

Title: Between a rock and a hard place: COVID-19 and South Africa's response

Type of submission: essay

Authors:

Ciara Staunton,* School of Law, Middlesex University (London); Institute for Biomedicine, Eurac Research, Bolzano (Italy)

Carmen Swanepoel, Division of Haematology, Department of Pathology, Faculty of Medicine and Health Sciences, Stellenbosch University and National Health Laboratory Services, Tygerberg Hospital, South Africa

Melodie Labuschagine, Department of Jurisprudence, School of Law, University of South Africa

* Corresponding author

Middlesex University School of Law

Room W245, The Burroughs

Hendon

London NW4 4BT

c.staunton@mdx.ac.uk

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Authors biographies

Dr Ciara Staunton is a Senior Lecturer in Law at Middlesex University, London and a Senior Researcher at the Centre for Biomedicine, Eurac Research, Italy. She is also an Honorary Research Associate at the Faculty of Health Sciences, University of Cape Town and a Consultant to the South African National Health Laboratory Service. Her research focuses on the governance of new and emerging technologies, in particular stem cell research, genomic research and biobanking. Ciara's current research focuses on the sharing of health data for research, with a particular focus on Africa. She has been in receipt of grants from the Wellcome Trust, the National Institutes of Health and the Irish Research Council and has been involved in the development of policy in Ireland, Bahrain and Africa. She was previously a post-doctorate researcher at the Centre for Medical Ethics and Law, Stellenbosch University. During this time she co-ordinated the Advancing Research Ethics in Southern Africa (ARESA) Program and was a member of the H3Africa Ethics and Regulatory Issues Working Group. She obtained her PhD from NUI, Galway for her thesis *The Regulation of Stem Cell Research in Ireland*. Prior to starting her academic career, she was a Legal Researcher at the Law Reform Commission of Ireland.

Dr Carmen Swanepoel is a Principal Medical Scientist and lecturer within the Division of Haematopathology and jointly appointed by the National Health Laboratory Services (NHLS) and Stellenbosch University (SU) at Tygerberg Hospital, South Africa. She is concerned with research, diagnostic test development and the teaching and training of staff/students. She currently oversees the and a small registered biorepository (NSB) within the faculty's Pathology department and also fulfil the role of the Haematology Molecular Diagnostic Scientist. Over the years she has gained expertise in other biobank and genomic related operations ranging from governance, ethics, LIMS, sample and data sharing and protection, sample QC, risk management through to sustainability. Promoting the science of biobanking, genetics and cancer within South Africa and the rest of Africa is a key mission and are involved in various projects associated with biobanking, cancer and genetic research. Other research interest includes molecular applications in leukemia diagnosis and cancer resistance mechanisms.

Professor Melodie Labuschaigne is Professor in Medical law and Ethics in the Department of Jurisprudence in the School of Law, University of South Africa. She is a former Director of the School of Law and Deputy Executive Dean of the College of Law at UNISA. She obtained the degrees BA, BA (Hons), MA and DLitt from the University of Pretoria, and the degrees LLB and LLD (in medical law) from the University of South Africa. She has published numerous articles on medical law, focusing on the legal regulation of stem cell research, ethical, legal and social issues relating to genomic research, assisted reproduction and biotechnology law, in local and international law journals and has presented many local and international conference papers. She is a recipient of the Chancellor's Award for Excellence in Research from the University of SA, the Women in Research Leadership Award, and the Hugo de Groot Prize. She has been involved with the revision and drafting of health legislation for many years and is regularly approached to provide legal opinions on legal issues relating to medical law. During 2016-2018 she served on the Academy of Sciences of South Africa consensus panel on *Human genetics and genomics in South Africa: Ethical, legal and social implications*, and has recently been invited to serve on the ASSAf consensus study on gene editing (2019).

Between a rock and a hard place: COVID-19 and South Africa's response

Abstract

The spread of COVID-19 across China, Asia, Europe and the United States of America was met with public health responses that initially encouraged hand washing and social distancing. They quickly turned to restrictions on the freedom of movement and assembly in the form of forced isolation, mandatory quarantines and lockdowns. Africa's first confirmed case was not until 14 February in Egypt and March saw a steady spread of the virus throughout the African continent. Concern began to rise about the impact that the virus would have on a continent that is currently facing HIV and TB epidemics and sporadic outbreaks of Ebola and Lassa Fever. There were fears that the already weakened health systems in many African jurisdictions may be unable to cope with another pandemic and quick and decisive action to stop the spread of the virus was considered to be essential.

On 15 March 2020, nine days after the first recorded case in South Africa, President Cyril Ramaphosa announced a State of Disaster. Over the following weeks, a series of regulations were promulgated that limited the freedom of movement and assembly, limited the sale of certain items, specifically prohibited the sale and transportation of alcohol and cigarettes and criminalised the spread of disinformation on COVID-19. Together they represent the greatest limits on the Bill of Rights in post-apartheid South Africa. However, public health strategies such as social distancing and regular hand washing are a privilege many in South Africa cannot afford, especially for those in crowded informal settlements and who use mass public transport systems. In this paper, we consider these regulations and argue that two major issues are a lack of a community informed response and an over-reliance on the criminal law to this major public health crisis.

