The constitutionality of the Disaster Management Act and the Covid-19 regulations enacted thereunder: does this regulatory regime contravene the right to just administrative action?

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law in Constitutional Law and Administrative Justice by Coursework and Dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature: Signed by candidate **Date: 14/02/22**

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The constitutionality of the Disaster Management Act and the Covid-19 regulations enacted thereunder: does this regulatory regime contravene the right to just administrative action?

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ABSTRACT

This paper covers the constitutionality of the Disaster Management Act known as the Covid-19 regulations. It will argue that to keep in line with an open and transparent government in a participatory democracy, we needed a more open and public regulation making process which was less truncated. It argues that had all communities been consulted in the making and enforcing of lockdown regulations there would have been more adherence and less lives lost. Furthermore, because Covid-19 regulation-making is administrative action, had more procedural fairness and participation been included in the process then the right would not have been breached.

I will then show that the process was irrational, unreasonable and unlawful, and that the executive used the DMA declaration to exercise powers of emergency and that the lockdown declaration was more a de facto state of emergency and not a state of disaster. I will then set out the socio-economic consequences of the lockdown on gender-based violence, women and children, and early childhood development learners, and how more public participation and giving effect to just admin action could have mitigated these effects. Furthermore, this not only makes this irrational and unconstitutional but also takes us back to Apartheid like powers being exercised by the executive.

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Chapter One

1. INTRODUCTION:

1.1.INTRODUCTION

This mini dissertation will show that the National State of Disaster declared on 15 March 2020 was a de facto state of emergency when one considers that non-derogable rights were limited, and there was criminalisation of non-compliance.[1] We saw the executive used the state of disaster to exercise their will with little to no oversight from the parliamentary and judicial branches.[2] This was not only a breach of the right to just administrative action per section 33(1) of the Constitution[3], but also a breach of fundamental constitutional rights to safety and security (section 12), freedom of movement (21), and the rule of law (section 1(c)).[4]

The importance of openness, public participation, and checks and balances in a democratic South Africa will be at the forefront, followed by the distinction a National State of Disaster from a State of Emergency.[5] I will then show the differences between plenary legislation-making from regulation-making as it was done under the Disaster Management Act[6]; which will show why the pandemic was an emergency, and the implications of poor participation in legislation making. I will then analyse the DMA, the regulations, and their constitutional analyses in Courts, and then prove that in terms of rationality and reasonableness review; the courts did not uphold the right to just administrative action, exercised too much deference, and allowed the executive branch undermine the rule of law in the passing of regulations, and bypass constitutional safeguards like the powers exercised under the Apartheid regime.[7] Ultimately, the secret manner and poor communication in the Covid-19 regulation-making

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[1] Staunton, C., Swanepoel, C. and Labuschagine, M., 2020. Between a rock and a hard place: COVID-19 and South Africa's response. *Journal of Law and the Biosciences*...

[2] *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (538/2020) [2021] ZASCA 95; [2021] 3 All SA 723 (SCA) (1 July 2021), Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) (26 June 2020) & Freedom Front Plus v President of the Republic of South Africa and Others (22939/2020) [2020] ZAGPPHC 266; [2020] 3 All SA 762 (GP) (6 July 2020)*

[3] Constitution of the Republic of South Africa, 1996.

[4] Section 1(c) of the Constitution

[5] Staunton, C., Swanepoel, C., & Labuschaigne, M. (2020). Between Rock and Hard Place: COVID-19 and South Africa's Response. Journal of Law and the Biosciences, 7, 1-12.

[6] Hereafter referred to as the "DMA". Bester, P.C., Els, S. and Olivier, L., 2020. DEPLOYMENT OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE FOR COVID-19: A CASE STUDY ON GOVERNANCE. *Africa Journal of Public Sector Development and Governance*, *3*(1), pp.105-135.

[7] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) (26 June 2020)*

process has far reaching consequences for citizens confidence in the executive and became a breeding ground for corruption and cause for concern in terms of separation of powers and rule of law considerations.

1.2.RESEARCH QUESTION

This thesis asks the question whether the DMA regulations known as the Covid-19 regulations were constitutional, considering that they breached the right to just administrative action and were consequently irrational and unreasonable. Furthermore, the paper will ask whether the declaration of the Disaster management act instead of a state of emergency allowed constitutional safeguards to be suspended, and whether the courts exercised too much deference in the review of these regulations?

1.3.STRUCTURE

This paper focuses on the importance of an open and transparent government in a constitutional democracy, and why we needed a more open and participatory process in terms of plenary legislation making. I will then cover the differences between plenary legislation and regulation making; what is regulation-making and how is it different from plenary legislation-making? Including why checks and balances so vital to this process. This will then set the tone for why we needed more public participation considerations as argued by the applicants in *Esau* and this is the first reason why the DMA regulations are unconstitutional. I will then preface the right to just administrative action and how delegated legislation constitutes administrative action as decided in *Esau* and why the lack of public participation and procedural unfairness contravenes the right to administrative action. I will then argue that there was too much deference exercised in the Covid-19 constitutionality cases which is why they passed constitutional competence.

I then set the scene of the development of Covid-19, and I define a pandemic. I highlight the differences between a State of Emergency and a National State of Disaster: what constitutes a pandemic and what does that mean for derogable and non-derogable powers? Starting from the premise that lockdown was de facto a state of emergency.

Then I analyse the DMA regulations by looking at the cases of Khosa, De Beer, FITA, and highlight that the court failed to apply the appropriate section 36 analysis, incorrectly applied the rationality review, and exercised too much deference by treating lockdown regulation

making as executive action as opposed to administrative action. Which is further supported by the complete lack of reasonableness review.

Lastly, I will cover the socio-economic effects of lockdown and the negative impact in terms of Gender based Violence and effect on early childhood development learners. As well as the disproportionate response of the executive to curbing the harsh socio-economic impacts on these marginalised groups. Further, had the right to administrative action and a more open regulation making process taken place, then these consequences could have been mitigated. This will have long lasting and devastating impacts on South African citizens, erode the rule of law, and undermine open, transparent, and democratic governance.

1.4.METHODOLOGY

The methodology used in this paper is a literature review and desktop analysis involving legal scholars, members of the judiciary and social scientists who have written on the pandemic, exercises of public power, administrative action, and the adverse effects of lockdown. The research is aimed at critically examining the different sources of law to see how to make a stronger democracy and prevent further constitutional derogations from happening again should another disaster arise.

The aim of this paper is not to just criticise our executive in what we understand to have been unprecedented times, however it is to rectify the approach and ensure that constitutional supremacy is always upheld.

Chapter 2

2.1. CONSTITUTIONAL SUPREMACY, SEPARATION OF POWERS, THE RULE OF LAW, AND PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESS IN AN OPEN AND DEMOCRATIC SOUTH AFRICA:

2.1.1. CONSTITUTIONAL SUPREMACY AND THE RULE OF LAW:

South Africa's constitutional democracy is built on the foundational values of a multi-party democratic system of governance based on participation, openness, accountability, and responsiveness.[8] Etienne Mureinik famously uses a metaphor of a 'bridge' to explain the purpose of our bill of rights and argues that it aims to serve as a 'historic bridge between the past of a deeply divided society characterized by strife and conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'[9]. He argued that the bridge leads from a culture of authority, submission, and parliamentary supremacy to one of justification.[10] The culture of justification is based on the principle that the ruling party must defend and justify their decisions to the electorate, to break away from the past tradition of inspiring fear by command under parliamentary supremacy. For the Constitution to be a bridge in this direction, the Bill of rights must be central; as it demands justification.[11]

The rule of law as set out in section 1(c) of the Constitution 'is a basket of ideals'[12] which include the principles that no one person is above the law, and every sphere of government can only exercise the laws mandated to them known as the principle of legality. The law is to be stated in a clear and accessible manner, and cannot be exercised arbitrarily, and must be applied rationally.[13] It has been conceptualized by Cachalia and Kohn as a basket of ideals dedicated to reasonable certainty, and it is required that every sphere of government in the

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[8] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005)* para 111

[9] Mureinik, E., 1994. A bridge to where? Introducing the Interim Bill of Rights. *South African Journal on Human Rights*, *10*(1), pp.31-48. Page 31.

[10] *Ibid*., 32.

[11] *Ibid.*

[12] Cachalia, R. and Kohn, L., 2020. Quest for'reasonable certainty': refining the justice and equity remedial framework in public procurement cases. *South African Law Journal*, *137*(4), pp.659-697. page 39.

[13] Krüger, R., 2010. The South African Constitutional Court and the rule of law: the Masethla judgment, a cause for concern? *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, *13*(3). Pages 481-482.

separation of powers should uphold the rule of law.[14] That every institution of the state has the duty to interpret, uphold, respect the law, and thus, explain why every decision they have taken is exercised in a lawful and justified manner.[15]

2.1.2. SEPARATION OF POWERS:

The constitution does not explicitly include the phrase "separation of powers".[16] However, it is implicitly read into the Constitution from the foundational values, and through Chapter 3 of the Constitution, which speaks to how the state is structured, and sets out the "principles of co-operative governance". Co-operative governance requires that the three spheres of government being the legislature, the executive, and the judiciary 'co-operate' with each other and communicate with good faith, mutual trust, and serve and uphold Constitutional supremacy and the rule of law.[17] The division of government into the three branches is referred to as the 'vertical separation of powers', and it requires an intricate balance between the collaboration of, and co-operation between the three spheres but also a separation where there will be a functional overlap. This concept of vertical separation is contrasted with the 'horizontal separation of powers' which falls into the directives of different branches within the spheres.[18]

Chapter 4 of the Constitution is known sets out the powers and functions of parliament or the legislative branches of government being the national assembly, the national council of provinces, the municipal councils, and the provincial legislature.[19] This forms the legislative authority and details the law-making process. This branch requires the co-operation with the executive and the judiciary, as well as communication between them. In a single party democracy, we have one ruling party which forms the executive and dominates the legislative branch. Furthermore, the legislative members are authorised to refer bills to the constitutional court to determine their constitutionality.[20]

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[14] Powell, C., 2017. Law as justification: Glenister, separation of powers and the rule of law. *Acta Juridica*, *2017*(1), pp.55-74. page 65.
[15] *Ibid.*
[16] Fish Hodgson, T., 2018. The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South Africa doctrine for a more radically transformative Constitution. *South African Journal on Human Rights*, *34*(1), pp.57-90, page 71.
[17] *Ibid.*
[18] *Ibid., 72.*
[19] *Ibid.*
[20] *Ibid.*

Chapter 5 of the Constitution provides the roles, and powers of the National Executive and the President.[21] It sets out the privileges and capacities of the President as the head of the state as well as of the head of the National executive, sets out his ability to constitute his cabinet and appoint Ministers to his Cabinet from the Legislature. Also, to appoint members of the judiciary, and to chapter 9 institution roles. In addition, it provides the functions of the legislature on how to remove the president by impeachment or motions of no confidence, and the power to appoint a new one.[22]

Chapter 8 focuses on the third sphere being the judiciary; the hierarchy of courts, functions and the processes of appointment and removal of judges.[23] It sets out judicial independence and provides that the courts are autonomous and independent, subject only to the Constitution. It adds additional safeguards like tenure and compensation, and declares that no organ of state, or person may interfere with the functioning of the courts.[24] This structure facilitates and speaks directly to constitutional checks and balances in the Constitution.[25] David Dyzenhaus[26] explains that the separation of powers is not a one-dimensional understanding of 3 arms of government, rather it ensures that public power is exercised in both a procedurally, and substantively fair manner, and through upholding the values of the rule of law, and those which our constitution is built on.[27]

In keeping in line with the values of a deliberative, justificatory, and participatory democracy; interactions and co-operation between the spheres of government extend from between the branches to the electorate. In *Democratic Alliance*[28]; the court stated that a human-rights informed and truly 'post liberal understanding; of the separation of powers, requires a dignified and meaningful role for all participants.[29] The concept of meaningful engagement has been at the forefront of many socio-economic rights cases such as *Abahlali*[30] where the court held that private individual landowners and the municipality have the

[21] Fish Hodgson op cit note 16.
[22] *Ibid.* 72-73.
[23] *Ibid.* 73
[24] *Ibid.*
[25] Labuschagne, P., 2004. The doctrine of separation of powers and its application in South Africa. *Politeia*, *23*(3), pp.84-102, page 91.
[26] *Ibid.*
[27] Powell op cit note 14 at 65.
[28] *Democratic Alliance v President of the Republic of South Africa and Others* CCT122/11 [2012] ZACC 24 2012 (12) BCLR 1297 (CC) 2013 (1) SA 248 (CC)
[29] Fish Hodgson op cit note 1677.
[30] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009)

constitutional obligation to facilitate meaningful public engagement with the people they are evicting, as the eviction process leads to homelessness which violates fundamental constitutional rights to safety, and security per section 12 of the Constitution. Therefore, in keeping with the spirit of openness, and a participatory democracy; this concept requires not only upholding the rule of law and good faith.[31] It also requires taking a "people centred approach to separation of powers"[32], by implementing public participation with those involved directly with the judiciary, legislature, executive and other state institutions.[33]

2.1.3. ACCESS TO INFORMATION AND PARTICIPATION IN LEGISLATION AND DELEGATED LEGISALTION-MAKING:

In keeping with the culture of justification, and meaningful engagement we need the right to reasons and a culture of reason-giving which not only entails the right to explanations about how the law is enacted and used, but also that the reasons which inform the legislature must be considered "good reasons".[34] Thus, substantive efforts to ensure justification are required, and can only be done through transparency, openness, responsiveness, and communicating to the electorate and upholding their Section 32 constitutionally mandated access to information right.[35] In the *Certification case*[36] the Constitutional court declared that the right of access to information is addressed at the promotion of good governance. In *Brummer v Minister for Social Development and Others*[37] they argued that this right is central to a country built on values of responsiveness, openness, and accountability. In addition, that the Constitution requires that transparency is to be furthered by affording the public with accessible, accurate, and timely information.[38]

South Africa's right to information act was codified by the Promotion of Access to Information Act 2 of 2000 (per section 32 of the Constitution) and like all rights, the right of access to information is limited by section 36(1) of the Constitution known as the limitations

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[31] Fish Hodgson op cit note 16 at 85.
[32] *Ibid.*
[33] *Ibid.*
[34] Dyzenhaus, D., Hunt, M. and Taggart, M., 2001. The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation. *Oxford University Commonwealth Law Journal*, *1*(1), pp.5-34, page 29.
[35] *Ibid* & Klaaren, J., 2021. The human right to information and transparency. Page 223.
[36] *Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)*
[37] *Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009)*
[38] Klaaren op cit note 35.

clause, as well as by the Protection of Personal Information Act 4 of 2013[39]. PAIA gives the right to privately and publicly held information but also protects the right to privacy, protects commercial confidentiality, unauthorized use of personal data, protects legal privilege, financial welfare, and economic interests, as well as national security, and defence.[40] Not only does the right of access to information provide openness and transparency, it also allows a direct involvement and participation of citizens in the democratic process as envisioned by the Constitution.[41]

