

DEMOCRATIC OVERSIGHT

IN THE TIME OF THE COVID-19 LOCKDOWN

When the COVID-19 lockdown came into force on 26 March 2020, concerns were expressed about the lawfulness of certain aspects of the government's response to the pandemic. Several fundamental human rights enshrined in the South African Constitution are affected by the regulations promulgated by the executive branch of the government, including the freedom and security of the person, freedom of expression, assembly, movement and residence, trade, occupation and profession, and the rights to education, privacy and access to information.

By Adv Gary Pienaar

Photo: John Salvino, Unsplash

In the spirit of *‘thuma mina’*, most South Africans responded positively to President Cyril Ramaphosa’s call for a national COVID-19 lockdown. Many citizens and commentators indicated their preparedness to surrender aspects of their civil and socioeconomic rights in the interest of the common good and the compelling exigencies of the crisis, recognising the necessity of prioritising the right to life of the many who might succumb.

Judicial oversight

After [some confusion involving the location of judicial authority](#) between some divisions of the High Court and his office, Chief Justice Mogoeng Mogoeng and the heads of courts held a media conference on Tuesday 17 March 2020 during which Mogoeng announced [directives](#) stipulating that, as a designated essential service, the justice system would carry on, with a number of measures to ensure hygiene and physical distancing. Urgent matters would proceed and members of the public with a ‘material interest’, including litigants and those supporting them and the media, would be allowed in court.

Mogoeng instructed the courts to stay open during the lockdown, among other reasons so that citizens could challenge the lockdown rules if necessary. The Constitution makes provision for such challenges, even under a state of emergency, which gives the government extraordinary powers, beyond those it now has in terms of the declared national state of disaster.

Fake news and surveillance

Since the lockdown, a number of people have been arrested for flouting the lockdown regulations, amongst them a [man](#) who allegedly spread potentially dangerous false claims of contaminated tests. The Gauteng department of health [reportedly](#) encountered difficulties with its community-testing initiatives as a result of the false claims.

However, the fake news provisions are extremely vague, [to the extent](#)

[that they may be unenforceable](#). Intention, for example, is always difficult to prove.

On 26 March 2020, Stella Ndabeni-Abrahams, Minister of Communications and Digital Technologies, promulgated the [‘Electronic Communications, Postal and Broadcasting Directions’](#). This included instructions to telecommunications companies to maintain the availability of their services during the lockdown, as part of a package of measures providing reassurance that the free flow of official, private and social news and information would continue.

At the same time, Direction 8 required that internet and digital telecommunications licencees had to provide location-based services in collaboration with the relevant authorities to combat the spread of COVID-19.

This provision caused consternation as it authorised the government to ‘track and trace’ people’s location and movements using their private cellphones. This [broadly-phrased power](#) raised the spectre of state surveillance [using digital location and interception of communications](#), which were reminiscent of apartheid-era spying and movement control, as well as of more recent political abuses of state security capacity. South Africa is not alone in introducing such measures, which are increasingly applied [both here and elsewhere in the world, including newer democracies in Europe](#).

In many countries, the crisis has also been used to [limit the right of access to information](#) — an essential enabling right in any situation, and particularly when ordinary democratic checks and balances have been constrained in various ways.

Given the new offence of spreading fake news, many people feared that the content of their communications would also be accessible to state surveillance. These fears arose because Direction 8 of the regulations contained none of the democratic safeguards of a clearly and narrowly specified purpose for

accessing clearly specified categories or types of information, how the information would be used, whether it would be anonymised, and the duration the information would be stored, as well as prior judicial authorisation.

The government’s [reassurance](#) that it would not engage in ‘intrusive’ surveillance wasn’t uniformly accepted at face value. Subsequently, [amended regulations promulgated on 2 April 2020](#) provided much-needed detail and greater reassurance in this regard. For example, while a track and trace database with personal details would be created, it would be confidential, and disclosure of the information would be permitted only for purposes related to addressing, preventing or combatting the spread of the virus. This personal information could be retained only for a period of six weeks after being obtained and would thereafter be destroyed.