Introduction

In December 2019, a cluster of pneumonia cases was reported in China, which eventually led to the identification of the first case of COVID-19. Since then, COVID-19 has spread across Asia to Europe, and through to the United States before the first case was reported in Egypt on 14 February.¹ Daily updates from the Africa Centre for Disease Control (Africa CDC) shows that the number of recorded cases has risen daily with (as of 18 June 2020) 52 African Union Member States reporting 267 519 cases, 7197 deaths and 122 661 recoveries.² Together with Egypt and Algeria, South Africa was considered to be at the highest risk of the virus being imported and spreading with a moderate to high capacity to respond to an outbreak.³

South Africa's National Institute of Communicable Diseases (NICD) reported its first confirmed case on the 5 of March 2020. Since then, the number of recorded cases has steadily increased, but not at

¹ 'COVID-19 Cases Top 10 000 in Africa' (WHO | Regional Office for Africa)

<<https://www.afro.who.int/news/covid-19-cases-top-10-000-africa>> accessed 13 April 2020.

² 'COVID-19' (Africa CDC) <<https://africacdc.org/covid-19/>> accessed 13 April 2020. WHO Africa numbers are different as the WHO only captures WHO countries. WHO Africa states that there have been 86,115 confirmed cases, 4,206 deaths and 88,776 recovered as of 16 June 2020. WHO Africa (<https://www.afro.who.int/>). (<https://who.maps.arcgis.com/apps/opsdashboard/index.html#/0c9b3a8b68d0437a8cf28581e9c063a9>). For more on the AU response see Marguerite Massinga Loembé and others, 'COVID-19 in Africa: The Spread and Response' [2020] *Nature Medicine* 1.

³ Marius Gilbert and others, 'Preparedness and Vulnerability of African Countries against Importations of COVID-19: A Modelling Study' (2020) 395 *The Lancet* 871.

the exponential rate that was initially expected.⁴ To date (16 June 2020), 73,533 confirmed cases and 1,568 deaths have been reported by the NICD. With the arrival of COVID-19, the initial advice to South Africans focused on regular handwashing and social distancing. However, the declaration of COVID-19 as a pandemic by the World Health Organisation (WHO) on 11 March 2020, the global daily rise in reported cases, but crucially, the first case of community transmission in South Africa recorded, prompted President Cyril Ramaphosa and his government to act. Although the number of cases at the time remained relatively low (61 confirmed cases; 0 deaths), a national State of Disaster was declared on 15 March 2020 and a series of measures limiting the rights of South Africans were announced.

Decisive action was indeed necessary. South Africa is a deeply unequal society.⁵ Only 16% of the South African population has access to medical aid,⁶ with most of its population relying on the public healthcare sector that is under-resourced and poorly administered. In its 2016-2017 Annual Inspection Report, the Office of Health Standards reported that out of 851 public sector health establishments, 62% of these were non-compliant with the norms and standards for healthcare quality. Areas of deficiencies identified included a lack of or poor leadership and management, knowledge, competencies and support from senior staff.⁷ In addition, the South African health care system carries a significant burden of tuberculosis (TB), HIV and HIV/TB co-infection, with millions of the population on immunosuppressant drugs as well as others who are HIV positive but not receiving treatment for HIV.⁸ There are concerns that those with these co-morbidities are more susceptible to SARS-CoV2 infections and have a higher risk of developing severe COVID-19 disease.⁹ Data shows that the younger populations have also been affected more than in other parts of the world.¹⁰ COVID-19 has disrupted the provision of routine health care in other parts of the world and will likely similarly affect South Africa, including the delivery of South Africa's routine chronic illnesses and its TB and HIV antiretroviral programmes. South Africa's already overstretched public health care system is thus unlikely to be able to withstand an explosion of COVID-19 cases, particularly when considering that better managed health care systems in some high-income countries (HICs) are overwhelmed. Preventing and containing the spread of COVID-19 in South Africa was thus a critical priority.

⁴ For up to date figures, see <https://www.nicd.ac.za/> (accessed 16 June 2020).

⁵ For more on this see Statistics South Africa, 'Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality | Statistics South Africa' <<http://www.statssa.gov.za/?p=12744>> accessed 13 April 2020.

⁶ Council for Medical Schemes *Annual Report 2015/2016*

⁷ Office of Health Standards Compliance *Annual Inspection Report 2016-2017* (Pretoria, 2018)

⁸ The estimated overall HIV prevalence rate is approximately 13,1% among the South African population. The total number of people living with HIV is estimated at approximately 7,52 million in 2018. 'Statistical Release' 26; 'The Numbers: HIV and TB in South Africa • It is estimated that there are around 3-million people living with HIV in South Africa who are not receiving treatment. Spotlight' (*Spotlight*, 4 July 2018) <<https://www.spotlightnsp.co.za/2018/07/04/the-numbers-hiv-and-tb-in-south-africa/>> accessed 8 April 2020. They constitute around 38% of those living with HIV. See

<https://www.unaids.org/en/regionscountries/countries/southafrica>. According to the 2018 WHO Global TB Report roughly 78 000 people died of TB in South Africa in 2017 – of these 56 000 were HIV positive and 22 000 were not.