An act of parliament is what the final piece of legislation is called once it has been passed from a bill and becomes law.[42]The President will then assent to it and implement it as a proclamation where it becomes an enforceable act or statute. On the other hand, a regulation or delegated legislation is derived from an act of legislature, and specifies, or amplifies the details of the original legislation for implementation by policy makers or administrators.[43] Therefore, the regulations cannot be in conflict with the legislation to which it owes its existence.[44] The legislature as the primary law making functionary of government can delegate law making powers to the administrators or members of the executive as an accepted and necessary function of a modern democratic state, and part of effective law-making.[45]

The term 'subordinate' or 'delegated' legislation is not defined in the Constitution, however, section 101(3) states that regulations, proclamations or other instruments of subordinate legislation should be available to the public.[46] The Constitution does not set out how these regulations should be enacted or legislated, but Chaskalson CJ in *New Clicks*[47] found that regulations form an essential part of the public administration, give effect to legislative policy, and detail how to execute them.[48] These regulations should therefore be accessible to

[39] Hereafter, referred to as PAIA,
[40] Klaaren op cit note 35 at 336 & 339, & Calland, R., 2017. Access to information and constitutional accountability: Ruffling feathers in South Africa. *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*, *50*(4), pp.367-389. page 376
[41] Klaaren op cit note 35.
[42] The Presidency of the Republic of South Africa: NATIONAL POLICY DEVELOPMENT FRAMEWORK 2020: Approved by Cabinet on 2 December 2020, Ms Lusanda Mxenge Acting Director-General and Secretary of the Cabinet, page 8.
[43] *Ibid.,*9.
[44] *Ibid.,* 30.
[45] Henrico, R., 2020. Legislative administrative action and the limited extent of public participation. *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*, *2020*(3), pp.496-509., page 499.
[46] *Ibid.,* 500.
[47] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005)*
[48] Henrico op cit note 45 at 501.

the public for the purposes of transparency, openness, and accountability supported by our culture of justification. Access to regulations further gives the public awareness of what the law is through its publication in the Government Gazette and facilitates direct participation.[49]

Although there is no set out constitutional condition for public participation or commenting in regulation-making, the requirement for public deliberation, commenting, participation in legislation making as a process should be applied to subordinate legislation making too if one circumscribes to the values of the Constitution and the rule of law.[50] Our Constitution per section 59(1)(a), section 72(1)(a) and section 228(1)(a) focuses on the crucial relationship between participatory, and representative elements of democracy central to the legislation process.[51]

All branches of parliament involved in the bill process, are required to facilitate public involvement in the law-making process.[52] How the public participation takes place, and the level of engagement is left to the mandated individual. However, failure to fulfil this function effectively renders the legislation unconstitutional.[53] This was seen in *Doctors for Life International*[54] where the NCOP passed health bills without facilitating public engagement, hearings, or written submissions on these bills.[55] Here, Ngcobo DCJ argued that elements of participation and representation should be seen as being mutually supportive.[56] Furthermore, public participation on a continuous basis is prime to the functioning of an open and representative democracy. It encourages citizens to be actively involved in public affairs, learn about the law-making process, and identify themselves with institutions of government. It promotes effectiveness, strengthens the legitimacy of law-making in the eyes of the public, and allows voices to be heard. This open process helps prevents corruption, secret lobbying, and hidden interests in the law-making process. Importantly participatory democracy and inclusivity is important to those who are relatively 'disempowered' in countries like South Africa which has huge disparities of influence and wealth.[57] Significantly, public

[49] Henrico op cit note 45 at 501.
[50] Ibid., 499.
[51] *Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006),* 122
[52] Legislative Sector South Africa: Practical Guide for Members of Parliament and Provincial Legislatures, Law-making, Oversight, Diplomacy and Protocol, page 7.
[53] Ibid., 17.
[54] Doctors for life supra note 51.
[55] *Ibid.,* 2
[56] *Ibid* 115
[57] *Ibid.*

participation serves as a check on any abuse of executive power that could manifest in legislation and regulation-making.[58] It is against this background that the nature and scope of the duty to facilitate public involvement must be conceived and understood.[59]

However, the amount of public participation is dependent on the nature of the delegated legislation being passed.[60] Due regard should be paid to the extent to which these laws regulate in our society, and how far-reaching the consequences of these regulations are, as opposed to being mere 'guidelines'. In *AAA Investments*[61] it was stated that the Minister of Finance was required and effectively facilitate public involvement regarding the best possible way in which the micro-lending industry could be regulated and resulting in the Minister issuing an exemption notice. The interested stakeholders and requisite role players were engaged by the Minister through his discretion without the set-out requirement for public participation in terms of the original legislation, due to the importance and far-reaching consequences this would have on micro-lending.[62]

In terms of delegated legislation, an Administrator exercises a public function or power in terms of the original legislation which largely affects the public and should therefore include them as much as possible without inflicting an onerous burden on the administration.[63] In *Logbro Properties CC*[64] the exercise of public power was described as amounting to someone acting in the position of authority or superiority due to said Administrator being a public authority. Therefore, the enaction of delegated legislation as the exercise of state power speaks directly to the power imbalance between the state and the people. Therefore, an important way to address and reduce the power imbalance is through meaningful participation in the law-making process which will lend cogency and credence to the democratic status of such delegated legislation.[65] These principles were not upheld in the Covid-19 regulation making as argued by the applicants in *Esau*[66] which further constituted

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[58] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021),* 167.
[59] *Doctors for life* supra note supra note 51 para 117
[60] Henrico op cit note 45 at 499.
[61] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006)*
[62] Henrico op cit note 45 at 502.
[63] *Ibid.*
[64] *Logbro Properties CC v Bedderson NO and Others (372/2001) [2002] ZASCA 135; [2003] 1 All SA 424 (SCA) (18 October 2002)*
[65] Henrico op cit note 45 at 502.
[66] *Esau* supra note 58.

the breach of the Constitutional right to just Administrative Action per section 33 of the Constitution.

2.2. THE RIGHT TO JUST ADMINISTRATIVE ACTION:

Where there is any person aggrieved by the administrative action which are procedurally unfair, unreasonable, or unlawful that person or group of people have recourse to judicial review of Administrative Action by virtue of their right to just Administrative Action as per section 33 of the Constitution.[67] This right is legislated through the Promotion of Administrative Justice Act 3 of 2000[68]; which is the primary pathway to the judicial review of administrative action. The right to judicial review of the exercise of public power (section 33(3)(a)) speaks to the separation of powers and doctrine, but also that of openness, accountability, justification, and the tenets of the rule of law. However, O'Regan J argues that instead of our focus and reliance being on judicial review, which is retroactive, we should rather focus on being proactive and including procedural fairness in our administrative decisions, and thus delegated legislation making process should include the facilitation of public engagement and comments in the administrative process, instead of doing so in secrecy and waiting for the public to challenge it in courts.[69]

PAJA is the codification of the section 33 right and provides for reasonable, lawful, procedurally fair just administrative action with the provision of reasons.[70] Lawfulness is required in all exercises of public power, even if it is not administrative action. Where regulation-making is challenged on the grounds of lawfulness, authority depends on the empowering legislation for validity.[71] Procedural fairness and reasonableness are context dependent as what is procedurally fair and reasonable in one context, may not be in another. Furthermore, the context will also inform the level of scrutiny, and of deference.[72]

Delegated legislation or legislative administrative action is a special class of administrative action.[73] It involves law making and taking policy decisions for law-making. Under the

[67] Henrico op cit note 45 at 503.
[68] Hereafter referred to as PAJA
[69] Henrico op cit note 45 at 504.
[70] *New Clicks* supra note 47 at 143
[71] *Ibid.,* 144
[72] *Ibid.,* 145
[73] *Ibid.,* 147

Constitution these decisions fall within the executive category, to whom the legislature has delegated its law-making functions to.[74]

In *Esau*[75] the court stated that Covid regulations do constitute Administrative Action as defined in section 1 of PAJA.[76] In *New Clicks*[77] it was stated that delegated legislation making by public bodies is a vital part of public administration. Furthermore, that the Constitution calls for transparency, and openness, and this requires public participation in deliberative legislative assemblies, and in law making. Thus, to hold that delegated legislation does not form part of the right to just administrative action contravenes the commitment of the Constitution to a transparent and open government.[78] The court added that delegated legislation is to be procedurally fair and reasonable which requires more rigorous review by courts, and usually requiring written reasons for the legislation to be provided to those who are adversely affected by the administrative decision. However, this would hamper efficient administration which is also provided for in PAJA to alleviate this burden and find a healthy balance between the two.[79]

Chaskalson J added that it would be inconsistent with the purpose of PAJA to not include delegated legislation within the purview of Administrative Action and would neither be consistent with the provisions of the Constitution.[80] The decision to pass delegated legislation is administrative in nature, and the regulations are made 'under an empowering provision', with in this case 'direct, external legal effect' and 'adversely' affects on those in the pharmaceutical industry.[81]

In *Mostert*[82] they referenced Chaskalson in New clicks but contended that there had been no majority in that case.[83] However, they continued to apply PAJA and took regulation-making to be Administrative Action.[84]

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[74] *New Clicks* supra note 47 at 147.
[75] *Esau* supra note 58.
[76] *New Clicks* supra note 47 at 113-114.
[77] *Ibid.,* 113
[78] *Ibid*.
[79] *Ibid.,* 115
[80] *Ibid.,* 118
[81] *Ibid.,* 135
[82] *Mostert and Others v Nash and Others (34664/2017) [2018] ZAGPJHC 511; [2018] 4 All SA 267 (GJ) (14 August 2018)*
[83] *Ibid.,* 8,9, and 10.
[84] *Esau* supra note 58 at 42

In *Bato Star*[85] it was explained that courts should approach judicial review in the context of administrative action with the required level of sensitivity or deference to the important role of executive delegated legislation-making.[86] However, Ministers should approach legislation-making and instrument a legal framework which upholds constitutional supremacy, balances all interests, and needs, as well as saves lives and preserves dignity.[87] It is precisely this balance of competing interests, along with public participation and procedural fairness which Ministers should have involved in the making of the DMA regulations.

2.3. BREACH OF THE RIGHT TO PROCEDURAL FAIRNESS AND ADMINISTRATIVE ACTION AFFECTING THE PUBLIC:

The procedural fairness inquiry in sections 3 which gives the right to procedural fairness for an individual who is adversely affected by the administrative action in question and then section 4 which provides the right to procedural fairness to the public whose rights to Administrative Action have been adversely affected. The right to procedural fairness as set out in PAJA speaks to the *audi alteram partem* (right to be heard), and the rule against bias.[88] PAJA is the legislative expression of these principles and includes that there be adequate notice given of the purpose and nature of the proposed administrative action, there should be a reasonable opportunity to make representations, that there must be a clear statement of the administrative action, there should be appropriate notice of any right to internal appeal or review, and there should be adequate notice of the right to request reasons as provided for in section 5.[89]

Kohn argues that Section 4 of PAJA is particularly noteworthy as it gives effect to participatory democracy, premised on transparency, openness, and accountability.[90] As where an administrative action adversely affects the rights of the public, the administrator is bound to give effect to procedurally fair administrative action and gives effect to the right to be heard. This is done through the holding of a public inquiry, following a comment and notice

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[85] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)*
[86] *Ibid.,* 123.
[87] *Ibid.,* 124.
[88] Kohn, L. and Corder, H., 2014. Judicial Regulation of Administrative Action. *the South African Monograph on Constitutional Law, Murray & Kirkby (eds)*. page 16-17
[89] *Ibid.*
[90] *Ibid.,* 17.

procedure, by adopting another procedure which constitute an appropriate procedure, following a process which is fair but different.[91]

In *Albutt*[92]; Ngcobo J in his dissent argued that there is a close relationship between rationality and procedural fairness, and thus, hearing an affected party will assist in determining the rationality of a decision as it assists in giving the decision-maker all the information they need to make an informed decision.[93] He further held that the duty to act fairly lies within the 'four corners' of the rule of law as from sections 33 and 34, it is clear that the Constitution requires both substantive and procedural fairness. He thus, controversially added that in exercises of public power be in administrative or executive, decision-makers not only have the duty to not act arbitrarily, but also owe a duty of fairness in decisions which adversely affect individuals.[94]

2.4. The issue with Covid-19 regulation making under the Disaster Management Act:

In *Esau*[95] the applicants challenged the lack of public participation in the making of the DMA Covid-19 regulations. The challenged that constitutionality of the formation of the National Coronavirus Command Council (NCCC), on the grounds that it tries to duplicate and replace the powers of the National Disaster Management Centre (per section 3 of the DMA) who are mandated with handling states of disaster.[96] They argued that any decisions taken, and regulations made by the NCCC should consequently be declared invalid and unconstitutional considering that the National Executive usurped parliamentary powers unlawfully by relinquishing their own powers and passing the buck to the NCCC,[97]

They held that the Minister of Co-operative Governance and Traditional Affairs, Nkosazana Dhlamini-Zuma had made the 25 March 2020- 16 April 2020 regulations providing for a hard nation-wide lockdown, without any public participation.[98] They further contended that she further extended the lockdown to 30 April 2020, and amended the 16 April regulations; again, without the requisite public participation.[99] Where she did invite public participation; it

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[91] Kohn L and Corder H op cit note 88 at 17-18.
[92] *Albutt v Centre for the Study of Violence and Reconciliation and Others (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (23 February 2010)*
[93] Plasket, C., 2020. Procedural fairness, executive decision-making and the rule of law. *South African Law Journal*, *137*(4), pp.698-712, page 703.
[94] *Ibid.,* 703-704.
[95] *Esau* supra note 58
[96] *Ibid.,* 1.1.1
[97] *Ibid.,* 5.
[98] *Ibid.,* 6.
[99] *Ibid.,* 7.

took place between the 25-27 April 202 on the 'Schedule of Services Framework for Sectors' and was published on the 29 April 2020 in Schedule 9, but this was not enough time given for meaningful engagement.[100] They noted that the making of the DMA regulations did constitution Administrative action however, they never elaborated on this which was fatal to the level of judicial scrutiny.[101]

They accepted that although some DMA regulations were onerous, they were justified by the legitimate purpose of limiting the spread of the disease and to allow time for the healthcare infrastructure to prepare and keep up with the spike in infections, the exacerbating spread, and to promote adequate levels of health and general hygiene.[102] However, they continued that other regulations bore no rational link to limiting the spread and impact of Covid-19 like the set of directions related to the selling of permissible clothing, and were subsequently invalid.[103] Their focus was on section 27(2) of the DMA which limits the movement of people and restricts movement of goods and services, limits human dignity, limits freedom of residence and movement, and restricts the control and occupancy of premises.[104]

The respondents explained that the NCCC includes the entire cabinet, and section 85 of the Constitution gives the cabinet the power to control its own processes, but does not dictate their modus operandi, or how they should meet, or arrange themselves.[105] They provided that the NCCC was established to ensure that when constituted, Cabinet exclusively deals with Covid-19 issues instead of discussing issues of general Cabinet business.[106] Therefore, the Minister and President Cyril Ramaphosa did not unlawfully delegate power to the NCCC as a separate entity as it is made up of Cabinet members.[107]

The respondents added that Minister implemented existing national legislation when making the DMA regulations.[108] In doing this she exercised her Constitutionally and legislatively mandated duty from Parliament and the DMA legislation. Furthermore, the Cabinet and the

[100] *Esau* supra note 58 at 12.
[101] *Ibid.,* 24.
[102] *Ibid.,* 2.
[103] *Ibid.,* 2 & 3.
[104] *Ibid.,* 45.
[105] *Ibid.,* 57 and 62.
[106] *Ibid.,* 64.
[107] *Ibid.,* 65.3
[108] *Ibid.,* 78.

