informed speech rather than try to hope to use draconian measures to prevent irresponsible speech. Irresponsible speech is deleterious in these times, but proportionate, measured, and, above all, rational responses from those with power are always a better cure than throwing out babies with bathwater.”⁷⁵

Reg 5 of the ICT regulations requires over-the-top and internet service providers “to remove fake news related to COVID-19 from their platforms”. Fake news is defined with reference to the same prohibition in section 11 of the 18 March regulations discussed above.

The problems with enforcing prohibitions on fake news are well-known. One person’s fake news is often another person’s sincerely held belief. Another person’s facts might be yet another’s opinion. The problem with these regulations in particular, is that the ‘fake news’ contemplated relates specifically to government’s response to the coronavirus outbreak. In the law of defamation, it is well-established that public officials engaged in public duties do not have the same recourse to law as they or ordinary citizens would in their private affairs. **The reason for this is obvious: The public has an interest in whatever government does, and the nature of public discourse is that there will be disagreements about public policy and government conduct. These regulations, to the extent that they quash public opinion or protest against how government is dealing with the outbreak, are evident violations of section 16(1) of the Constitution, and do not appear to satisfy either the section 16(2) nor section 36(1) formula to test for justifiable limitations on that right.**

5.2.7 *Freedom of movement and trade*

Perhaps the most notable addition in the 25 March regulations are the wide-ranging restrictions on freedom of movement and freedom of trade.

Reg 11B of these regulations confines everyone in the country to their residences, unless they leave “strictly” for a valid reason, like performing an essential service or purchasing essential goods, or attending a funeral. Movement between provinces or metropolitan or district areas is prohibited outright, except, according to the 2 April amendments, travel to and from work, cargo transportation, transportation of mortal remains, and attendance of funerals. This prohibition on movement, under reg 11C, extends to all “commuter transport services” except those necessary for rendering essential services or obtaining essential goods. Such commuter transport services may only carry half of its licenced capacity. An arbitrary change for taxi services and private vehicles was suddenly allowed on 2 April, allowing them to carry up to 70% and 60% of their licenced capacities respectively. Employers in essential services are required to make transport arrangements for employees who cannot travel to and from work.

Furthermore, all businesses except those involved in essential services or goods are forced closed for the period of the lockdown by reg 11B. Retail stores may not sell anything but essential goods.

⁷⁵ Hjul P. “Human Rights Day, during a declared disaster”. (2020). *LinkedIn Pulse*. <https://www.linkedin.com/pulse/human-rights-day-during-declared-disaster-paul-hjul/>.

Violations of these provisions, per reg 11G, makes one liable for a fine and/or imprisonment for a period not exceeding six months.

As discussed above, these regulations appear to amount to suspensions of the respective rights (sections 21(1) and 22 of the Constitution), as exercising those rights has become entirely subject to government approval, rather than individual choice and discretion. As such, they do not qualify as a limitation on rights as contemplated in section 36(1).

5.2.8 *General indemnity*

The indemnity against providing compensation for damage or harm caused under reg 4 of the 18 March regulations is made into a general principle in reg 11E of the 25 March regulations. It provides that “no person is entitled to compensation for any loss or damage arising out of any *bona fide* action or omission by an enforcement officer under these regulations”.

The same objection alluded to above regarding reg 4 applies here. The Rule of Law requires that the governed and the governors be subject to the same law, including the common law of delict. There is no justification for exempting civil servants who cause damage in good faith, but not other citizens who do the same.

5.2.9 *Privacy and information and communication technology*

Reg 5 of the ICT regulations requires certain broadcasting licensees “to receive and disseminate public information” regarding government’s response to COVID-19 in all “local” languages and sign language. Licensees with access to radio frequency spectrum must “make available their platforms for the streaming of public announcements to their customers or subscribers”. Websites “operating within .zaDNA” are required to display a link to the government’s coronavirus website on their landing pages.

This regulation represents a limitation on the commercial freedom of licensees but might qualify as an acceptable limitation in terms of section 36(1).