No person would be allowed to ‘intercept the contents of any electronic communication’ — Reg.11H (12). The amended regulations also required the appointment of a retired judge as the COVID-19 Designated Judge, to make recommendations and give directions regarding the enforcement or amendment of the regulations, to safeguard people’s right to privacy. In a widely welcomed move, [the minister of justice promptly appointed](#) the highly respected retired Constitutional Court Justice Kate O’Regan to undertake these responsibilities.

In a further welcome move, the Information Regulator of South Africa, the guardian of access to information and privacy in terms of the Protection of Personal Information Act 4 of 2013, issued a detailed [Guidance Note](#) on 3 April. The Regulator recognised the need to effectively manage the spread of COVID-19, but outlined the conditions for the lawful gathering and processing of personal information with which public and private bodies needed to comply when entrusted with personal information.



A view down Long Street, Cape Town during the COVID-19 lockdown in April 2020. The billboard on the building at the end of the street calls on South Africans to “stay home” to help the government’s efforts to contain the pandemic.

Photo: [Discott](#)

Lockdown enforcement

The lockdown is being enforced by the SA Police Service with support from metropolitan police services and the army. However, Regulation 11E states 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.” This regulation does not provide blanket immunity for misconduct by the security forces, but commentators have [expressed concern](#) that it gives them more cover than under normal conditions.

Relevant oversight bodies — the Independent Police Investigative Directorate (IPID) and the Military Ombudsman — are operating with reduced capacity or without urgency. An IPID media statement on 25 March indicated that [its services remained available during the lockdown period](#). Although it had only a limited number of investigators on standby in each province, provincial management would ensure that its work would continue. Its website provides standby mobile numbers for each province. On 2 April, the military ombudsman [publicly confirmed the availability of its services](#) during the lockdown.

Parliament

Despite the unprecedented crisis facing the country, and the exceptional concentration of power assumed by the executive branch, Parliament commenced its scheduled recess and constituency period on 18 March, within three days of the

disaster declaration, suspending all sittings until 13 April 2020.

On Friday 27 March, the Parliament’s presiding officers [issued a media statement](#) saying that:

“Members of Parliament, who are classified under the lockdown regulations as amongst those performing essential services, will be fulfilling their constitutional responsibilities during this period, in their constituencies in support of efforts against COVID-19.”

The statement provided no guidance or direction as to how the members of parliament are to fulfil these constitutional responsibilities, including the duty to scrutinise and oversee executive action, or the duties to facilitate public participation in oversight during a lockdown. Its duty to ensure transparency is vital when the DMA requires the Disaster Management Centre to file only an annual report with parliament.

Parliament initially issued a few media statements calling on the minister of health to investigate [reported shortages of personal protective equipment at public health-care facilities](#), and calling on the heads of the police and army to [investigate allegations of their members’ abuse of authority](#). But it didn’t respond to [calls by civil society](#) to all legislatures and rejected a request by [the official opposition](#) to the Speaker of Parliament to ensure at least some committee oversight. This led to a widespread view that they were [abdicating their responsibilities](#).

There is an urgent need to ensure transparent and timely answers that provide the public with vital information about the implementation of government’s undertakings. Key examples include: details of government’s progress in providing vital personal protective equipment to health-care workers; the rollout of the COVID-19 testing programme; progress with emergency provision of water to unserved communities; the issuing of permits to informal traders; the provision of social relief for those in need of food and other essentials; and the provision of promised financial relief for individuals and small and medium companies.

On 15 April 2020, the Speaker issued rules for virtual meetings, which included public participation via livestreaming. The Parliament [announced](#) the resumption of oversight duties by means of virtual meetings and the cancellation of members’ scheduled leave from 28 April to 4 May 2020. Work related to COVID-19 oversight would be prioritised. The chairperson of the Portfolio Committee on Police, Tina Joemat-Pettersson, [announced](#) plans for a committee meeting, but did not indicate a date. The Defence Committee has also been silent about scheduling a meeting to receive updates concerning investigations into allegations of SANDF members’ alleged misconduct.

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