President coordinated the functions and administrations of the state department themselves as provided for by section 85(2)(c) of the Constitution.[109]

On the topic of public participation, they stated that the decision to implement a lockdown had to made swiftly and decisively, and thus there was not enough time or opportunity for a meaningful participation or engagement process before making that decision.[110] However, they added that once lockdown regulations had been published, there was widespread feedback from Cabinet, the President, stakeholders, and members of the public regarding the issues identified with the wording of the lockdown regulations.[111] The Minister then continued to publish the informed amendments to the lockdown regulations.[112] Furthermore, the Minister engaged with other spheres of government, organs of state, the Disaster Management Centre, The National Joint Operational Intelligence Structure (NAT JOINTS), and stakeholders. They added that she was responsive to both suggestions and complaints brought to her attention. Thus, this feedback and these consultations constitute part of the public participation process.[113] The DMA does not require a public participation process before making regulations, it only provides that relevant Cabinet members should be consulted by the Minister. Thus, the nature of the public participation process which the Minister did embark on goes beyond what is required by the DMA.[114]

They further argued that even where public participation was not undertaken, the public's check and balances on power abuses of the executive still lie with parliament even in times of crisis.[115] This is seen as the Minister is still accountable to parliament for the exercise and promulgation of delegated legislation and they do not claim that she is not accountable to parliament.[116] Section 59(4) of the DMA requires that the Minister must make the regulations available to the NCOP for adoption and which serves as checks and balances.[117] They added that the Disaster Management Centre coordinates with the public through civil society structures, the media, and spheres of government. Thus, any suggestions on less restrictive means of accomplishing the saving of livelihoods and lives can be channelled through the

[109] *Esau* supra note 58 at 82.
[110] *Ibid., 142*
[111] *Ibid., 143*
[112] *Ibid., 144*
[113] *Ibid., 160*
[114] *Ibid., 161*
[115] *Ibid., 164*
[116] *Ibid.*
[117] *Ibid., 165*

Centre and any of the platforms.[118] However, who is consulted, and which communities are consulted in the South African landscape is has huge consequences for socio-economic considerations which they did not consider.

The Court agreed with the respondent that it is not their place to impose on the Executive exactly how truncated the public participation process they should follow, as this is context specific and left to the Executive to decide.[119] However, if the approach of the applicants and the court had focused on regulation making as administrative action; the court could interfere with whether there was procedural fairness as provided in section 4 of PAJA regarding how much of engagement with communities, interest groups and citizens was required considering that their Constitutional rights were adversely and materially affected.

The applicants argued that the regulations restrict people's movement and autonomy to go to and from their homes.[120] Further, that they do not allow parents to move children between their households. Further that the regulations dictate that citizens may only purchase cold food and not hot food, and winter clothing but no other clothing. Additionally, exercise is limited to 3 hours which would exacerbate the spread if everyone were out at the same time. Therefore, they contend that the regulations are irrational and go beyond their alleged purpose of combatting Covid-19 spread, preventing disruption, and protecting property, providing relied and addressing the destructive effects of the pandemic as per section 27(3) of the Constitution, and less restrictive means can be employed.[121]

The Court assessed each regulation in issue; Regulations 16(1) and (2) on movement, Regulation 16(4) on interprovincial travel, and Regulation 16(3) on curfew.[122] They argued that the primary goal is to save lives and contain the spread of the virus through the limitation of freedom of movement of people and thus, the regulations are rationally connected to their purpose.[123] The court declared that the regulations are valid and that the construction of the DMA is acceptable in that the regulations allow for the harm cause by the disaster to be contained.[124]

2.5. CONCLUSION:

[118] *Esau* supra note 58 at 167
[119] *Ibid., 171*
[120] *Ibid., 183.*
[121] *Ibid.*
[122] *Ibid., 237-8*
[123] *Ibid., 239-241*
[124] *Ibid., 252*

Ultimately, it is submitted that the right to just administrative action was contravened on the grounds of procedural unfairness and the lack of meaningful engagement and public participation in the regulation making process. This not only violated the administrative action right but also contravened the fundamental tenets of an open, participative, and accountable democracy and the rule of law principles. Arguably, if the applicants had focused their application on regulation making as contravening their rights to just administrative action then the judges may have insisted on more public participation and exercised less judicial deference.

Chapter 3

3.1. IS IT A STATE OF DISASTER OR A STATE OF EMERGENCY?

3.1.1. COVID-19 DEVELOPMENT AND SPREAD, AND DEFINING A PANDEMIC:

A pandemic is defined as a disease of global proportions or that has spread country-wide.[125] SARS CoV2 forms part of the coronavirus family, and more commonly referred to as "Covid-19".[126] The virus caused a world-wide pandemic after first being reported in Wuhan China in 2020.[127] South Africa followed other countries as advised by the World Health Organization (WHO) and adopted measures aimed at curbing the spread of Covid through a nation-wide lockdown. Under sections 3 and 27 of the DMA; the President of South Africa declared a national state of disaster.[128] The Act allowed him to announce, and institute measures which include the prohibition on movement of citizens. This was done through restrictions on people leaving their homes, except where there were "strictly controlled circumstances", and where the person was an essential worker.[129] He announced the closing of all businesses except those conducting essential service[130]s, and the deployment of the South African National Defence Force (SANDF) to support South African Police Services (SAPS) in enforcing lockdown measures primarily in lower income communities where lockdown was more difficult to enforce.[131]

The measures developed and got stricter overtime, as the knowledge of the virus improved.[132] During the initial stage of lockdown, mild measures were introduced; and then South Africa moved to a strict phase of lockdown with severe regulations, which were then adjusted

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[125] Oxford dictionary definition: https://www.oxfordlearnersdictionaries.com/definition/english/pandemic_ accessed 12/02/2022

[126] *Freedom front Plus* supra note 2 at 1

[127] Listings of WHO's response to COVID-19 29 June 2020 https://www.who.int/news/item/29-06-2020-covidtimeline accessed 03/08/2021 & '1st known case of coronavirus traced back to November in China'. By Jeanna Bryner published March 14, 2020, https://www.livescience.com/first-case-coronavirus-found.html Accessed 03/08/2021

[128] *Freedom front Plus* supra note 2 at 8

[129] *Ibid.,* 11

[130] Essential services include services and goods are defined as goods and services that are produced and available during lockdown. These included food, medication, and sanitation produces, agricultural and transport services, social support and financial services.: Frequently asked questions about essential services: Western Cape Government Website: https://coronavirus.westerncape.gov.za/frequently-asked-questions/frequently-asked-questions-about-essential-services accessed 03/08/2021

[131] *Freedom front Plus* supra note 2

[132] Ibid., 2

overtime.[133] The strict lockdown measures were promulgated in the 25 March regulations.[134] Initially lockdown was limited to 3 weeks. However, it was extended for a further 14 days until 30 April 2020, and then a new set of regulations were promulgated on 29 April. These described the 5 different alert levels which set out measures to deal with the pandemic. Chapter 3 of the DMA declared that level four would be implemented nation-wide from 1 May 2020.[135] Those regulations determined which restrictions would be in place, and the movement of people. Under Regulation 16; people were limited to their residences but were allowed to leave for the identified reasons. These include performing an essential service, moving children as allowed, buying permitted goods, going to work as allowable, obtaining authorized services, and exercise between 20:00pm and 06:00am.[136]

Over the next few months, dozens of regulations, amendments to, and repeal of those regulations, their directives and notices were published by the Department of Co-operative Governance and Traditional Affairs, as well as other government agencies, and cabinet departments.[137] This created an excess and confusing framework of regulations which were difficult for lay people, legal scholars, and jurists to keep up with.[138] In *De Beer*[139] it was noted that the regulations on movement, and selling cold or hot foods which were central to the case were changed many times changed during the delivery of application for leave to appeal, again prior to the hearing of the same case, and again since the hearing of the application and during the few days whilst the judgement was reserved.[140]

A risk strategy was put in place to ease lockdown restrictions.[141] Level 5 provided for drastic measures to be used to save lives and contain the virus. Some activity was allowed to resume, but subject to excessive precaution to limit community outbreaks and transmission spikes.[142] Level 4 restrictions reopened the economy, to a significantly greater level than permitted under level 5 strict lockdown.[143] For example, restaurants were permitted to prepare and sell

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[133] *Freedom front Plus* supra note 2
[134] *Ibid.,* 12
[135] *Ibid.,* 13
[136] *Ibid.*
[137] Van Staden, M., 2020. Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa. *African Human Rights Law Journal*, *20*(2), pp.484-511. page 493.
[138] Ibid., 507.
[139] De Beer supra note 2.
[140] *Ibid.*
[141] *Fair trade independent tobacco association note 7 at 6*
[142] *Ibid.*
[143] *Freedom Front Plus* supra note 2 at 14

cooked, hot food for home delivery once more. Construction, manufacturing, engineering, wholesale, and retail products permitted under alert level 4 resumed.[144]

Level 3 eased the restrictions relating to social activities and work; to prevent high transmission levels.[145] Level 2 eased more restrictions apart from social distancing to always be maintained. it restricted some leisure and social activities to prevent any a virus resurgence. Level 1 permitted activity and movement to continue with health guidelines and preventative measures to be always followed.[146] The NCCC determines the appropriate alert level based on the assessment of the infection rate and the capacity of our healthcare system to give care to those who need it.[147]

3.2. THE DIFFERENCES BETWEEN A NATIONAL STATE OF DISADTER AND A NATIONAL STATE OF EMERGENCY:

National States of Disaster are not defined in the Constitution, instead they are regulated by the DMA.[148] The statute defines a state of disaster as a progressive or sudden, widespread, or localised, natural or caused occurrence which causes or threatens to cause injury, disease, or death, damage to property, infrastructure, environment, or the significant disruption of community life.[149] It must be of proportions that exceeds the ability of these affected by the disaster to rely on their own resources, to manage its effects.[150] The Disaster Management Centre categorises disasters according to whether they are national, local, or provincial.[151] The Act is administered by a Minister of Co-operative Governance and Traditional Affairs (CoGTA; the incumbent being - Dr Nkosazana Dhlamini Zuma) and authorized by the President. Section 23(6) of the DMA provides that a disaster will be taken as a national disaster where a single province is unable to deal with the issue alone, or where it affects more than one province. Section 28(6) provides that categorizing a disaster under this section gives the Executive primary responsibility for co-ordination and management of the disaster through delegated legislation making.[152]

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[144] *Freedom Front Plus* supra note 2
[145] *Fair Trade Independent Tobacco Association* supra note 7 at 7
[146] *Ibid.*
[147] *Ibid.*
[148] *Freedom Front Plus* supra note 2 at 40
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid., 42*
[152] *Ibid.*

Section 27(3) is the empowering provision with authorises the issuing of directions and regulation-making. It provides that the powers in subsection (2) may only be exercised for the purposes of protecting the republic, assisting members of the public and providing relief, preventing, or combatting disruption, protection of property, and dealing with destructive or adverse consequences of the disaster.[153] Section 27(5) states that a national disaster should lapse, 3 months post the date of declaration but this may be extended by the Minister, one month at a time.[154] The Act gives wide discretionary powers of extension to the Minister, and does not apply to disasters where a State of emergency has been declared.[155] Furthermore, the Act does not apply where the incident can be appropriately dealt with national legislation.[156]

Section 37 of the Constitution deals with a State of Emergency.[157] Section 37(1) sets out the judicial requirements for the declaration of a state of emergency and stipulates that it must be declared in terms of an Act of Parliament. It will be declared when the life of the nations is threated by war, natural disaster, general insurrection, invasion, or any other public emergency. Further that the declaration is required to restore order and peace. Section 37(2) states that any state of emergency legislation enacted or any other directive taken as a result of the declaration is effective prospectively, and for no more than 21 days from the declaration date.[158] Unless the National Assembly chooses to extend this declaration, it can only be extended by the President for only 3 months at a time, according to the voting stipulations set out in the State of Emergency Act 64 of 1997.[159]

Section 37(3) empowers Courts to decide on the validity of the declarations, any of their extensions and or any legislation or action taken because of the state of emergency. This is an important consideration when one looks at the role of Courts in a constitutional democracy committed to constitutional supremacy and human rights realizations.[160] Courts are vital accountability mechanisms for separation of powers considerations, as an independent arm of government. The Constitution demands that the Courts exercise their judicial authority independently, subject only to the Constitution and applicable legislation. It must be imparted

[153] *Freedom Front Plus* supra note 2 at 46.
[154] *Ibid.*
[155] *Ibid.,* 41
[156] *Ibid.*
[157] *Ibid., 48*
[158] *Ibid., 49*
[159] *Ibid.*
[160] Klaasen, A., 2015. Public litigation and the concept of "deference" in judicial review. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, *18*(5), pp.1900-1929, page 1914

impartially without prejudice, fear, or favour. As a safeguard the Constitution prohibits the interference with Court functions to apply to all state organs and branches of government. The Constitution places a positive duty on the organs of state to ensure and protect the Court's impartiality, independence, dignity, and effectiveness.[161]

This notion of accountability of checks and balances between the different arms of government again speaks to tenets of separation of powers.[162] The role of the courts under our democracy require Court intervention to protect individual rights per section 34 of the Constitution granting the right of access to courts.[163] This must be balanced against the responsibility to not transgress or intrude into the affairs of other branches of government.[164] The courts recognize the vitality of protecting the rights of the executive branch to implement and formulate policy.[165] In *Bato Star*[166] the court argued that decisions of administrative agencies should be treated with the appropriate level of respect, to ensure the court recognizes the proper role of the executive as mandated by the Constitution. The court should not give itself superior wisdom relating to matters falling within the scope of the Executive branch. A Court can give consider policy decisions and findings of fact informed by experts in the field. However, it is the extent to which they give weight to these considerations which is dependent on the scope of judicial review, the identity of the decision-maker, and the character of the decision.[167]

Ultimately, the separation of powers is made up of a variety of principles which are often in tension with one another in different circumstances of different case.[168] The doctrine rests on an understanding of functional competence that should be protected, as well as upholding the Constitution, and the individual rights of citizens. Therefore, the court will sometimes have to intrude on functions of the other branches, or it will exercise the required deference and respect.[169]

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[161] Klaasen op cit note 160 at 1914.
[162] O'Regan, K., 2005. Checks and balances reflections on the development of the doctrine of separation of powers under the South African constitution. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, *8*(1). Page 1.
[163] *Ibid,*14. Kohn, L., 2013. The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far? *South African Law Journal*, *130*(4), pp.810-836. Page 816.
[164] Kohn *Ibid*, 811.
[165] O'Regan op cit note 362 at 22.
[166] *Bato star* supra note 85.
[167] O'Regan op cit note 362 at 23.
[168] Ibid., 25.
[169] O'Regan op cit note 362 at 25.