Reg 6 of the ICT regulations requires electronic communication service providers to “rapidly deploy temporary electronic communications networks and services” when and where requested, “after consulting with the relevant Ministers”.

It is unclear who and about what must be consulted with ministers. This lack of clarity is inconsistent with the Rule of Law requirement that all positive legal obligations in society be clear, accessible, and understandable. The requirement to rapidly deploy infrastructure is, like the aforementioned, a limitation on commercial freedom, but might be acceptable in terms of section 36(1).

Reg 8 of the ICT regulations requires certain licensees in the internet and digital “sector” to “provide location-based services in collaboration with the relevant authorities identified to support designated departments to assist and combat the spread of COVID-19”.

Reg 11H of the sudden 2 April amendments introduces contact tracing into the coronavirus regulatory regime. The Department of Health is tasked with maintaining a database of persons “who are known or reasonably suspect to have come into contact with any person known or reasonable suspected to have

contracted COVID-19”. This database must contain all relevant information regarding those persons, including their addresses and cellphone numbers. The Director-General of Health may then direct mobile service operators (“without prior notice to the person concerned”) to provide information relating to those subscribers’ locations. The mobile service operator may not refuse, and refusal might entail a fine and/or imprisonment for up to six months. Per subreg (11), these obligations only subsist for the duration of the disaster, may only be used in connection with combating the spread of COVID-19, and must be destroyed after six weeks. Subreg (12) disallows the DG of Health to intercept the content of an electronic communication. Subreg (13) directs the Minister of Justice to designate a former judge to whom the DG of Health must make weekly reports on whose locations are being traced. Subreg (16) obliges the DG of Health to inform all persons who have been traced within six weeks after the disaster has ended.

These regulations are particularly problematic, in that they require service providers to encroach on subscribers’ section 14 right to privacy on behalf of government. The invasion of privacy *per se* does not itself appear to be justifiable under the section 36(1) test. Cellphone location tracking is justifiably used when criminals are being pursued. Each leg of the constitutional limitation analysis is easily satisfied in that respect. But when dealing with law-abiding, presently fearful citizens, the story changes dramatically.

The lockdown has already created an environment of isolation and self-enforcement. Many citizens are ‘snitching’ on their neighbours when they leave their homes. Society is regulating itself, for now. This may change in the future if more panic sets in. But under present circumstances it is overkill to conscript service providers – private companies – into government service by requiring them to infringe on the right to privacy. There is no good reason for government to know where South Africans are or what they are up to. The reasoning for this regulation is thus elusive and might not comport with the imperatives of the Rule of Law.

It is, however, worthwhile to note that the criteria controlling how the Department of Health may use the location information, and the controls put in place for a designated judge to oversee the process, are a welcome step away from government’s usual open-ended provisions. This complies comfortably with the imperatives of the Rule of Law, even though the power itself does not.

Reg 12 of the ICT regulations prohibits licensees from increasing prices or performing “mobile number portability” for the duration of the disaster.

Price controls are arbitrary and problematic in any context, and particularly in emergency situations. Strain on network infrastructure is at its highest for the duration of the lockdown due to most South Africans being confined to their homes. It would make sense under these circumstances to regulate the usage of the network (to ensure all users get their ‘fair share’ of the network) by increasing prices. If prices cannot be increased, and there is wanton overuse of the network, all connections are undermined.⁷⁶ Legally, this regulation might comply with the section 36(1) test, although it is certainly arguable that this limitation on commercial freedom is self-defeating and therefore irrational.

⁷⁶ See also Hjul (footnote 75 above).

5.2.10 Conclusion

The legislative process is long and cumbersome, but this is for good reason. It allows the public to know what is being proposed, to comment on those proposals and to observe their development into final legislation. This is superior to the regulatory process, whereby ministers and officials are empowered to ‘shoot from the hip’, so to speak, and enact new rules that South Africans have to comply with, on a whim. In present circumstances, changes have been made to the coronavirus regulations at multiple junctures within days of one another, causing confusion and widespread legal uncertainty. This state of affairs threatens the Rule of Law, which may not be deviated from even during times of disaster or emergency.