⁹ Academy of Science in South Africa, *ASSAf Statement on the Implications of the Novel Coronavirus (SARS-CoV-2; COVID-19) in South Africa* <https://www.assaf.org.za/files/2020/ASSAf%20Statement%20Corona%20Virus%20%20March%202020%20web.pdf>

¹⁰ 'Why Sub-Saharan Africa Needs a Unique Response to COVID-19' (*World Economic Forum*) <<https://www.weforum.org/agenda/2020/03/why-sub-saharan-africa-needs-a-unique-response-to-covid-19/>> accessed 4 April 2020.

In drafting the government's response to the virus, President Ramaphosa and his Cabinet had the opportunity to learn from the experiences of China and Europe that focused on social distancing, self-isolation, quarantine, testing and lockdown. While such strategies have been proven effective in limiting and at times containing the spread of the virus, the socio-economic realities in South Africa limit their effectiveness. Public health strategies such as regular hand washing and social distancing that have proven to be effective in limiting the spread of the virus elsewhere are cheap preventive measures, but they are a privilege that many cannot afford in South Africa. Approximately 13% of all households are located in informal settlements that are poorly structured, cramped and at times lack access to running water.¹¹ Self-isolation and quarantine are practically impossible in situations where several people share a bedroom or indeed for the estimated 200,000 people who are currently homeless in South Africa. A significant portion of the population relies on cramped and over crowded public transport, with 69% using public taxis, 20.2% using buses and 9.9% using the trains.¹² All of these factors highlight the impracticality of maintaining social distancing and challenges in ensuring good hygienic hand washing practices in these types of settings.¹³

Despite these socio-economic realities, South Africa's COVID-19 response needed to focus on containing and slowing down the spread of the virus. It is unsurprising that the regulations promulgated under the State of Disaster mainly focused on severely limiting the freedom of movement and assembly of its citizens. It was clear from the outset that this would have a considerable economic impact, and on 31 March, South Africa was downgraded to junk status with the South African Rand falling to a record low.¹⁴ President Ramaphosa was left with a choice of sacrificing the economy to slow the spread of the virus or putting the economy first and risk exposing an already weakened healthcare system and population suffering from other comorbidities to the virus. Faced with this choice, his decision to lockdown the country cannot be criticised and may prove decisive in containing and slowing down the spread of the virus. Considering the time it took to reach its borders, South Africa had time to prepare a COVID19 response and draw on the importance of its community informed response to other epidemics. However, despite the impact that these regulations were going to have on civil society, the lack of public deliberation and community engagement in developing these regulations are concerning. Furthermore, the criminalisation of non-compliance with these public health measures seeks to undermine their aims, has the potential to increase stigma and discrimination of the disease, and fails to address the real issue: ensuring that the population has the means to comply with the regulations. Combined, these factors question whether South Africa has learned from its response to its HIV epidemic. In outlining the first month of South Africa's COVID-19 response, this paper will critique the lack of engagement, the criminalisation of non-compliance and discuss their potential impact.

National State of Disaster

¹¹ Informal settlements and human rights in South Africa. (2018) Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Socio-Economic Rights Institute of South Africa. See

<https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>

¹² Stats SA *National Household Travel Survey 2013* (Pretoria, July 2014).

¹³ There have been attempts to improve the situation in certain areas. See 'Covid-19 Lockdown: 28 Water Trucks Deployed to Informal Settlements in Cape Town' <<https://www.iol.co.za/capeargus/news/covid-19-lockdown-28-water-trucks-deployed-to-informal-settlements-in-cape-town-46109602>> accessed 13 April 2020.

¹⁴ 'The Price SA Will Pay for Being Downgraded to Junk' (*BusinessLIVE*) <<https://www.businesslive.co.za/bd/economy/2020-03-31-the-price-sa-will-pay-for-being-downgraded-to-junk/>> accessed 10 April 2020.

On 15 March 2020, President Ramaphosa addressed the nation and announced a National State of Disaster. A State of Disaster is distinct from a State of Emergency. The power to declare a State of Emergency derives from section 37 of the Constitution and it must be declared within the terms of the State of Emergency Act 1997. It can only be declared when ‘the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency’ and ‘the declaration is necessary to restore peace and order’. Upon declaration of a State of Emergency, certain rights under the Bill of Rights may be derogated from, with the exception of those non-derogable rights expressly contained within section 37(5), that includes the rights to dignity, life and the right to a fair trial. A State of Emergency can only last for 21 days, unless Parliament decides to extend this declaration by 3 months at a time. The first extension must be done by a majority of Parliament and any subsequent extension requires the support of 60% of Parliament. Any court within South Africa has the power to decide on the validity of the State of Emergency, an extension of the State of Emergency or any regulations promulgated as part of the State of Emergency. Parliament and the courts thus clearly have a supervisory role under the State of Emergency. A partial State of Emergency was declared by President PW Botha in 1985 that extended to the entire country in 1986, permitting the then President to rule by decree, detain citizens without trial, restrict the freedom of movement and give the police and military considerable powers, which continued until 1990. A State of Emergency has not been declared since the establishment of a democratic South Africa in 1994.