Section 37(4) deals with the derogation from the Bill of Rights.[170] It provides that any legislation enacted resulting from state of emergency declaration may 'derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency'[171]. The legislation is consistent with the obligations of the Republic under International law conventions applicable to state of emergency which have been ratified, conforms to subsection 5 which provides that "no act of parliament or legislation enacted in consequence of the declaration of a state of emergency may authorise or permit the indemnification of the state, or person in respect of an unlawful act; any derogation from this section, and any derogation of any of the non-derogable rights as set out in the section". The rights include the rights to equality (section 9), human dignity (section 10), life (section 11), freedom and security of person (section 12), slavery, servitude, and forced labour (section 13), children's best interests (section 28), and arrested, detained, and accused persons (section 35). Furthermore, it must be published in the Government Gazette as soon as possible after enaction.[172]

Thus, we see that the DMA gives wider discretionary powers to the executive branch, unlike the state of emergency provisions which provide which rights cannot be suspended and limits the time period within which the state of emergency operates. Therefore, due to such wide powers under the DMA; the executive should have taken more care to exercise the utmost transparency, accountability, and checks and balances throughout the regulation making process. This begs the question as to whether declaring Covid to be state of emergency was bypassed in favour of the DMA to prevent the executive having to make the time and effort to be more open, transparent, and accountable to citizens and the other branches of government even during unprecedented times.

This distinction was explained in *Freedom Front Plus*[173] where the applicant sought the review of the Constitutionality of the state's response to the Covid-19 crisis.[174] The applicant, a political party brought the application in the interests of its members and of the public per section 38(d) of the Constitution.[175] They argued that sections 23(8), 26(2), and 27 of the DMA are inconsistent with the Constitution and invalid as the sections do not provide for the

[170] *Freedom front plus* supra note 2 at 51
[171] Section 37(4) of the Constitution
[172] *Freedom front plus* supra note 2 at 51
[173] *Ibid.*
[174] *Ibid., 1*
[175] *Freedom front plus* supra note 2 at 4

same safeguards set out in section 37 of the Constitution under a state of emergency.[176] They held that the DMA is unconstitutional on the grounds that it calls for severe restrictions on the rights set out in the Bill of Rights.[177] They did acknowledge that lockdown easing of restrictions has a mitigating impact, however, even under the lower levels, fundamental rights were still limited. They contended that under a state of emergency this was not the case.[178] Further that the DMA may be extended unilaterally by the Minister, but under the state of emergency, extension is permitted after Executive and Parliamentary debate. A competent Court may decide on the validity of declaring a state of emergency or action taken under it, but there is no parallel position where a state of disaster has been declared.[179]

The rights under a state of emergency are limited to the extent that it is strictly required by the emergency, and any appropriate legislation should be consistent with international law obligations. Furthermore, the powers of indemnity are removed, whereas these safeguards do not exist under the DMA. They further argued that the DMA grants extreme unrestricted powers to the Minister which are far more powerful that what the powers of the President under the state of emergency would be. Thus, the absence of these safeguards in effect prevents the DMA from facing constitutional scrutiny.[180]

The respondents maintained that the applicants' case was based on a vital misconception that the state of emergency is the same as the state of disaster.[181] They argued that the applicant wrongly assumed that the derogations which apply under a state of emergency may apply under a national state of disaster. Further, that states of emergency and disaster are profoundly 'different legal animals which is patently clear'.[182] The jurisdictional requirements of a state of emergency limits its control to the severest of circumstances. It may only be declared when the life of the nation is under threat and is used to restore peace and order. Failure to meet these requirements constitutes unlawfulness.[183] States of disaster on the other hand cover a large range of different instances as provided for in the definition.[184] Disasters can take many forms and threaten the wellbeing and lives of many

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[176] *Ibid., 16.1*
[177] *Ibid., 54.*
[178] *Ibid., 55.*
[179] *Ibid., 56-58*
[180] *Ibid.*
[181] *Ibid., 58.*
[182] *Ibid., 59.*
[183] *Ibid.*
[184] *Freedom front plus* supra note 2 at 60.

people and communities. However, it still does not constitute a threat to the life of the nation, nor does it disrupt order and peace.[185] However it is submitted that their reasoning is superficial, in that a hard lockdown limited fundamental non-derogable rights such as freedom of movement.[186]

They further contended that states of emergency refer to the severest circumstances where the constitutional order and the life of the nation is threatened.[187] Thus, only in this case is it necessary to suspend the normal constitutional protections and order to restore the constitutional state. This is an extraordinary constitutional measure and not used lightly and thus, the safeguards are provided, and jurisdictional requirements are strict.[188] They argued that a derogation of rights, or suspension is not the same as a rights limitation. A limitation of rights is allowed in the ordinary course of events under section 36 of the Constitution even in the absence of a state of disaster. However, under states of emergency, the Constitution permits the suspension of all rights except those set out in the table of non-derogable rights.[189] However, the court did not undertake a section 36 analysis to test the constitutionality of this limitation.

The Court agreed with the respondent and held that if the applicant contends that executive is not complying with its constitutional obligations under section 36, then it may institute the review that conduct in a separate challenge, however this does not invalidate the DMA.[190] Instead, the Court is limited to deal with the nature of the attack on the DMA; which is on the grounds that declaring a state of disaster and not an emergency is unconstitutional because there are no safeguards on the power provided by the DMA and that the state of disaster does not comply with the principle of legality.[191] The Court held in favour of the respondents and held that there was no suggestion on the facts that the life of the nation was under threat from Covid-19, or that security and peace must be restored.[192] It would have been irrational and unlawful to declare a state of emergency. The application was consequently dismissed.[193]

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[185] *Ibid.*
[186] Ibid., De Beer supra note 2 & Esau supra note 58.
[187] *Freedom front plus* supra note 2 at 62.
[188] *Ibid., 63.*
[189] *Ibid., 64.*
[190] *Ibid., 70*
[191] *Ibid., 72.*
[192] *Freedom front plus* supra note 2 at 75.
[193] *Ibid., 82.*

The applicants here should have also launched their application in terms of administrative action, which they also failed to make this distinction that the DMA regulations constitute administrative action and thus, the court would have been able to go into a rationality and reasonableness review. Not only did the courts bypass the opportunity to go into a section 36 limitations analysis which they could have introduced *mero motu,* they exercised too much deference in stating that they limited to deal with the nature of the attack on the DMA which was misconstrued by the applicants as an emergency when it was a disaster.[194]

3.3. WHY THE STATE OF DISASTER IS A DE FACTO STATE OF EMERGENCY:

How the state of disaster was enacted in South Africa does not respect the rule of law and constitutional supremacy as set out in section 1 (c) of the constitution.[195] Section 36 of the Constitution provides that the rights provided for in the Bill of Rights 'may only be limited in terms of a law of general application to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality, and freedom'[196]. The limitation considers the nature of the right, the purpose and importance of the limitation, and whether there are less restrictive means to achieve that purpose. However, apart for the provisions set out in subsection 1 or any other constitutional provision, no other law can limit any right entrenched in the Bill of Rights.

The rule of law principles are enshrined in section 1(c) of the Constitution and are not subject to the section 36 limitations clause, which Van Staden submits, was not observed under a state of disaster.[197] He adds that the lockdown regulations exceed the section 36(1) limitations and enter the realm of rights derogations as ser out in section 37(4). It is evident that during the initial weeks of lockdown during Levels 5 and 4; South Africans found themselves in a de facto, undeclared state of emergency.[198] He agrees with the applicants that the South African government should have declared a state of emergency and not a state of disaster because non-derogable rights were limited. The rights to human dignity, freedom of movement and related rights linked to freedom of association, privacy, freedom, property and safety and security were limited without being subject to a section 36 limitation to decide whether these derogations were justifiable in an open and democratic South Africa.[199] Therefore, "the Bill

[194] *Ibid.*
[195] Van Staden op cit note 137 at 506?
[196] Section 36(1) of the Constitution.
[197] Van Staden op cit note 137 at 507.
[198] *Ibid., 508.*
[199] Van Staden op cit note 137 at 508.

of rights does not de facto exist during a pandemic".[200] Ultimately, grave situations are not a justification for derogation or suspension of fundamental rights and undermine the Constitutional and rule of law supremacy. The constitution provides for all eventualities so that it is still supreme in the most desperate times and enjoyed during normal times.[201]

Regulations were promulgated and withdrawn 'on ministerial whim'[202] and parliament and the judiciary regrettably allowed this. Van Staden recommended that Parliament should adopt national legislation to exclusively regulate the exercise of executive discretion in regulation making procedure and powers. They must provide substantive criteria for the Executive to comply with when amending or replacing regulations, so that there is a balance between reacting to the situation and legal certainty to changing circumstances.[203] He further recommended that a strict necessity for promulgating the DMA, should emphasised, restated, and reinforced with a more human rights centric approach as opposed to an executive minded approach considering South Africa's historical and evidentially present context.[204]

He argues that there is no clear oversight role over executive discretion under the DMA, like there is under a state of emergency.[205] Further, that although parliament is not excluded from meeting, however, they are subject to the limitations on freedom of assembly which curtails their ability to convene. Under the DMA, when the hard lockdown was declared from 26 March 2020 to 31 April 2020, the freedom of movement was restricted. Gatherings like funerals were restricted to 50 people, and all but essential movement was prohibited for 3 weeks and imposed a hard lockdown. One could only leave home for essential goods, buy medial products, seek medical attention, collect social grants, attend a funeral, access public transport for essentials or attend work which was deemed an essential service during specified times. The moving between provinces, and to leave the house, exercise and walk the dog was prohibited.

The Regulations also provided that a person who tested positive for Covid-19 or has been in contact with someone positive cannot refuse treatment, isolation, and quarantine.[206] Under the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions

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[200] *Ibid., 509.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid., 510.*
[204] *Ibid.*
[205] Staunton, C., Swanepoel, C. and Labuschagine, M., 2020. Between a rock and a hard place: COVID-19 and South Africa's response. *Journal of Law and the Biosciences*. Page 5.
[206] Staunton op cit note 205 at 5-6.

gazetted in June 2017 under the National Health Act 2003; where a person refuses testing, treatment, isolation, or quarantine of a notable medical condition then the head of the provincial department can apply to the High Court to require mandatory treatment, testing, isolation or quarantine of that individual.[207] Failure to comply results in imprisonment of 12 months max or a fine or both. Furthermore, the regulations provide that the person is subjected to 48 hours of isolation or quarantine when the application is sent to the Courts. This application can be made by a SAPS, SANDF or peace officer member. Even though these restrictions on freedom of movement and assembly were to hinder the spread of Covid-19, these restrictions, with criminal sanctions on non-compliance, extend even beyond those imposed during Apartheid.[208]

Although the regulations were introduced because of a public health emergency and thus, under a wholly different context to Apartheid, the restrictions on freedom of movement and assembly have been met with some apprehension.[209] Tseliso Thipanye the CEO of the South African Human Rights Commission (SAHRC) described the regulations as similar to those under a state of emergency. However, he noted that the President was reluctant to declare a state of emergency given the historical association to apartheid. However, in the first week of April, the government relocated thousands from their homes to decrease the population in '29 critically crowded information settlements across the country'[210] to decrease the spread of Covid-19. The residents that opposed this relocation a likened it to the 1968 Apartheid forced removed in District Six where more than 60 000 residents were forcibly removed. In the Covid temporary camps for the duration of the pandemic for 2000 homeless people was highly concerning however, as many of the homeless people complained of being forcibly removed to move to temporary camps. These are all mandated by the WHO; however, it is relying on coercive measures like criminal sanctions on non-compliance with regulations which not only fails to consider the socio-economic realities of the majority of South Africans but is also contrary to good public health policy.[211]

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[207] *Ibid., 6.*
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid*
[211] Staunton op cit note 205 at 7.

The submission that lockdown regulations were in fact state of emergency measures are further corroborated by the internal deployment of SANDF.[212] President Ramaphosa announced suppressive and aggressive measures, which included a country-wide lockdown and the coinciding internal deployment of the SANDF in support of the South African Police Service (SAPS). The aim of lockdown was to "flatten the curve". On the 25 March, there was initial deployment of 2 820 soldiers, and by the 21 April this was increased to 73 180. The biggest ever deployment of the defence force. The deployment was to maintain law and order, control the border line to combat the Covid spread, and support other state departments. The deployment lasted till the end of September 2020 but had reduced to 20 000.[213] This was supposed to maintain national security. However, national security again is only threatened where there is a state of emergency. The Constitution sets out national security in section 198(a) to reflect the resolve of South Africans as a nation and as individuals. To live as equals, in peace and in harmony.[214]

Broadly interpreted, one can assume that Covid-19 threatens national security in terms of being contrary to "free from fear and want". This is further refined by the right to human security as provided by the United Nations Development programme which states that human security consists of "all-encompassing conditions in which individual citizens live in freedom, peace and safety; participate fully in the process of governance; enjoy the protection of fundamental rights; have access to resources and the basic necessities of life; and inhabit an environment which is not detrimental to their health and well-being."[215] It is thus clear that the threat emanating from COVID-19 constitutes a threat to national security in general and more specifically personal safety, and human security. [216]

Therefore, where there is a national security risk, then it is expected that the SANDF would be deployed to ensure that the citizens and the nation are protected. However, the issue arises in that a pandemic is not legally considered a state of emergency, further that the deployment of the defence force is meant to be in support of its citizens. Not against them, as was misused under the Apartheid regime to supress most South Africans.[217] A lockdown imposed

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[212] Bester, P.C., Els, S. and Olivier, L., 2020. DEPLOYMENT OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE FOR COVID-19: A CASE STUDY ON GOVERNANCE. *Africa Journal of Public Sector Development and Governance*, *3*(1), pp.105-135. 105.
[213] *Ibid 105-6.*
[214] *Ibid.,107.*
[215] *Ibid.*
[216] *Ibid.*
[217] Bester op cit note 212 at 108.

by the security services of the state can be seen as curbing and minimising the threat of the disaster, however, also as the result of a threat to the nation.[218]

The High Court in *Khosa*[219] assessed the lawfulness of the SANDF deployment within the country, to enforce Covid-19 regulations. An application was brought by the family of Collins Khosa and others who had been victims of defence force and lockdown brutality, against the Minister Defence and Military Veterans and Others. On 15 May 2020, Judge Fabricus ruled that the Constitution provides for the deployment of SANDF in concurrence with the South African Police Services Act 68 of 1995. He confirmed however, that the precise method of how that mandate should operate is left to Parliament. Parliament consequently built-in section 19 of the Defence Act 42 of 2002 to give effect to the wide powers in section 201(2)(a) of Constitution.