The courts have the authority and duty to declare any regulations that do not qualify under or satisfy the provisions in the Constitution, particularly the test in section 36(1), or which do not satisfy the legality requirements of the Rule of Law as contemplated in section 1(c), as invalid and unconstitutional, until such a time that a state of emergency is declared.

6. STATE OF EMERGENCY ACT

The State of Emergency Act was enacted to give effect to section 37(1) of the Constitution, which provides that a state of emergency may only be declared in terms of an Act of Parliament. It will be recalled that in states of emergency, certain rights enumerated in the Bill of Rights may be suspended if it is strictly necessary, and subject to a proportionality analysis.

Section 1(1) of the Act empowers the President to declare a state of emergency in the *Gazette*. Subsection (2) requires the President to “briefly” set out the reasons for the declaration. And subsection (3) allows the President to withdraw the declaration at any time with another proclamation in the *Gazette*.

Section 2(1) of the Act empowers the President to make regulations that:

are necessary or expedient to restore peace and order and to make adequate provision for terminating the state of emergency, or to deal with any circumstances which have arisen or are likely to arise as a result of the state of emergency.

There is an inconsistency between this provision and section 37 of the Constitution. The Constitution requires that a state of emergency be *necessary* to restore peace and order. Section 2(1) of the Act allows a state of emergency measure to be *expedient* in the restoration of peace and order. Necessity and expediency are different standards, in that where something is necessary, no other approach or avenue would guarantee the sought-after result, and where something is expedient, it is merely convenient or easier to implement than the alternatives. It is, however, noteworthy that section 2(3)(a) of the Act prohibits the making of regulations that are inconsistent with the Constitution.

Section 3 of the Act provides for supervision over the state of emergency by Parliament, *inter alia* empowering the National Assembly to reject any regulation or a part thereof.

As of Friday, 3 April, more than a week after the so-called “lockdown” began, no state of emergency had been declared, and all government’s measures were proceeding in terms of the Disaster Management Act, and, according to the Minister of Justice, in terms of section 36 of the Constitution.⁷⁷

The coronavirus regulations as discussed above, however, clearly inhibit various constitutional rights, particularly freedom of movement and freedom of association, to such an extent that it can no longer be considered a mere limitation, but indeed a suspension. In other words, the lockdown appears to represent a *de facto* (undeclared) state of emergency.

The problem with the *de facto* state of emergency is that it is unconstitutional.⁷⁸ There is no provision in the Constitution for an ‘implied’ or ‘implicit’ state of emergency. Indeed, any state of emergency must be declared, explicitly, by the President, in terms of the State of Emergency Act. This will immediately activate various legislative and judicial safeguards that are absent during a so-called state of disaster.

The *de facto* state of emergency must be made *de jure*. But herein lies the probable reason for the President not declaring a state of emergency: The constitutional requirements for such a declaration are not present. For a state of emergency to be declared, the continued existence of South Africa must be at stake, and there must have been a breakdown of peace and order.⁷⁹

The mere refusal of citizens to comply with existing regulations cannot be construed as a breakdown in peace or order, any more than a refusal by criminals to comply with prohibitions on murder and robbery can be so construed. It would be grossly inappropriate and irrational for government to overreact by derogating from South Africans’ entrenched rights in the absence of disorder and truly widespread non-compliance. The deployment of the military, in this respect, also seems very premature.

In other words, neither of the constitutional requirements for a state of emergency to be declared are satisfied by the current coronavirus outbreak.

This is not to downplay the seriousness of the pandemic, but it must be borne in mind that COVID-19’s mortality rate is lower than other prevalent diseases in South Africa. In other words, if we are to regard the coronavirus outbreak as such a threat to South Africa’s very existence that it is grounds for a declaration of a state of emergency, then we must apply the principle throughout, and resign ourselves to a permanent state of emergency until all these other, worse conditions, are also solved.