The Constitution does not make provision for the executive power to declare a State of Disaster. This is made possible through the Disaster Management Act 2002. This Act gives the relevant Minister the power to limit certain rights and freedoms within South Africa through the promulgating of regulations. A State of Disaster lasts for 3 months (unless it is terminated) and can be extended by the Minister one month at a time. Although rights may be limited, they cannot be derogated from, and any regulations promulgated must conform to the Bill of Rights. The courts can declare a State of Disaster invalid (and indeed the current State of Disaster was challenged and dismissed by the Constitutional Court¹⁵), or any regulations promulgated under the State of Disaster (on 2 June the regulations were struck down as unconstitutional¹⁶). Unlike the State of Emergency, there is no clear oversight role for Parliament in a State of Disaster. Parliament is not precluded from meeting during this time, but limitations on the freedom of assembly may affect the ability of Parliament to convene.

To meet the criteria under the 2002 Act for a “disaster”, there must be the presence of a disaster that is defined as 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.’ COVID-19 clearly falls within the definition of a disaster under the 2002 Act and on 15 March 2020, President Ramaphosa

¹⁵ ‘ConCourt Kicks out NGO’s Legal Challenge against 21-Day Coronavirus Lockdown’

<<https://www.iol.co.za/news/politics/concourt-kicks-out-ngos-legal-challenge-against-21-day-coronavirus-lockdown-45768339>> accessed 8 April 2020.

¹⁶ In the matter between Reyno Dawid de Beer, Liberty Fighters Network, Hola Bon Renaissance Foundation and the Minister of Cooperative Governance and Traditional Affairs (case no. 21542/2020) of 2 June 2020. https://www.judiciary.org.za/images/Rule_A16/In_the_matter_between_Reyno_Dawid_De_Beer_-_Libert_Fighters_Network_and_Minister_of_Cooperative_Governance_and_Traditional_Affairs_Case_No_21542-2020.pdf (accessed 16 June 2020). For more on this case see M Labuschaigne, ‘Ethicolegal Issues Relating to the South African Government’s Response to COVID-19’ (2020) 13 South African Journal of Bioethics and Law <<http://www.sajbl.org.za/index.php/sajbl/article/view/630>> accessed 16 June 2020.

granted Dr Nkosazana Dlamini-Zuma, the Minister of Cooperative Governance and Traditional Affairs, the power to limit certain rights and freedoms within South Africa. A series of restrictions were announced on the same day, with further restrictions announced on 23 March 2020.¹⁷ Amongst others, the regulations criminalised the spread of disinformation, prohibited the sale and transportation of cigarettes and alcohol from midnight on 26 March for 3 weeks (that was further extended by two weeks on 9 April 2020¹⁸) and controlled the prices of certain essential products. For the purposes of this article, we will focus on the restrictions to the freedom of movement and assembly.

Restrictions on the freedom of movement and assembly

Strategies for containing the spread of COVID-19 that have been implemented elsewhere centre on social distancing, isolating, limiting the movement of citizens, testing and quarantining of those who have tested positive. Such measures are at the heart of South Africa's response. Initially gatherings were restricted to 100 individuals and establishments that served alcohol could have no more than 50 individuals. As of midnight on 26 March, all gatherings, including gatherings for prayer were prohibited for 3 weeks, with the exception of funerals that were limited to 50 individuals. As of midnight on 26 March, all but essential movement was prohibited for 3 weeks (and extended until 31 April), in what is known locally as a lockdown. The leaving of a home was only permitted to buy essential goods, seek medical attention, buy medical products, collect social grants, attend a funeral of no more than 50 people, access public transport for essential services, or attend work that is deemed to be an essential service during specified times. The leaving of a house for exercise or to walk a dog was prohibited and the movement between provinces and districts was not permitted. These restrictions were extended by a further two weeks on 9 April and the total 'hard' lockdown period lasted until 30 April.

The regulations introduced also state that anyone who is suspected of having COVID-19 or has been in contact with a person who has tested positive for COVID-19 cannot refuse testing. If confirmed positive, they cannot refuse treatment, isolation or quarantine. Similar provisions already exist in the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions gazetted in June 2017 under the National Health Act. Under this regulation, if a person refuses to consent to the testing, treatment, isolation or quarantine of a notifiable medical condition, the Head of a provincial department can apply to the High Court to require the mandatory testing, treatment, isolation or quarantining of that individual. Failure to comply may result in imprisonment not exceeding 12 years, a fine, or both. The COVID-19 regulations, however, go further, and while an application to the magistrate's court for the mandatory testing, treatment, isolation or quarantine is made, that person can be placed in isolation or quarantine for 48 hours. Furthermore, the power to make this application is vested in the hands of an 'enforcement officer', defined as including a member of the South African Police Service (SAPS), the South African National Defence Force (SANDF), a peace officer and not the Head of a provincial department.