It was argued by the applicants that there was a lack of adherence to operational procedures, and a code of conduct regarding the deployment, as required by section 19(3)(c)(i). It was provided that the code and procedures are meant to safeguard and protect the public from abuses by soldiers who are not trained to police the streets. Furthermore, the soldiers did not receive the appropriate training or resources prior to this deployment. Therefore, the purpose of the deployment could not be lawfully achieved.[220]

Complaints in the media also revealed that the appropriate parliamentary procedures were not followed.[221] These included the procedures meant to be followed in parliaments discussions on additional deployment, and the circulation of the President's second letter of deployment and subsequent approval. In addition to the lack of openness and public participation in the parliamentary discussions and those of the NCCC. Therefore, there was unlawful exercise of executive power in the SANDF deployment process which curtail the tenets of the rule of law, constitutional values, political accountability, and a participatory democracy. [222]

Central to the complaints were the problematic and brutal conduct of SANDF members in enforcing the lockdown regulations which portray a state of emergency rather than a state of

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[218] Ibid., 109.
[219] *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)*
[220] *Ibid.,* 116.
[221] *Ibid.*
[222] *Ibid.,* 118.

disaster.[223] States of emergency are to be declared in exceptional circumstances which arguably include national disasters. As noted in *FFP*; the premise of the declaration is to protect the life of the nation which justifies the suspension of certain fundamental rights. However, from *Khosa* it is seen that even non-derogable rights like the rights to safety and security and freedom from torture and the right to life were suspended, as opposed to 'limited'.[224] This begs the question as to whether a state of disaster was declared instead of an emergency to accommodate a suspension of these rights?

These issues and public concerns need to be considered against South Africa's history with states of emergencies.[225] They were often declared by the Apartheid government and resulted in gross human rights violations. Many citizens including children were detained without trial. The media was silenced, excessive force used, and curfews imposed. Thus, the curfew during level 4 of the lockdown is reminiscent of these circumstances.[226]

It is further held that curfew is a drastic derogation of the right of freedom of movement.[227] Thus, Bester, Els, and Olivier argue that curfew will only pass constitutionality if it were required under a state of emergency, as it limits the rights to freedom of movement in a way which will not be acceptable under the Section 36 analysis. Thus, level 5 and 4 may prove to be unconstitutional. Furthermore, unlike under apartheid, fundamental rights are now constitutionally protected, and section 37 holds that certain rights can never be suspended under a state of emergency and most definitely not during the lockdown period.[228]

3.2.The lack of a section 36 analysis and the lack of a rationality test:

We know that under the Constitution, individual rights are not unlimited.[229] Certain provisions in the Bill of Rights have internal limitations on the rights they provide, and section 36 applies to general limitations. Section 36(1) states that '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

[223] *Khosa* supra note 219 at 119
[224] *Freedom front plus* supra note 2.
[225] *Khosa* supra note 219 at 120.
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid., 121.*
[229] Van Staden op cit note 137 at 488.

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'. There is a section 36 limitations analysis, which includes within it a rationality test which is separate to the principle of legality rationality test, and that of the administrative action rationality test.[230]

The regulations are wide and resemble those under a state of emergency.[231] They considerably limit constitutional rights and enforce criminal liability for non-compliance. Section 36 only allows doe limitations which are justifiable and reasonable in an open and democratic society. Further, it requires a law of general application which ensures that the Executive cannot impose new restrictions by unauthorised policies and must uphold the rule of law.[232]

Justice Mokgoro in the *Hugo*[233] minority explained that the rights entrenched in the Constitution may be limited by a law of general application.[234] The limitation is permissible only to the extent that it is justifiable and reasonable in democratic and open society based upon freedom and equality.[235] This 'law' does include delegated legislation.[236] Which as noted is taken from a parent statute and has thus undergone the participatory and required legislative process.[237] However, as mentioned delegated legislation with such far reaching consequences should have included more public participation in their process.

It has been expressed by the National Peace Council, that lockdown appears political instead of a health response which does not address the core issue which is the virus.[238] Furthermore, restriction of movement has class aspects and consequences in the sense that it 'tells the poor to die in their small rooms'[239]. The effect of lockdown regulations does not affect South African's equally; on the financially insecure and impoverished as opposed to the varying

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[230] Promotion of Administrative Justice Act 3 of 2000.
[231] Jason Brickhill: Constitutional implications of Covid-19. 2519-7886: The Corporate Report, Volume 10 Issue 1, 2020, p. 33 – 38, page 2.
[232] *Ibid.*
[233] *President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)*
[234] *Ibid., 95*
[235] *Ibid., 96*
[236] *Ibid., 103*
[237] *Ibid.*
[238] Brickhill op cit note 231.
[239] Brickhill op cit note 231.

inconveniences experienced by the middle-, and upper- middle-class citizens is particularly devastating. This makes compliance difficult for many South Africans especially more so when rules are arbitrarily enforced leading to the erosion of support for and compliance with regulations, and thus limiting the effectiveness of regulations to combat the virus. Furthermore, the implementation of regulations was inconsistent across the country, often marked by the lack of clear organisation, and corruption. Thus, leading to members of the public losing faith in the government, and evading regulations which further leads to the erosion of the rule of law.[240] In addition to the fact that the means employed did not achieve the ends so how could there be a rational connection?

As noted, the courts are the guardians of the constitution and the rule of law, and give effect to separation of powers tenets and when using their strongest form of review, they must exercise deference and not penetrate the exclusive territories of the legislative and executive branches.[241] However, our representative democracy again must be participatory to give meaning to constitutional commitment to openness, accountability, and responsiveness.[242] Their sensitivity to the balance between the appropriate level of scrutiny and formal level of judicial review lies within the twin notions of variability and deference which marks the difference between review and appeal.[243] We are not arguing that the decision to pass the DMA be changed to a state of emergency, just that its rationality be questioned, about how appropriate the legislation is in the circumstances.

In *Pharmaceutical Manufacturers*[244] Chaskalson P considered rationality in the context of the principle of legality review of executive power and stated that it is the 'most minimal of the constitutional limitations which applies across the board to all exercises of public power'[245]. He confirmed that the exercise of public power should not be arbitrary as required by the rule of law, and therefore decisions should be rationally connected to the purpose for which that power is given, to not be consistent with the Constitution.[246]

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[240] *Ibid.*
[241] Kohn op cit note 163 op cit note 163 at 818 & 817.
[242] *Ibid., 819.*
[243] *Ibid.*
[244] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)*
[245] Kohn op cit note 163 at 824-825.
[246] Kohn op cit note 163 at 825.

The rationality test as the minimum threshold requirement applicable to all exercises of public power, does not offend the separation of powers doctrine in that it allows for the delicate balance of restraint on the part of the court but also questioning of the exercise of public power as to whether not the means are rationally related to the ends. This is a two-stage objective inquiry which focuses on the structure of the decision-making procedure instead of the decision itself.[247] First it asks whether the decision or the concerned conduct furthers a legitimate government purpose, and then it assesses whether the conduct pursued to achieve this purpose, are factually capable of furthering the interest based on the information available to the decision-maker and any reasons for this decision are rationally connected to the purpose pursued.[248] They are not assessing the accuracy of the decision, but whether that it is constitutionally legitimate. However, the court failed to even do this.

3.4. SECTION 36 LIMITATIONS ANALYSIS AND RATIONALITY TEST:

Section 36(1) limits rights, but is made for rights protection, and not rights infringement.[249] It provides that rights may only be limited if it is justifiable and reasonable in an open and democratic society, based on equality, dignity, and freedom. When determining whether this has been done appropriately, courts are required to conduct an assessment on the purpose, nature, extent of the right and its limitation, ascertain the limitation's proportionality and rationality. Then the Courts are required to consider if there are less restrictive means available to achieve the same purpose, and they must test every alleged constitutional infringement against this formula. It is a strong limitation on exercises of state power as the unavailability of less restrictive means specifically is a high bar to reach.[250]

When a right's limitation is being evaluated in terms of the section 36 limitations analysis, rationality is also considered. Section 36(1) lists relevant factors which are included in assessing the reasonableness and justifiableness of the rights limitation and section 36(1)(e) mentions the relation between the limitation and its purpose.

When a right is limited, 'the essential content of the right must not be extinguished but maintained'[251]. The limitation must be interpreted in the favour of the bearer of the right, and the Court will attend to the substance and not the form of the limitation. Therefore, the rights

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[247] *Ibid.*
[248] *Ibid., 826.*
[249] Van Staden op cit note 137 at 491.
[250] *Ibid.*
[251] Van Staden op cit note 137 at 491.

limitation will be considered objectively and consider the reality of the circumstances, instead the subjective purpose for which the rights limitations were enacted.[252]

Section 36 limitations do not however apply to section 1 and the values set out above.[253] Therefore, a pandemic or state of disaster is not a valid reason for limiting the imperatives of the rule of law or the requirement of advancing human freedoms and rights being limited due to the pandemic. These values should always be observed with no exceptions. Furthermore, because the pandemic is dealt with under section 27(1) of the DMA, and not the state of emergency under section 37 and therefore, any infringement of Constitutional rights should be subject to and comply with section 36(1) and its formula for determining the justifiability of the limitation of non-derogation or suspension of rights.[254]

The Constitutional Court expressed in *Khosa*[255] that freedom is inherent to dignity and even under a state of disaster, citizens should have their rights recognised and protected despite the circumstances and again these rights in the Bill of Rights which cannot be limited or suspended.[256] In *De Beer*[257] it was argued that the pandemic does not necessarily justify the web of new regulations against the Section 36(1) requirements. Every single regulation in the web must pass the limitations test. However, in that case the court still deemed the regulations to be rationally related to the purpose, however, they failed to do a proper section 36 analysis and bypassed the consideration of less restrictive means.[258]

In *Esau*, the Court corrected applicants for not relying on Section 36(1), but then the judgement failed to include a section 36(1) analysis.[259] Even though none of the applicants relied on Section 36(1), there is no rule of law which prevents a Court from *mero motu* giving effect to constitutional provisions even though those were not brough to the Court expressly. In *CUSA v Tao Ying Metal Industries*[260] the Constitutional Court held that where it is apparent on paper that a party should have brought an application under a certain rule, and the common law parties proceed with the incorrect perception of what the law is, then the Court is obligated *mero motu* to raise the point of law that parties were required to deal with.

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[252] Ibid.
[253] Ibid., 492.
[254] Ibid.
[255] *Khosa* supra note 219.
[256] Van Staden op cit note 137 at 500.
[257] *De Beer* supra note 2.
[258] *Ibid.*
[259] Van Staden op cit note 137 at 500.
[260] *CUSA v TAO YING METAL INDUSTRIES [2008] ZACC 15*

Otherwise, this would result in a decision preceded on an incorrect application of law which would infringe on the principle of legality.[261]

Van Staden argues that in essence, 'ministers and government agents being given the discretion to determine the extent of freedom is an antithesis of freedom under law'[262]. The legislation should itself set out Constitutional rights limitations, and not those made by the Executive unilaterally without the requisite public participation. Furthermore, it has been argued that it is appropriate for the DMA to bestow such wide discretion in the instance of a crisis. However, if the DMA had been an example of the default position in SA statutory law, and thus the regulations were the rule and not the exception then it would be incorrect to have the DMA give such wide discretionary powers. Even so, 'organs of state would still have to bear section 36 requirements in mind even during situations of crisis for their conduct to pass constitutional muster'[263].

3.5.CONCLUSION:

Therefore, the regulations and nature of derogations and suspension of fundamental rights is akin to that of a state of emergency. The issue is not that wide regulations were employed to hinder the spread of Covid-19 it is the means employed, not being in line with the requirements of the Constitution. In effect giving wide and unchecked unilateral powers to the executive without any sort of responsiveness, openness, or accountability and thus no respect for the Constitution and the Rule of Law.[264] A pandemic is the one time that the exercise of power needs to be authorised, as well as lawfully clear.[265]This does not only beg the question as to whether it passes administrative action lawfulness review which the courts failed to undertake, but also does not seem rational in terms of section 36 limitations analysis because of the clear suspension of rights, but also administrative action rationality per section 6(f)(ii) of PAJA.

[261] Van Staden op cit note 137 at 501.
[262] *Ibid., 506.*
[263] *Ibid., 506-7.*
[264] *Ibid.*
[265] *Ibid.*

Chapter 4:

4.1 SECTION 36, TYPES OF RATIONALITY REVIEW, AND THE APPROPRIATE LEVEL OF DEFERENCE:

As noted, before, the courts in *FFP* failed to apply a section 36 limitations analysis and even a rationality test. The failure to apply this rationality test also occurred in *De Beer*[266], and in *FITA*[267] where they failed to establish a rational connection between the banning of tobacco products and curbing the spread of Covid-19; and exercised too much deference.

4.1.1. TYPES OF RATIONALITY REVIEWS:

There are differing rationality reviews under section 36, principle of legality, and administrative action.[268] However, in practice the court has been known to collapse the different tests and added the likes of procedural fairness in *Motau*[269] and *Albutt.*[270] As well as reason-giving to assessing the rationality of the exercise of executive power, and even insert a new requirement of fairness as seen by Ngcobo in *Democratic Alliance v President*.[271]

Section 36(1)(d) within the limitations inquiry asks the court to consider the relationship between the limitation and the purpose of the limitation, and this has been dubbed by the courts as the 'rational connection test'.[272] If there is no rational connection between the purpose and the limitation then that is the end of the inquiry.[273]

Under the principle of legality, rationality review demands an objective inquiry.[274] In *Pharmaceutical Manufacturers*[275] it was noted that decisions cannot be arbitrary and must be rationally connected to the purpose for which the power was given, otherwise the law is

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[266] De beer supra note 2.
[267] Fair trade Independent Tobacco Association supra note 7
[268] Kohn op cit note 163 at 829-833.
[269] *Minister of Defence and Military Veterans v Motau and Others (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014)*
[270] Sewpersadh, P. and Mubangizi, J.C., 2017. Judicial review of administrative and executive decisions: Overreach, activism or pragmatism? *Law, Democracy & Development*, *21*(1), pp.201-220, page 213.
[271] *Ibid.*
[272] Iles, K., 2007. A Fresh Look a Limitations: Unpacking Section 36. *South African Journal on Human Rights*, *23*(1), pp.68-92, page 84.
[273] *Ibid.*
[274] Du Plessis, M., 2013. The variable standard of rationality review: suggestions for improved legality jurisprudence. *South African Law Journal*, *130*(3), pp.597-620.
page 598.
[275] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000),* 17

contrary to the rule of law principle against non-arbitrariness. This is an objective test in that it cannot pass muster merely because the decision-maker who took it, in good faith and mistakenly believed it was rational. This conclusion would be putting form above substance.[276]

The strongest form of review, and the least deferential in terms of section 33 of the Constitution and PAJA.[277] section 6(2)(f)(iii) states that 'A tribunal or court has the power to judicially review administrative action if the action itself is not rationally connected to (aa) the purpose for which it was taken, (bb) the purpose of the empowering provision, (cc) the information before the administrator, (dd) reasons given for it by the administrator'.[278]

In administrative law, the principle of legality may be used to challenge executive actions that do not qualify as "administrative actions" in terms of PAJA.[279] The principle of legality forms part of the rule of law, as enshrined in section 1 of the Constitution. In turn, rationality forms part of the principle of legality. It entails not only that a "decision must satisfy all legal requirements, but it also means that the decision should not be arbitrary or irrational". Theoretically, rationality in terms of the principle of legality is a narrow requirement and does not include requirements such as reasonableness, the right to reasons and procedural fairness, which are reserved for the review of administrative actions in terms of PAJA. However, in practice the Courts have gone further in their interpretation and application of the rationality requirement.