⁷⁷ Rabkin F. “Constitutional rights during disaster”. (2020). *Mail & Guardian*. <https://mg.co.za/article/2020-03-19-constitutional-rights-during-disaster/>.

⁷⁸ Erasmus (footnote 16 above) 655-656.

⁷⁹ See also De Vos P. “COVID-19: Citizen rights in a time of disaster – and under a State of Emergency”. (2020). *Daily Maverick*. <https://www.dailymaverick.co.za/article/2020-03-23-covid-19-citizen-rights-in-a-time-of-disaster-and-under-a-state-of-emergency/>.

7. CONCLUSION



The 1980s in South Africa was characterised by widespread reform away from strict Apartheid by the government of PW Botha. Much, if not all this reform, however, was overshadowed by what South Africans today associate most closely with that decade: Brutal, successive states of emergency where government, then not bound by any constitutional bill of rights, made short work of South Africans' common law freedoms. The memory and psychological scarring of this lawless regime lingers for many South Africans. Others are today experiencing it for the first time.

It has been possible for government to intercept cellphone communications (including location) since RICA⁸⁰ was passed into law in 2002, at the beginning of the United States of America's global War on Terror. No real or effective opposition was mounted against this intrusion on privacy, likely because the intervention was sold as a noble tool to fight terrorism and crime. At the time nobody understood the implications of totalitarian surveillance and control, which might today and in the future become more evident. Many will argue, of course, that the coronavirus pandemic is a good reason for government to make short work of the rights to privacy, movement, and assembly. But it is a slippery slope: *There can and will always be another seemingly good reason for depriving certain rights.*

This does not deny that circumstances might justify the limitation or suspension of rights – indeed, the Constitution makes explicit and clear provision for such an eventuality. However, if that event arises, it is government's responsibility to proceed in lockstep with the Constitution, and it is up to civil society and South African citizens to be ever vigilant about how government conducts itself.⁸¹ It is doubtful whether such constitutional adherence and vigilance is being displayed during the present crisis.

It is beyond deeply concerning, not to mention upsetting, that in little more than the first week of the lockdown, eight South Africans lost their lives at the hands of the security forces in the latter's attempt to enforce the coronavirus regulations. Two of those died while in police custody. At the time of writing, these deaths surpassed the number of people killed by the coronavirus.⁸²

While this paper is chiefly jurisprudential, it must always be remembered that there is a very real human element in this story: More than 56 million South Africans, of whom the majority are poor, are being deprived of the protection of their rights – their livelihoods, dignity, and freedom. Their rights are not only threatened by a well-meaning but inherently coercive and ineffective government, but also by the very COVID-19 virus itself.

Constitutionalists specifically find themselves in a difficult position. Our usual protestations against the excesses of State power appear less valid now than in times of normalcy. But as Brookes and MacAulay noted years ago, in 1958, when South Africa was experiencing far more turmoil and government crackdown than today:

"It is not always easy to see what course should be followed by friends of freedom in these circumstances. But at least they must keep their own minds clear, speak the truth boldly, and protest in every constitutional way open to them. To do less would be rank disloyalty to South Africa, who needs the honesty and courage of all her sons."

⁸⁰ Regulation of Interception of Communications and Provision of Communication-Related Information Act (70 of 2002).

⁸¹ See Deochand E and Babuza M. "What does a COVID-19 national state of disaster mean for rights?" (2020). *City Press*. <https://citypress.news24.com/Voices/what-does-a-covid-19-national-state-of-disaster-mean-for-rights-20200320>; Du Toit P. "ANALYSIS: How the state will take control of our lives and why it must be kept in check". (2020). *News24*. <https://www.news24.com/Analysis/analysis-how-the-state-will-take-control-of-our-lives-and-why-it-must-be-kept-in-check-20200326>.

⁸² Karim A. "UPDATE | Lockdown: 3 die allegedly at the hands of the police". (2020). *News24*. <https://www.news24.com/SouthAfrica/News/lockdown-number-of-deaths-from-police-action-rises-to-8-surpasses-sas-covid-19-casualties-20200403>.