Through the restrictions on movement and assembly, it was anticipated or expected that the transmission of the virus would be hindered. However, these restrictions extend beyond the restrictions on freedom of movement and assembly imposed under the apartheid government.

¹⁷ For a list of all regulations, guidelines and speeches see 'Regulations and Guidelines - Coronavirus Covid-19 | South African Government' <<https://www.gov.za/coronavirus/guidelines>> accessed 13 April 2020.

¹⁸ 'President Cyril Ramaphosa: Extension of Coronavirus COVID-19 Lockdown to the End of April | South African Government' <<https://www.gov.za/speeches/president-cyril-ramaphosa-extension-coronavirus-covid-19-lockdown-end-april-9-apr-2020-0000>> accessed 13 April 2020.

Although these restrictions were introduced in response to a public health emergency and is a completely different context to apartheid, the restrictions on the freedom of movement in the lockdown period have been met with some apprehension. The CEO of the South African Human Rights, Tseliso Thipanyane, describes the measures introduced as similar to those associated with a State of Emergency and argues that President Ramaphosa was reluctant to use that term due to its association with apartheid.¹⁹ Considering the almost total limitation on the right of assembly (with the exception of a funeral) and the severe limitations on the freedom of movement, the effect of these measures is indeed more akin to a State of Emergency in the context of these rights. Furthermore, in the first week of April, South Africans learned of the government's plan to decrease the population in 29 critically overcrowded informal settlements across the country by relocating thousands of residents from their homes in an attempt to slow the spread of the coronavirus.²⁰ Residents that opposed this relocation find it reminiscent of apartheid's forced removal in 1968 of over 60,000 residents of Cape Town's District Six area (after the apartheid government's declaration of District Six as a whites-only area). Conditions at temporary camps for the duration of COVID-19 lockdown for 2,000 homeless people to slow down the spread of the virus are a cause for concern. Many of these homeless people have said they have been forced to move to the temporary camps.²¹

The restrictions on freedom of movement are within the powers granted under the 2002 Act and in line with the World Health Organisation (WHO) recommendations on curbing the spread of the virus. The declaration of a State of a Disaster and the subsequent regulations can be reviewed and declared invalid by a court and the measures should conform to the Rule of Law. However, it is the reliance on the criminal law for non-compliance with the restrictions that we consider to be unnecessary and contrary to good public health policy, but also fails to consider the socio-economic realities for non-compliance.

Criminalisation of public health measures: potential impacts

South Africa, and indeed Africa, is no stranger to epidemics. On 8 August 2014 the WHO declared a Public Health Emergency of International Concern (PHEIC) in response to the West Africa Ebola epidemic that went on for over two years. South Africa currently has a generalised HIV epidemic, is battling a TB epidemic, and considerable investment has gone into its prevention, testing and treatment campaigns. While every epidemic is different, the importance of community engagement is clear in developing any response to an epidemic, and interventions that succeed are likely to be informed by the community. During the Ebola epidemic, WHO guidance initially prohibited traditional burial practices for containment purposes, but these guidelines had to be changed and were modified in conjunction with the affected communities.²² South Africa similarly learned that

¹⁹ 'Human Rights Suspended in Face of Covid-19 Disaster' (*SowetanLIVE*)

<<https://www.sowetanlive.co.za/news/south-africa/2020-03-23-human-rights-suspended-in-face-of-covid-19-disaster/>> accessed 8 April 2020.

²⁰ 'Covid-19: Household Screenings Begin as Experts Warn about False Picture of Crisis' (*TimesLIVE*)

<<https://www.timeslive.co.za/sunday-times/news/2020-04-05-household-covid-19-screenings-begin-as-experts-warn-about-false-picture-of-crisis/>> accessed 8 April 2020.

²¹ 'Suspect Held for Teen's Rape at Strandfontein Camp for Homeless' <<https://www.iol.co.za/news/south-africa/western-cape/suspect-held-for-teens-rape-at-strandfontein-camp-for-homeless-46588855>> accessed 13 April 2020.

²² Akin Abayomi and others, 'African Civil Society Initiatives to Drive a Biobanking, Biosecurity and Infrastructure Development Agenda in the Wake of the West African Ebola Outbreak' (2016) 24 *Pan African Medical Journal* <<http://www.panafrican-med-journal.com/content/article/24/270/full/>> accessed 13 February 2020; Suerie Moon and others, 'Will Ebola Change the Game? Ten Essential Reforms before the next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola' (2015) 386

prevention, testing and treatment campaigns must involve the community and community-based services are essential in achieving results.²³ Public engagement is thus essential at both a macro level in the formation of policy and at a micro level whereby community engagement can help support the implementation of policy.