4.1.2. DEFERENCE:

Linking back to the separation of powers considerations; the balancing of interests, and sensitivity to those interests not only 'affects the formal limits of judicial review, but also informs the level of scrutiny the courts apply within these limits in terms of variability and deference.[280] In *NDPP v Zuma;*[281] Harms DP held that 'the independence of the judiciary

[276] *Pharmaceutical Manufacturers* supra note 275
[277] Sewpersadh op cit note 270 at 202.
[278] Promotion of Administrative Justice Act
[279] Laubscher, R., 2021. The COVID-19 Lockdown Regulations and the Courts' Irrational Rationality-Test-De Beer v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2020] ZAGPPHC 184 (2 June 2020) and Fair-Trade Independent Tobacco Association v President of the RSA (21688/2020) [2020] ZAGPPHC 246 (26 June 2020). *THRHR*, *84*, p.110. page 113.
[280] Kohn op cit note 163 at 820.
[281] Plasket op cit note 93 at 508.

depends on the judiciary's respect for the limitations of its powers'[282]. This is the starting point within which the theory of deference should be understood.

Depending on whether the exercise of public power is executive, legislative, or administrative in nature, they are all subject to rationality and legality.[283] However, depending on the level of review, courts exercise in line with the separation of powers, a level or varying measures of deference. Sachs J has defined the theory of deference as 'there is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be a better part of discretion'.[284]

Deference as a theory is an aid to the separation of powers balance between respect and overreach.[285] Kohn argues that Courts must ensure that they don't "exercise too 'eager' a 'display of judicial activism' nor do they 'display a failure of nerve'"[286]. The level of deference which is adopted correlates to how extensive a role the Court will play in a certain case. In 2004; Hugh Corder stated that the theory of deference adopted will "'animate the drawing of the line between executive action and administrative action'.' In this respect, this 'theory' will either serve to limit or to expand the frontiers of judicial review"[287]

> O'Regan's judgement in *Bato star*[288] articulated a flexible two-pronged litmus test to determine the degree of deference needed in a certain case.[289] She stated that 'the first key element involves the recognition of the proper role of the executive and legislature within the Constitution. This is akin to what has been called the requirement of 'democratic principle',"" in terms of which the decisions of these arms of state ought to be respected in so far as they are 'clothed with democratic legitimacy'. 'The second element is that of 'comparative institutional competence' - essentially the so-called 'polycentricity' concern - which O'Regan J explains as follows: '[A] Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to the other branches of government." [290]

[282] Plasket op cit note 93 at 508.
[283] Kohn op cit note 163 at 821.
[284] *Ibid.*
[285] *Ibid., 822.*
[286] *Ibid.*
[287] *Ibid., 822*.
[288] Bato star supra note 85
[289] Kohn op cit note 163 at 822
[290] *Ibid., 823.*

> She also referred to Hoexter's account of deference as "A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."[291]

These considerations will inform the appropriate rigorousness of review in the Court's jurisdiction.[292] In this context deference is balanced with variability which ensures that the intensity of the judicial review or appeal will be specific to the context.[293] Variability has played a crucial part in the application and development of the principles of legality. This is seen in the context of rationality which will vary in intensity based on which context it is applied, and this separates it from the even more vigorous form of reasonableness review set out in PAJA in the context of administrative action.[294]

4.2. REASONABLENESS:

Section 6(2)(h) of PAJA provides that 'a decision must not be so unreasonable that no reasonable person could have reached it'[295]. In *Johannesburg Stock exchange*[296] it was stated that to establish unreasonableness, it must be shown that the decision-maker did not apply his or her mind to the information before them.[297] What is considered reasonable in once circumstance will not necessarily be considered reasonable in another and is context specific. The factors to be considered when determining reasonableness include the expertise and identity of the decision-maker, the nature of the decision, reasons given for the decision, the

[291] Bato star supra note 85 at 46
[292] Kohn op cit note 163 at 824.
[293] Ibid.
[294] Ibid., 824 & 825.
[295] Bato star supra note 85 at 42
[296] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd. and Another (18/1988) [1988] ZASCA 18; [1988] 2 All SA 308 (A) (22 March 1988)*
[297] Bato star supra note 85 at 43

range of factors relevant to the decision, the nature of the competing interests involved, the impact of the decision on the well-being and lives of those affected. Even though the review functions of the Courts have procedural and substantive ingredients, there is still an emphasis on the distinction between review and appeal. The Court is tasked with ensuring that decisions taken by administrative agencies fall within the reasonableness bounds which are required by the Constitution, balanced with the Court's being cautious of not usurping the functions of those administrative agencies.[298]

Justifiability was used to refer to reasonableness in the Interim Constitution of 1993 is explicitly reserved for the territory of administrative action and requires 'something more'[299]. In addition to rationality, it requires a further proportionality assessment which is a more rigorous judicial assessment and needs more than a simple determination of whether the means adopted are rationally connected to the ends they seek to achieve. It requires a further element of showing that the means adopted were the most suitable or appropriate in the circumstances.[300] This test is used to avoid 'an imbalance between the adverse and beneficial consequences of an action and to encourage the decision-maker to consider both the need for the action and the possible use of ls drastic or oppressive means to accomplish the desired end'[301].

This is relevant in that the De Beer and FITA cases should have incorporated a reasonableness review as it was established in Esau that covid regulations were administrative action, and the overlooking of this issue was fatal to both applications as the court did not rigorously apply rationality review and exercised too much deference. Which in effect was both irrational and unreasonable.

4.3. THE RATIONALITY REVIEW OF COVID-19 REGULATIONS:

In *De Beer*,[302] the Minister brought an appeal from the high Court.[303] The case was initially brought to Court by Mr. Dawid De Beer; the member and president of the second respondent "Liberty Fighters Network" (LFN) which is a nongovernmental organization that primarily acts as a tenants' association.[304] They sought out an order to declare the national state of

[298] Bato star supra note 85 at 45
[299] Kohn op cit note 163 at 825.
[300] *Ibid., 826*
[301] *Ibid.*
[302] *De Beer* supra note 2
[303] *Ibid., 1*
[304] *Ibid.*

disaster invalid, unlawful, and unconstitutional. Further, that the declarations propagated by the Minister from 18 March 2020 to be declared unlawful and unconstitutional. They further requested that the order of all gatherings set out in the Regulation of Gatherings Act, 1993 to be lawful. They further asked for all services, businesses, and shops to be permitted to operate further, so long as they enforce the precautionary measures of wearing gloves, masks and using hand sanitizer, until the respondent has as provided for by Section 70 of the Labour Relations Act 1995, consulted with the Essential Services Committee (ESC) as required on which services constitute essential and non-essential services in the DMA regulations.[305]

They argued that the use of public power which includes the decision to promulgate delegated legislation per section 27(2) of the DMA requires a rational basis.[306] They should have brought the case as judicial review of administrative action as the regulations adversely affect their rights; and in that way they could have insisted on both a rationality and reasonableness review through PAJA. However, they relied on *Democratic Alliance v President*[307] and brought their case for rationality review and argued that rationality applies to the process and substance of the decision made, or in this case, the executive action.[308]

They further argued that the lockdown regulations were invalid and unconstitutional on the grounds that they were not approved by the NCOP.[309] However, the Court correctly held that only regulations made in the ordinary course of business in terms of the DMA need to be approved by the NCOP. This does not apply to emergency regulations made during the state of disaster, as it would negate the urgency needed to implement regulations swiftly under these circumstances.[310] However, this disregards the changing nature of urgency over the 10 months of lockdown, when the spread has slowed down and the curve has flattened, one cannot say the circumstances call for emergency and hasty decisions to justify every single decision made thereafter.[311]

The SCA in this case argued that the Court *a quo* should have assessed each of the regulations in issue, against the purpose of curbing the spread of infection, to determine whether there was in fact a rational link between the regulations passed, and the curb of the

[305] De Beer supra note 2 at 3
[306] *Ibid.,* 19
[307] DA v President supra note 28
[308] *Ibid.*
[309] Laubscher op cit note 279 at 115.
[310] *Ibid.*
[311] Adv Mitchell De Beer in Administrative Justice and Open Governance lecture. 4 October 2021.

spread. However, the SCA argued that the HC did not do this, instead they infiltrated the realm of proportionality by assessing whether better means could have been adopted.[312]

Van Staden and Laubscher agree with the SCA that the rationality test applied in the HC was a problematic interpretation of the rationality test and ignored precedent on how to correctly embark on the rationality analysis. Laubscher states that "Although the Court's description of the rationality test was correct, the Court's approach in considering the rationality test as a threshold requirement, before considering the other factors contained in section 36 is misplaced and perpetuates the incorrect approach to the rationality test, which was developed in earlier judgments."[313] He further added that it is completely irrational to invalidate all regulations due to the irrationality of some regulations. The HC should have considered the rationality of each regulation on its own merit in order to declare all such regulations invalid as opposed to assuming that all regulations were invalid.[314] Van Staden agrees with this analysis but points out that the Court correctly stated that not all regulations were irrational and that the state of disaster itself was rational.[315] The Court further stated that irrational measures are inherently prohibited in terms of section 36 and further the case showed that the Counsel for the respondents (the executive) admitted that section 36(1) was not taken into consideration when the regulations were formulated. [316]

However, I argue that the judges in De Beer SCA took a very deferential approach to lockdown regulations. The SCA on the merits of the appeal spent most of the time critiquing the HC approach and the evidential issues and pleadings of the respondent.[317] However, in terms of rationality they agreed that the exercise of public power like the promulgations of regulations under the DMA must have a rational basis as per *DA v President*.[318] The SCA stated that the case was not correctly pleaded.[319] Furthermore, it argued that the HC erred in that it failed to limit themselves to an enquiry into the presence or absence of a rational connection between the measure and its purpose, rather it strayed into whether or not in the Courts opinion there were evidently better means that could have been adopted.[320] On the

[312] De Beer supra note 2 at 103 – 106
[313] *Ibid., 116.*
[314] *Ibid.*
[315] Van Staden op cit note 137 at 496.
[316] *Ibid.*
[317] De beer supra note 2 at 95-100.
[318] *Ibid., 101.*
[319] *Ibid., 102.*
[320] *Ibid.*

rationality of the restriction on movement set out in section 33(1) they argued that the high Court should have asked whether the restrictions were rationally connected with the purpose for which the measure was enacted, namely to restrict the spread of the virus. Which it said it was, however, that the court was not in the position to decide whether less restrictive means should be employed.[321]

It concluded that a generalized uneasiness that the regulations lack coherence, restrict liberty, or may have been less strictly formulated is not enough grounds to declare invalidity.[322] Thus, we see a very deferential approach taken to lockdown regulation, even though when dealing with rights violations, a more demanding standard of proportionality is required. Furthermore, again as Section 36 and PAJA requires that Administrative Action requires a further reasonableness review which includes rationality and proportionality review.[323] The case was badly argued as the counsel for De Beer should have argued their case on reasonableness of just administrative action and relied on Esau. However, in that they missed this point of law the Courts should have still introduced the reasonableness analysis *mero motu* if not on the basis of Just administrative action, then on the grounds of the section 36 limitations analysis.

In *Fair Trade Independent Tobacco Association*:[324] the case concerned the fact that the Minister of CoGTA enacted legislation (section 27(2) of the DMA) which prohibited the sale of cigarettes, e-cigarettes, and tobacco related products as part of the measures to reduce the exacerbated spread of Covid-19.[325] The applicant, Fair-Trade Independent Tobacco Association (FITA) had an issue with this prohibition and sought an order to declare tobacco-related products and cigarettes as essential goods, and thus sough the invalidity of regulation 27 of 'the level 4 regulations' and regulation 11A of 'the level 5 regulations', and regulation 45 of the 'level 3 regulations' to subsequently be declared invalid and set aside. Further they requested that the sale of cigarettes and tobacco products to be declared to be essential goods and thus, their selling to be lawful.[326]

[321] De Beer supra note 2 at 104-105.
[322] *Ibid.,* 116.
[323] Promotion of Administrative Justice Act
[324] Fair Trade Independent Tobacco Association supra note 7
[325] *Ibid., 1*
[326] *Ibid., 2 and 5*

FITA challenged the prohibition of the sale of cigarettes and tobacco products and cigarettes on the grounds that this prohibition was contrary to the rule of law, and irrational.[327] They condemned the promulgation of regulations 27 and 45 which ban tobacco products and cigarettes because of the health hazards associated with the use of tobacco or smoking, and they argued that this is misguided. They argued that the alleged health hazards do not justify a blanket prohibition of tobacco and cigarette sales. They argued that therefore, there is no rational connection between prohibition of tobacco products and reducing the spread of Covid-19.[328]

In addition to the lack of a rational link between the means adopted and the ends, they further added that there were no proportionality considerations in the promulgation of these regulations.[329] Further that this prohibition is not followed by most other countries who are equally affected by the pandemic, and further that prohibiting smokers and tobacco users from accessing the products leads to serious emotional and physical adverse consequences. This also increases the issue of illicit non-regulated product use increasing, which pose a major health hazard. Ultimately, the Minister's attitude regarding these issues is extreme and constitutes executive overreach.[330] They also should have added, that these regulations infringe on the right to autonomy regarding consumption and adds to the increasing flailing of the informal economy and income of the working classes which was already a huge issue under lockdown.

The Court stated that the rationality test is not a stringent one and should not be confused or conflated with the reasonableness requirement.[331] Even in cases where an exercise of public power or a law curtails a fundamental right. Therefore, the question should simply be whether in placing the ban on the sale of tobacco products, did the Minister act irrationally and breach the rule of law and principle of legality?[332] The question is not whether less restrictive means could or should have been adopted, only that of a rational connection.[333]

The respondents contended that the main reason why the Minister banned the sale of tobacco products was 'to protect human life and health and to reduce the potential strain on the health

[327] Fair Trade Independent Tobacco Association supra note 7 at 12
[328] *Ibid., 13*
[329] *Ibid.*
[330] *Ibid., 14*
[331] *Ibid., 25*
[332] *Ibid., 27*
[333] *Ibid., 28*

care system'[334]. This would ensure that the healthcare facilities are not exhausted to this extent. She argued that those in need would be denied access to healthcare, and that the reality is that South Africa is under resourced as a country and has a shortage of healthcare essentials required for managing the virus such as ICU facilities and ventilators.[335] A report from the Department of Health estimated that it will need to treat more patients when the pandemic peaks and thus, between '25,000 and 70,000 hospital beds would be required for COVID-19 patients at the epidemic's peak, and between 4,000 and 14,000 ICU beds'[336]. She further held that this reality which is factually uncontested places a duty on the executive to take strict measures to prevent unnecessary strain on the scarce healthcare facilities that are available.[337]

The Minister admitted that even though there are studies which are still being undertaken to establish whether there is a potential link between the use of tobacco products and Covid-19; the medical literature and sources she has assessed and consulted so far shows that the use of tobacco products increases the risk of developing a more severe form of the disease as well as increased chances of transmission.[338] Therefore, based on the facts available to her, it is concluded that smoking is a risk factor for the development of Covid-19 and that smokers and tobacco users have a higher chance of contraction and progression of the virus than non-smokers. 'The evidence further shows that smokers are 1.4 times more likely than non-smokers to have severe symptoms and are 2.4 times more likely to be admitted to ICU, and to require medical ventilation or die when compared to non-smokers'[339]. Thus, she as the responsible decision-maker in good consciousness cannot ignore these figures. Lastly, she added that on the authority of reliable experts, smoking is thus a risk factor in threat and progression of Covid, with smokers having 'up to twice the odds of Covid-19 progression'[340].

FITA on the other hand had an issue with the medical literature, expert reports, and the other documentation relied on by the Minister, and contended that the material is not only inadequate but does not support her decision to prohibit the sale of tobacco products.[341] They added that the Minister in supporting her decision disregarded a whole body of empirical

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[334] Fair Trade Independent Tobacco Association supra note 7 at 34
[335] *Ibid*
[336] *Ibid., 35*
[337] *Ibid.*
[338] *Ibid.*
[339] *Ibid., 36*
[340] *Ibid., 38*
[341] *Ibid., 40*

evidence which negated and challenged her premise of accelerated Covid-19 progression amongst tobacco users and smokers. Therefore, FITA requested that the Court should undergo the exercise which required the evaluation of each party's evidence and sources and form their own opinion as to which information is more accurate, and persuasive in terms of Covid-19 progression and smoking.[342] Again their argument should have been framed around reasonableness, of which information was available to the decision maker and whether she applied their mind. The lack of an administrative action and reasonableness argument was fatal to their application.

The Court responded that FITA required them to overstep their jurisdiction and commence on an assessment which is contrary to the principle of legality review.[343] The question to be considered is not whether the evidence, research, and medical literature which the Minister premised her decision on is so conclusive or cogent as to determine a direct or substantive link with more Covid-19 susceptibility. Their task rather is to determine whether the evidence that the Minister considered provides a rational link for her to make the decision to prohibit tobacco products to curb the spread of the virus and reduce the strain on the under resourced healthcare system [344]

In the eyes of the Court, the evidence relied on and consulted by the Minister even though it is still developing and is inconclusive on the topic of higher Covid-19 progression and susceptibility amongst smokers, the Minister has a firm rational ground to justify the promulgation of the regulations prohibiting the sale of tobacco products.[345] "As to whether the Minister have tendered 'better, more convincing' and 'less limited' evidence? Perhaps. However, this is not the question before them"[346].

On the topic of the booming trade of illicit tobacco products as a result of the ban; and that the ban increased 'black-market' purchase of cigarettes and tobacco products instead of stopping smoking.[347] The Minister responded that the fact that smokers still have access to cigarettes 'albeit illegally' which has led to the rise of criminal activity in society and a undermining of the law, meant that the ban was effective in reducing access to cigarettes and

[342] Fair Trade Independent Tobacco Association supra note 7 at 40
[343] *Ibid., 41.*
[344] *Ibid.*
[345] *Ibid., 43*
[346] *Ibid., 45*
[347] *Ibid., 65*

why people had to go 'underground'.[348] Therefore, even if the ban did not have the effect of stopping every single smoker from stopping smoking, this does not mean that the ban is irrational. In that the test for rationality is whether the means are rationally related to the ends, and not that the means selected were the most effective means. Rather that they could rationally achieve this purpose.[349]

The Court agreed and held that in their view; the reality of the increase in illicit trading of tobacco products is not fatal to the rationality inquiry in that the Minister is only required to show that the means she chose were able to achieve the intended objective and were 'reasonably capable of achieving it'[350]. Ultimately, they held that tobacco products do not constitute essential goods, and the application was dismissed with costs.[351]

This approach is a clear example of formalistic reasoning and takes a form over substance approach to rationality review.[352] It is bewildering that the Court considered that the Minister's choice to conveniently choose information and to rely on sources which suits her decision to be rational. When it is not only unreasonable but also unlawful in that it shows a clear failure of the administrator to apply her mind to the facts presented before her. Furthermore, the measures she adopted cannot be rationally connected to the ends if they are that disproportionate and go 'too far'.

Laubscher[353] argues that the approach *Fair-Trade Independent Tobacco Association*[354] perpetuates an incorrect approach to rationality review.[355] He says that although the applicants did not clearly set out their argument in the application, the Court concluded from the applicants' submissions that the application constituted a review of an executive action as opposed to administrative action.[356]

The court correctly stated that a rational connection between the purpose of banning tobacco products and the means chosen to achieve the goal of saving lives and not hampering the efficiency of the healthcare system.[357] However, he argues that even when the Court stated

[348] Fair Trade Independent Tobacco Association supra note 7 at 66
[349] Ibid., 67
[350] Ibid., 69
[351] Ibid., 97 & 99
[352] Klaaren, J. and Penfold, G., 2006. Just administrative action. Constitutional Law of South Africa, 4(2), 85.
[353] Laubscher op cit note 279 at 114.
[354] Fair Trade Independent Tobacco Association supra note 7
[355] *Ibid.*
[356] Laubscher op cit note 279 at 116-117.
[357] Ibid., 117.

that they would not consider and evaluate the conflicting evidence and decide which is more persuasive and cogent, they subsequently made a decision to corroborate the evidence relied upon by the Minister by claiming that regardless of whether the information was conclusive or not, there was still a rational connection between the means and the ends based on the evidence available to the decision-maker[358].

He adds that the court should have evaluated the conflicting evidence as this would not contravene the principle of deference, as the court would have a more informed view as to which evidence was relied on, and based on all the evidence available was a complete prohibition rational?[359] Only if the Court suggested a course of action as a result of consulting the evidence and thus, making an executive decision; then this would contravene the principle of deference and separation of powers considerations.[360]

4.4. CONCLUSION:

Therefore, the court exercised too much deference in by not correctly embarking on the appropriate rationality analysis, and not considering whether or not the conduct was reasonable. Furthermore, Plasket[361] argues that where the right to just administrative action is considered, there can be no scope for much deference. It is either that the administrator was empowered by a valid empowering provision to take a certain decision, or she or he was not. This is a question of statutory interpretation and a question of fact.[362]

[358] Laubscher op cit note 279.
[359] *Ibid.* 118.
[360] *Ibid.*
[361] Plasket op cit note 93 at 511.
[362] *Ibid.*

Chapter 5:

5.1. THE SOCIO-ECONOMIC EFFECT OF LOCKDOWN ON MARGINALISED GROUPS:

The adverse effects of lockdown on the socioeconomic landscape of South Africa further add to the need for the protection of the rights to just Administrative Action and consequently a more vigorous rationality and reasonableness analysis, lawfulness, and judicial review on the part of the judiciary. When one looks at South Africa as a developing country and relatively new democracy, we see the need for balancing competing rights and interests, the need to consult the low-income communities which makes the majority of SA population, marginalised groups, interested groups and more active participation from the public. To achieve an open, transparent, justified, and accountable government.

5.1.1. THE EFFECT OF LOCKDOWN ON THE SOUTH AFRICAN ECONOMY, AND THE ADVERSE EFFECTS ON LOW INCOME COMMUNITIES:

As much as a total lockdown was necessary, South Africa has a deeply unequal society.[363] The healthcare sector is under resourced, and poorly administered; and only 16 percent of the population had access to medical aid. Between 2016 and 2017; the Office of Health Standards stated that out of the '851 public sector health establishments, 62 per cent of these were non-compliant with the norms and standards for healthcare quality'[364]. With this in mind, the South African executive should have taken a little longer to prepare their response to the pandemic as they had the chance to learn from Asia and Europe who chose to doucs on social-distancing, lockdown, testing, self-isolation, and quarantine.[365] Although South Africa's swift response has been approved and celebrated by WHO the long term effects on the economy and society were overlooked.

The Covid-19 lockdown had far-reaching consequences and cause a lot of stress for South African businesses.[366] Prior to lockdown South Africa already had high unemployment issues, unsustainable government debt trends, weak economic growth, and declining per

[363] Staunton op cit note 205 at 2.
[364] *Ibid.*
[365] *Ibid., 3.*
[366] *Ibid.*

capita income. This was exacerbated and worsened by the lockdown which costed the economy R 13 billion a day.[367]

The South African government implemented a hard lockdown about 23 days after the first infection.[368] Italy took 39 days to implement one, and the USA took 54 days. This 'speedy' implementation is considered an example of good governance and decisive action. However, unlike developed countries, South Africa's healthcare system has struggled to keep up with the exponential increase in patients in that it is underfunded and under resourced. South Africa had the opportunity to assess the impact and initial response of other countries seeing how they dealt with the influx of patients, and therefore once can understand why the executive felt the need to take decisive and swift action.[369]

However, they equally had the opportunity to observe the countries who took a slower approach to enforcing a lockdown such as the USA and Switzerland who first aimed to preserve their economies.[370] They did so by first implementing social distancing and then cancelling events as opposed to the South African 'rip off the band aid approach' and inflicting harsh restrictive regulations on the first day of lockdown. Instead, South Africa closed 35 out of the 53 land ports, they revoked visas, and they instituted travel bans especially to high-risk countries before a hard lockdown was imposed. South Africa chose to focus on the four factors being primary detection, preparation, lockdown, and enhanced surveillance. However, this has had a drastic and devastating effect on the economic and socio-economic landscape of the country. The pandemic exacerbated and exposed high levels of race and gender inequality and many South Africans living on the informal economy suffered huge losses in ceasing operations. Low-income workers have been affected the most, the lockdown also caused a rise in domestic violence and abuse of women and children.[371]

Many of the businesses had to close their businesses permanently and others continued to operate but under expensive restrictions.[372] The alcohol and the tobacco ban as noted caused many to lose their incomes but also was a loss of significant tax revenue. The grave change and loss of financial support of breadwinners fueled massive riots, looting and protests from

[367] de Villiers, C., Cerbone, D. and Van Zijl, W., 2020. The South African Government's response to COVID-19 (preprint),798.
[368] *Ibid., 799*
[369] *Ibid*
[370] *Ibid., 800.*
[371] *Ibid.*
[372] *Ibid., 801.*

the 9-18 July 2021 which were also influenced by public unhappiness with how the ruling party managed the pandemic. It was said to be sparked by the imprisonment of former President Jacob Zuma for contempt of Court, however, a lot of the anger was fueled by the grave situation in informal settlements and low-income areas which had been worsened by lockdown restrictions.[373] Thus, taking time to include community engagement may have taken the government longer to implement regulations but would have a accommodated a proportionate response to Covid-19 in the context of the South African socio-economic situation.

While these strategies were seen as effective in containing the spread of the virus, the socio-economic realities of South Africa limited their effectiveness.[374] Public health measures such as hand washing, and social distancing were still effective in limiting the spread of the virus and were considered 'cheap' preventative measures, but still a privilege to many South Africans. 'Approximately 13 per cent of all households are located in informal settlements that are poorly structured, cramped, and at times lack access to running water." 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 overcrowded public transport, with 69 per cent using public taxis, 20.2 per cent using buses, and 9.9 per cent using the trains'[375].

On 31 March; South Africa was downgraded to junk statues and the South African rand fell to a new recorded low.[376] The executive therefore had to choose between forfeiting the economy to save lives through slowing the spread of the virus, or prioritizing the economy and risk exposing the already vulnerable healthcare system and the part of the population suffering from other comorbidities to the virus. It is clear that the executive needed to impose a lockdown and that is not being contested. However, the grave impact that these regulations were going to have on the population, in addition to the lack of community engagement and public deliberation in developing the regulations disadvantaged the population but also put extra pressure on the government to make hasty but uninformed decisions. Furthermore, the choice to criminalize non-compliance, not only eroded the rule of law, but also undermined

[373] De Villiers op cit note 367 at 801.
[374] *Ibid.*
[375] *Ibid.*
[376] *Ibid.*

their aims and fails to address the "real issue" which is ensuring that the population has the means to comply with regulations.[377]

A community-centered approach would have been better to ensure that that the regulations address the issue of Covid and did not result in disproportionate effects on the poor, stigma and discrimination, as well as perpetuate health inequality.[378] Thus, the approach required contextualization of local health care systems, traditions and beliefs. President Ramaphosa may have consulted with industry and business, however, the clear lack of consultation with informal settlement communities and leaders is obvious in the amount of people who could not comply with these measures. The lockdown deprived the informal economy workers from access to wages and employment, who were already living hand to mouth and replaced their income with a R350 unemployment grant. As stressed in *De Beer*[379] the Court referred to the millions of informal workers who forced to watch their children go hungry, have lost their livelihood, and stripped of their 'rights to equality, dignity, and to earn a living and to provide for the best interests of their children.

About 17 million South African citizens rely on social grants which is their only income, and thus one in 5 people are dependent on state aid.[380] These social grants cover child support grants, foster care grants, relief of distress, disability grant, older persons grants, and care dependency grants among others afforded in terms of the Social Assistance Act 13 of 2004. However, as many more citizens were left unemployed and destitute by lockdown, more families now solely rely on these grants. Others were left completely homeless. 'While some relief measures aimed at mitigating the impact of the measures were announced, including an increase in some of the social grants, it was estimated that 45 per cent of South African workers are not eligible to access some of the funds that were made available'[381].

The South African government's response is based on an overreliance on and faith in the power of the criminal law; through the dependance on military defense of the SANDF.[382] In the context of pandemic, this criminalization had severe health-related effects on the population, undermined and exacerbated public health challenges caused by the pandemic,

[377] UNITED NATIONS POLICY BRIEF, 15 APRIL 2020, page 4.
[378] Ibid., 7.
[379] De Beer supra note 2.
[380] UNITED NATIONS POLICY BRIEF, 15 APRIL 2020 7-8.
[381] *Ibid., 8.*
[382] *ibid*

and had a devastating impact on already criminalized, marginalized, and stigmatized communities.[383]

It is submitted that this could have been ameliorated had efficient and the proper approach to judicial review of DMA regulations as Admin Action would have required the executive to implement more procedural fairness, in that they would have had the time to do so had they not rushed for a rip the band aid approach. This could have significantly prevented the harsh socio-economic and related exacerbation of gender-based violence and adverse effects on learners had more public participation been allowed in the various stages of the decision-making process. There was a rush to implement a lockdown in the initial stages. However, we were under lockdown for 2 years and the more we learnt about the pandemic, the more informed our decisions could be. An emergency is not an excuse to make uninformed and rash decisions where the emergency is lasting for 2 years.