At a macro level, any guidance must be contextualised to take account of local healthcare systems, beliefs and traditions. For the COVID-19 measures to succeed, it is necessary to know what different communities need to meet these measures, and an important component is community engagement. South Africa should draw on its considerable experience in conducting community engagement to ensure that the regulations address COVID-19 and do not result in stigma, discrimination, or disproportionately affect the poor and perpetuate health inequity. A community-centred response for COVID-19 is thus essential.²⁴ While President Ramaphosa clearly stated in his March 2020 address to the nation that he consulted with business and industry, there appears to be a lack of consultation with those living in cramped informal settlements who will struggle to comply with these restrictive measures. The lockdown deprives those working in the informal sector from employment and access to a wage. Generally living hand to mouth, they are unlikely to have savings. Indeed, in the *De Beer* decision that held some of the lockdown regulations to be unconstitutional, the Court referred to the millions of informal workers who have lost their livelihood, forced to watch their children go hungry and stripped of their 'rights of dignity, equality, to earn a living and to provide for the best interests of her children'.²⁵

Approximately 17 million South Africans rely on social grants as their only income, constituting one in five persons. Social grants take different forms and include a child support grant; disability grant; older person grant, foster care grant, relief of distress and a care-dependency grant, amongst others afforded in terms of the Social Assistance Act 13 of 2004.²⁶ However, with many more South Africans now left unemployed, there will be more within the family relying on these grants.²⁷ While a number of relief measures aimed at mitigating the impact of the measures were announced, including an

The Lancet 2204; Amaya M Gillespie and others, 'Social Mobilization and Community Engagement Central to the Ebola Response in West Africa: Lessons for Future Public Health Emergencies' (2016) 4 *Global Health: Science and Practice* 626.

²³ Stefan Hanson, Yanga Zembe and Anna Mia Ekström, 'Vital Need to Engage the Community in HIV Control in South Africa' (2015) 8 *Global Health Action* 27450; 'Towards a Science of Community Stakeholder Engagement in Biomedical HIV Prevention Trials: An Embedded Four-Country Case Study' <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0135937>> accessed 8 April 2020.

²⁴ 'Rights in the Time of COVID-19 — Lessons from HIV for an Effective, Community-Led Response' 20; 'COVID-19 Community Engagement in South Africa: The Time Is Now' (*Sustainable Livelihoods Foundation*, 10 April 2020) <<http://livelihoods.org.za/2020/04/10/covid-19-community-engagement-in-south-africa-the-time-is-now/>> accessed 13 April 2020.

²⁵ ²⁵ In the matter between Reyno Dawid de Beer, Liberty Fighters Network, Hola Bon Renaissance Foundation and the Minister of Cooperative Governance and Traditional Affairs (case no. 21542/2020) of 2 June 2020. https://www.judiciary.org.za/images/Rule_A16/In_the_matter_between_Reyno_Dawid_De_Beer_-_Libert_Fighters_Network_and_Minister_of_Cooperative_Governance_and_Traditional_Affairs_Case_No_21542-2020.pdf (accessed 16 June 2020), para 7.2-7.3.

²⁶ 'Social Grants Second-Most Important Source of Income in SA – Stats SA' <<https://ewn.co.za/2019/05/28/social-grants-second-most-important-source-of-income-in-sa-stats-sa>> accessed 8 April 2020.

²⁷ Stephen Devereux, 'Social Protection Responses to the COVID-19 Lockdown in South Africa' (*The Conversation*) <<http://theconversation.com/social-protection-responses-to-the-covid-19-lockdown-in-south-africa-134817>> accessed 8 April 2020.

increase in some of the social grants, it is estimated that 45% of South African workers are not eligible to access some of the funds that were made available.²⁸

The South African government's response is characterised by an over-reliance on, and faith in the power of the criminal law. This militarised response was very evident, with President Ramaphosa appearing in military fatigues on the night the lockdown started. Failure to comply with some of the lockdown restrictions may result in imprisonment of up to 6 months, a fine, or both. The South African National Defense Force (SANDF) has also been bestowed with additional powers. Under the 2002 Act, financial, human and other resources may be released and directed towards the resolution of the disaster. During the 23 March address, President Ramaphosa announced that he had directed the SANDF to be deployed to support the SAPS. The presence of the military in enforcing the lockdown soon became a familiar scene in many streets across South Africa and they quickly moved to enforce the regulations. An entire group of almost 50 wedding guests, including the bride and groom, were arrested in the first week of April for breaking the ban on public gatherings,²⁹ and two doctors who tested positive for COVID-19, were forced into quarantine at a medical facility.³⁰ However, on 2 June, the North Gauteng High Court issued an order prohibiting government from forcing those who test positive for COVID-19 into state quarantine facilities if they are able to self-isolate. The High Court held that a person is 'only required to be quarantined or isolated at a state facility, or other designated quarantine site, when that person is unable to self-isolate, or refuses to do so, or violates the self-quarantine or self-isolation rules'.³¹ Within the first few days of the lockdown there were reports of the SANDF and SAPS using rubber bullets³² and allegations of abuse.³³ Eight people were reported to have been killed by the police during the first week of the lockdown in enforcing the COVID-19 regulations, which at that time was more than the number of deaths related to the virus.³⁴

It is not just the heavy handiness of the enforcement and the power given to SAPS and SANDF that we take issue with, but the regulations that have criminalised knowingly exposing and transmitting COVID19 to others. The criminalisation of the transmission of HIV, for example, is considered to be bad policy that is lacking in any evidence-base and only serves to stigmatise the disease and discriminate against those who have it,³⁵ leading to potential human rights abuses.³⁶ In the context

²⁸ Ihsaan Bassier and others, 'South Africa Can – and Should – Top up Child Support Grants to Avoid a Humanitarian Crisis' (*The Conversation*) <<http://theconversation.com/south-africa-can-and-should-top-up-child-support-grants-to-avoid-a-humanitarian-crisis-135222>> accessed 8 April 2020.

²⁹ 'Lockdown Wedding Ends in Arrest of Bride and Groom' *BBC News* (6 April 2020) <<https://www.bbc.com/news/world-africa-52183152>> accessed 8 April 2020.

³⁰ 'WATCH | 2 Doctors Allegedly Forced into Quarantine after "bringing Coronavirus to Limpopo" | News24' <<https://m.news24.com/SouthAfrica/News/watch-2-doctors-allegedly-forced-into-quarantine-after-claim-of-bringing-coronavirus-to-limpopo-20200403>> accessed 8 April 2020.

³¹ 'Another court loss for NDZ as COVID-19 patients may not be forced into state quarantine.' *Citizen*, 3 June 2020. <<https://citizen.co.za/news/south-africa/courts/2296197/another-court-loss-for-ndz-as-covid-19-patients-may-not-beforced-into-state-quarantine/>> accessed 3 June 2020.

³² Jason Burke, 'South African Police Fire Rubber Bullets at Shoppers amid Lockdown' (*the Guardian*, 28 March 2020) <<http://www.theguardian.com/world/2020/mar/28/south-africa-police-rubber-bullets-shoppers-covid-19-lockdown>> accessed 6 April 2020.

³³ 'DA Calls for Investigation into "gross Violations" by Soldiers Policing Lockdown' (*SowetanLIVE*) <<https://www.sowetanlive.co.za/news/south-africa/2020-03-30-da-calls-for-investigation-into-gross-violations-by-soldiers-policing-lockdown/>> accessed 6 April 2020.

³⁴ Daneel Knoetze and Citizen reporter, 'Eight People Allegedly Already Killed by Police during Lockdown – More than the Virus' (*The Citizen*) <<https://citizen.co.za/news/south-africa/crime/2265100/eight-people-allegedly-already-killed-by-police-during-lockdown-more-than-the-virus/>> accessed 7 April 2020.

³⁵ The Lancet Hiv, 'HIV Criminalisation Is Bad Policy Based on Bad Science' (2018) 5 *The Lancet HIV* e473.

of pandemics, there is the concern that criminalisation could have severe health-related effects on the population, undermine and exacerbate public health challenges caused by the pandemic³⁷ and have a devastating impact on already marginalised, stigmatised or criminalised communities.³⁸ South Africa fortunately resisted any attempts to criminalise HIV, but it is unclear why there has been a different response to COVID-19. Rather than encourage screening, testing and treatment, is likely to drive those who have or suspect they have COVID-19 underground.

Stigma reduction campaigns are essential in a COVID-19 response.³⁹ Key to this is stopping the spread of disinformation. Here South Africa has considerable experience from its HIV epidemic, as there is a history of false cures for HIV that include garlic, beetroot and holy water, to name but a few.⁴⁰ However, once again the emphasis is on the criminal law, as the spreading of disinformation (or fake news) on COVID-19 through any media, that includes social media, has been criminalised. While stopping the spread of disinformation is necessary, informing the public about the disease is essential. The South African government has opted to centralise the dissemination of information, requiring that all requests for information be directed to the NICD. Other experts in South Africa have been instructed not to talk to the press.⁴¹ As a result of this, the NICD is overwhelmed and unable to respond to many of the requests.

Furthermore, criticism of the national response has been met with public attacks rather than engagement with the concerns raised. When a phased relaxation of lockdown regulations were announced and various sets of contradicting and confusing rules were outlined by the respective portfolio ministers, various experts raised their concerns and expressed their opinions. Prof Glenda Gray, the president of the South African Medical Research Council as well as COVID19 ministerial advisory committee member particularly came under fire when she criticised the government's phased relaxation of lockdown approach as 'nonsensical and unscientific' to the media. This in turn led to the South African Health Minister, Dr. Zweli Mkhize to release a statement in response to Prof Gray's public attack of government as well as a request of investigation of Gray's conduct by the MRC. The investigation was later on dropped and Prof Gray was cleared of any transgressions following the response and right of academic freedom outcry from the scientific community.⁴²

³⁶ 'Rights in the Time of COVID-19 — Lessons from HIV for an Effective, Community-Led Response' (n 24).

³⁷ 'Governing Global Health Emergencies: The Role of Criminalization – PRIO Blogs' <<https://blogs.prio.org/2020/03/governing-global-health-emergencies-the-role-of-criminalization/>> accessed 8 April 2020.

³⁸ 'HIV JUSTICE WORLDWIDE STEERING COMMITTEE STATEMENT ON COVID-19 CRIMINALISATION | HIV Justice' <<http://www.hivjustice.net/news/hiv-justice-worldwide-steering-committee-statement-on-covid-19-criminalisation/>> accessed 8 April 2020.

³⁹ Carmen H Logie and Janet M Turan, 'How Do We Balance Tensions Between COVID-19 Public Health Responses and Stigma Mitigation? Learning from HIV Research' [2020] *AIDS and Behavior* <<https://doi.org/10.1007/s10461-020-02856-8>> accessed 8 April 2020.

⁴⁰ Keymanthri Moodley and others, 'The Psychology of "Cure" - Unique Challenges to Consent Processes in HIV Cure Research in South Africa' (2019) 20 *BMC Medical Ethics* 9.

⁴¹ 'Information Squeeze: Covid-19 Scientists, Experts in SA Silenced as Government Centralises Communication' (*News24*, 18 March 2020) <<https://www.news24.com/SouthAfrica/News/information-squeeze-covid-19-scientists-experts-in-sa-silenced-as-government-centralises-communication-20200318>> accessed 6 April 2020.

⁴² Azarrah Karrim and Sarah Evans, 'EXCLUSIVE | Unscientific and Nonsensical: Top Scientist Slams Government's Lockdown Strategy' (*News24*) <<https://www.news24.com/news24/southafrica/news/unscientific-and-nonsensical-top-scientific-adviser-slams-governments-lockdown-strategy-20200516>> accessed 19 June 2020; 'Statement of the Minister of Health Launch of Mobile Laboratories National Health Laboratory Services 1 April 2020' (*SA Corona Virus Online Portal*, 1 April 2020) <<https://sacoronavirus.co.za/2020/04/01/statement-of-the-minister-of-health->

Banning other suitably qualified experts from speaking with the press will only further limit the dissemination of reliable information, which is important in stopping the spreading of disinformation and combatting any stigma. These experts can provide much needed up-to-date information on testing and treatment. There have been reports that employers are threatening to dismiss employees who cannot provide evidence that they do not have the virus.⁴³ The South African Health Minister, has rightly warned that such measures will likely lead to discrimination, but with none of the employees meeting the (then) testing criteria and it exposes a lack of knowledge on this key issue. Testing is free in the public sector, but in the month since the first case was announced, the public National Health Laboratory Service (NHLS) only conducted 6,000 tests in total despite projections that they will conduct 5,000 test per day. The roll out of mobile testing units on 1 April 2020 for mass community based testing began to address this,⁴⁴ but the reality is that eighty per cent of all tests have been conducted in private labs that charge between R900 (\$47) and R1400 (\$73) per test.⁴⁵ As of 16 June, a total number of 1 148 933 tests were conducted in both the public and private sector, out of a population of 59,83 million.⁴⁶

Conclusion

In some ways, South Africa was fortunate as it took almost 3 months for COVID-19 to arrive. President Ramaphosa and his Ministers had time to learn from the experiences of the differing responses in Asia, Europe and the US. The COVID-19 epidemic in South Africa was always going to play out against the backdrop of other epidemics necessitating quick and decisive action. However, there has been an over-reliance on the criminal law in ensuring compliance and insufficient consideration of the socio-economic realities that sees a large segment of the South African population living in over-crowded informal settlements and who now have either no or limited access to employment or social support.

As South Africa entered its third week of lockdown, President Ramaphosa was left with a choice of lifting a lockdown that would likely result in the spread of a virus, or extending the lockdown and measures that will disproportionately affect vulnerable populations, likely perpetuate inequality and lead to a rise in intergenerational poverty. Ramaphosa's choices left him between a rock and hard place with no good option to choose. His only hope is that he would make the least worst option. Time will tell whether a lockdown extension will be worth the inevitably devastating economic impact. This virus may not discriminate those that it infects, but the effects of the virus will be most felt on already marginalised and vulnerable populations in South Africa for some time to come.

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<<https://www.dailymaverick.co.za/article/2020-05-25-250-senior-academics-issue-statement-to-support-prof-glenda-gray-and-the-principle-of-academic-freedom/>> accessed 19 June 2020.

⁴³ 'Coronavirus: Mkhize Warns against Stigmatisation in the Workplace' (*News24*, 19 March 2020)

<<https://www.news24.com/SouthAfrica/News/coronavirus-mkhize-warns-against-stigmatisation-in-the-workplace-20200319>> accessed 8 April 2020.

⁴⁴ 'Statement of the Minister of Health Launch of Mobile Laboratories National Health Laboratory Services 1 April 2020' (n 42).

⁴⁵ 'Will It Be Enough? Inside South Africa's Plan to Ramp up Coronavirus Testing' (*Bhekisisa*, 3 April 2020)

<<https://bhekisisa.org/health-news-south-africa/2020-04-03-will-it-be-enough-inside-south-africas-plan-to-ramp-up-coronavirus-testing/>> accessed 6 April 2020.

⁴⁶ <sacoronavirus.co.za/2020/06/15/update-on-covid-19-15th-june-2020/> accessed 26 June 2020.