5.1.2. THE EFFECT OF LOCKDOWN ON GENDER-BASED VIOLENCE AND FEMICIDE 'GBVF' AND THE GOVERNMENT'S DISPROPORTIONATE RESPONSE TO AN ISSUE OF PANDEMIC PROPORTIONS:

Even prior to the pandemic, South Africa already had one of the highest rates of gender-based violence and femicide.[384] It was 'already five times higher than the global average and the female interpersonal violence death rate was the fourth highest out of the 183 countries listed by the World Health Organisation in 2016'[385]. In 2018 when President Ramaphosa had just assumed office, there was an outcry at the escalation of violence against children and women, and an overall increase in femicide. After the rape and murder of Uyinene Mrwetyana a first-year student from the University of Cape Town; civil society staged a national protest led by the Total Shutdown Movement. The government responded at the Presidential summit where it, and non-governmental organizations as well as interests' groups decided to band together and figure out how to prevent and end gender-based violence against women and children. This resulted in the setting up of the Interim Steering Committee on GBV and Femicide

[383] UNITED NATIONS POLICY BRIEF, 15 APRIL 2020, 9.
[384] Global innovations during the COVID-19 pandemic can help South Africa improve the safety of women and children. 13 Jul 2021 / by Lauren Tracey-Temba https://issafrica.org/crimehub/iss-today/police-and-courts-must-do-more-to-reduce-gender-based-violence accessed 03/08/21
[385] Ibid. 588.

which supervised 'the development of the Emergency Response Action Plan (ERAP) with an implementation period of six months and total budget allocation of R1.6 billion'[386].

However, when Covid-19 hit and resulted in the country going into a hard lockdown; there was a huge increase in GBVF cases as children and women were locked down with their abusers and the pandemic brought even more barriers in terms of access to justice. The police, Courts and prosecution were put under unprecedented strain and the pandemic consequently exacerbated challenges which victims already faced when trying to access justice. 'The government's GBV and Feminicide Command Centre, a call centre supporting victims of GBV, recorded more than 120,000 victims in the first three weeks of the lockdown. Weeks later in Pretoria, a similar call centre was receiving up to 1,000 calls a day from women and children who were confined to abusive homes seeking urgent help'[387].

The police are usually the first responders in severe assault or murder cases. They gather evidence, ensure survivors obtain medical treatment, and they provide them with safe alternative accommodation. However, even prior to the pandemic, it was revealed that the police don't adequately perform these functions. They are demotivated, lack sensitivity training, staff, and dedicated adequate personnel to attend to these issues and given legally correct information and support to victims. These issues have been exacerbated by the lockdown regulations. 'By early July, 36 police officers had died from COVID-19 and over 5 000 were infected. Several police stations have closed as SAPS officers tested positive. Although President Ramaphosa pledged $75 million to strengthen the criminal justice system and provide better care for victims of GBV, many women and children continue to suffer daily'[388]. By April 2020; most domestic violence shelters were full and reached capacity even though the GBV crisis was still assumed to peak.[389]

The lockdown had adverse consequences for our prosecution services.[390] The Courts recorded a substantial decline in new applications for domestic violence protection orders which 'decreased from 22 211 new applications in January to 18 112 in February and 10 262 between 26 March and 30 April'[391] Furthermore, Court operations were disrupted and hampered, and 'several magistrate's Courts, as well as the justice department's head office in

[386] Tracey Temba op cit note 384 at 589.
[387] *Ibid.*
[388] *Ibid.*
[389] *Ibid.*
[390] *Ibid.*
[391] *Ibid.*

Pretoria were closed for decontamination following COVID-19 cases. Magistrate's Courts weren't functioning optimally during early stages of lockdown, forcing matters to be postponed'[392]. More GBV cases were withdrawn as officials were not able to travel to various courts and coordinate GBV cases.

GBV legislation and hearings have been in place since 20 October 2020 and the three new bills were adopted 11 August 2021.[393] 'On the 3 June 2021 the National Assembly passed the Gender-Based Violence Bills; Criminal and Related Matters Amendment Bill, Domestic Violence Amendment Bill, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill'[394]. These bills were passed as a response to the 2018 Presidential summit.

The Bills will now be sent to the NCOP for concurrence. These measures are admirable and welcome however, this is poor planning considering that there has historically been a trend of increase in GBV during global pandemics.[395]

We once again see the most vulnerable members of society forgotten and fall to the wayside. Considering that GBVF is a social pandemic; the same care, time and effort taken to prioritize curbing the spread of Covid-19 should have been taken to tackling GBVF. Had more time been taken to consult communities, interest groups, and the most vulnerable groups in society on how to curb the spread but also consider the safety of individuals, then the regulations would not have been considered so irrational and more people would be willing to comply. Had the concerned arms of government noted and emphasized lockdown regulations as administrative action then these consequences could have been mitigated, and the regulations would have been more appropriate for the South African situation instead of just to the accommodation the interests of the upper classes.

If anything, the safety of women and children was jeopardized and their constitutional rights to safety and security have been compromised on with this approach to lockdown. Not only

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[392] Tracey Temba op cit note 384 at 589

[393] Gender-Based Violence Bills: briefing by role-playing Departments on state of readiness: Justice and Correctional Services, 06 November 2020, accessed 03/08/2021 https://pmg.org.za/page/GenderBasedViolenceBillsbriefingbyroleplayingDepartmentsonstateofreadiness

[394] NATIONAL ASSEMBLY PASSES GENDER-BASED VIOLENCE BILLS AND APPROVES NAMES OF COMMISSIONERS FOR THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION PRESS RELEASES: 3 June 2021, accessed 03/08/2021 https://www.parliament.gov.za/press-releases/national-assembly-passes-gender-based-violence-bills-and-approves-names-commissioners-south-african-human-rights-commission

[395] Peterman, A., Potts, A., O'Donnell, M., Thompson, K., Shah, N., Oertelt-Prigione, S. and Van Gelder, N., 2020. *Pandemics and violence against women and children* (Vol. 528). Washington, DC: Center for Global Development.

do we see the executive breach the right to just administrative action, but we also see the derogation of fundamental constitutional rights, and the rights and duties owed by the executive to its voting citizens, and consequently a breach of international obligations.

5.1.3. THE EFFECTS OF LOCKDOWN ON EARLY CHILDHOOD DEVELOPMENT 'ECD' LEARNERS:

The same criticism to lockdown approach in terms of the impact on gender-based violence can be extended to the governments lack of response to the adverse effect of lockdown on early childhood development learners. South Africa jumped onto the global trend of shutting down schools, 'as 188 countries have imposed countrywide school closures, affecting more than 1.5 billion children and youth. The potential losses that may accrue in learning for today's young generation, and for the development of their human capital, are immeasurable'[396].

Even though younger children were less susceptible to the Covid-19 physical symptoms, their general wellbeing was compromised.[397] On a global scale, lockdown measures that enforced school closures, negatively and adversely affected the cognitive, emotional, and physical well-being of more than 1.5 billion children.[398] This is incredibly damaging to the children in their early years, and worse who live in the poorest of societies, as those children are already living in vulnerable and deprived situations. Even prior to the pandemic and the lockdown, 43 percent of children below 5 years old were expected to be at risk, and unable to achieve their development potential due to the pre-existing state of inequality which has now significantly increased. Furthermore, school closures exposed even more vulnerabilities in political, social, and economic structures which have a lifelong impact on the general development and growth of children.[399]

The prime development of children in their early years calls for enriching, interactive, and stimulating environments.[400] These should have learning opportunities, adequate nutrition,

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[396] Sayed, Y., Singh, M. and Mort, T., 2021. COVID-19 and the 'new normal'in education: Exacerbating existing inequities in education. *African Safety Promotion: A Journal of Injury and Violence Prevention*, *19*(1), pp.18-42, 26-27.

[397] Koen, M., Neethling, M.M., Esterhuizen, S. and Taylor, B., 2021. The impact of COVID-19 on the holistic development of young South African at-risk children in three early childhood care and education centres in a rural area. *Perspectives in Education*, *39*(1), pp.138-156.
139.

[398] *Ibid.*

[399] *Ibid.*

[400] *Ibid.*

and social interaction. While the holistic development of children in their early years consists of internal and external influences, many children in these early years do not have access to caring and nurturing parent-child influences and environments at home, this was sometimes only possible through schools and child centres.[401]

In South Africa, the Department of Education refers this general childhood growth process as 'early childhood development'[402]. This is for children from birth to the age of 9 years old to thrive, and grow, morally, socially, mentally, spiritually, emotionally, physically and psychologically. In South Africa, the prolonger closure of schools and ECD centres disrupted the domestic dynamics and daily routines of many children and parents. Thus, placed the children as risk of being excluded from the continuity and mandatory skills from learning, as well as health, safety, and security. 'A report entitled the plight of the ECD workforce (April 2020) project show the numbers of young children who are supposed to be receiving quality education had dropped from 5 million to 1.5 million as a result of containment measures'[403]. Stakeholders and researchers show that the pandemic not only halted the economy, and led to vast levels of unemployment, but also added to financial strain on families including parents who had to provide for their children, but also teachers who lost their jobs due to the closing of the ECD centres. Which further led to the increase of vulnerabilities of young children who are in desperate need of care, stimulation, and guidance.[404]

The young children who were locked down and housebound with guardians, parents, grandparents or caregivers who were forced to nurture, teach, and care for children 24 hours a day, while many of them were underprepared and lacked the essential skills and equipment to do so stunted the growth and holistic development of many young learners.[405] Some children were subject to abuse and witnessing violence in their homes and communities, and further lost out on appropriate caregiving, learning, and social interaction.[406]

It is estimated that the ripple effects of the circumstances mentioned will not only compromise the healthy development of children in their early years but will spill over into how they conduct themselves as adults who have to care for the next generation.[407] These

[401] Koen op cit note 397 at 139.
[402] *Ibid.*
[403] *Ibid.*
[404] *Ibid.*
[405] *Ibid.*
[406] *Ibid.*
[407] *Ibid., 141.*

children not only were deprived of guidance, but also of essential skills on how to live, play, and interact with other children their own ages. This could potentially influence physical activity behaviours and the children returning to the normal schooling system will be unequipped with social skills and further left with feelings of isolation and not belonging. These issues as a result of the lack of social interaction also limit the development of how to think independently and hamper relationship skills. This could also lead to an unhealthy dependency on social media and the internet which can have dire consequences for the cognitive development of the child, as well as their emotional wellbeing, and can adversely affect their future academic achievement.[408]

It is globally accepted that the early years of a child's life requires stimulating environments and positive educational and community experiences for the child's future academic, social, and personal success.[409] South Africa department of Basic Education needs to improve both the quality and the access to education in the ECD centres and considering that children have been left behind in the lockdown process, this should now be a main priority. Researchers argue that ECD centres are the first step in the education ladder and that the right kind of investment into this initiative of cultivating the growth and opportunities of young children and our future generations serves 'to bridge the social-equity gap from a very young age'[410].

More than two-thirds of the countries globally have introduced a national distance learning initiative, however, in low income third world countries, this share is only at 30 percent.[411] Already before the pandemic, a third of the world's youth were already digitally exclude and lockdown measures, as well as physical distancing, border closures, and restriction of movement cuts off a significant amount of children's access to the rest of the world both technologically and literally.[412]

Face-to-face child services which include nutrition programmes, sexual and reproductive health services, maternal and newborn care, immunization services, schooling, HIV treatment, community-based child protection programmes, alternative care facilities, and 'case management for children requiring supplementary personalized care, including those

[408] Koen op cit note 397 at 150.
[409] *Ibid., 151.*
[410] *Ibid.*
[411] Peterman, A., Potts, A., O'Donnell, M., Thompson, K., Shah, N., Oertelt-Prigione, S. and Van Gelder, N., 2020. *Pandemics and violence against women and children* (Vol. 528). Washington, DC: Center for Global Development, 2.
[412] *Ibid., 4.*

living with disabilities, and abuse victims have been partially or completely suspended'[413] The impact of the pandemic has thus extended and reach far beyond the realm of physical health, and has had dire and grave effects on the children's safety, mental and physical well-being, safety, social development, privacy, economic security and psychological well-being and mental health.[414]

Furthermore, more time taken to contain the virus increases the adverse and long-term effects that the pandemic will have on children.[415] For example, the longer the economies are closed, the less likely children, bread winners, and struggling families are likely to recover. At a household level, already struggling families witnessed breadwinners lose their jobs, and/or sell productive assets for survival which has dire consequences for child poverty. Furthermore, the longer that schools are closed, the harder it will be, and the less likely children will be able to catch up on the essential learning syllabus, but also on the growth and development of social and life skills which will 'support a healthy transition into adulthood'[416]

Additionally, the longer that immunization campaigns are halted, then the more costly and greater the struggle to eliminate the likes of measles and polio outbreak.[417] For children caught at the center of this and who are directly affected to the susceptibility of these diseases, this will permanently alter the trajectory of their lives and health. Furthermore, the children who are facing 'acute deprivation' in terms of stimulation, nutrition, or protection, as well as 'periods of prolonged exposure to toxic stress, during the critical window of early childhood development are likely to develop lifelong challenges as their neurological development is impaired'[418] Children who drop out of school will face a higher risk of 'getting in with the wrong crowd', but also are more likely to face a higher risk of child labour, child marriage, and teenage pregnancy. In addition, they will see their lifetime earnings and plans for retirement exponentially fall or be unlikely to ever happen.[419]

Children who experience family breakdowns during this lockdown are at risk of increased and heightened stress, and risk losing the security, sense of support and this will have dire

[413] Peterman op cit note 411 at 4.
[414] *Ibid.*
[415] *Ibid., 12.*
[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid.*
[419] *Ibid.*

consequences on their wellbeing and mental health.[420] Lockdowns have also had the effect of increasing the risk of children witnessing abuse, violence, and suffering in homes, communities, but also in overcrowded shelters.[421]' Furthermore, children who are in conflict situations, and living in crowded and unsanitary conditions like internally displaced persons (IDP) settlements, refugee camps, and homeless shelters are at even more risk. Furthermore, children's reliance on online and distance learning has increased their risk of being exposed to online predators and inappropriate content.[422]

The increased amount of time that children spend online in the digital environment is likely to also expose them to wellbeing and health risks both emotionally and, in terms of mental health.[423] Excessive use of social media is related to the deterioration of the physical and mental health of children in that it manifests into deeper issues of body image concerns, eating disorders, and poorer sleeping patterns. Policy should be formulated to focus on addressing the challenges cause by lockdown, and those brought by the pandemic. These policy making decisions should have a broader community reach in order to minimize the risk to children's health, their mental and psychological wellbeing, as well as ensuring access to nutrition, good food, and educational support. More time should also be dedicated to providing protection and assistance to vulnerable children in need, and in low-income households and communities. 'Addressing these challenges quickly is key to avoiding a rise in inequality, among the current generation of children and the next, and to ensuring inclusive growth'[424].

Ultimately, it is clear that the South African response has been poor.[425] The state's policy on ECD learners was based on the notion that 'education is a fundamental and universal human right to which all young children are equally entitled without discrimination[426]. However, the ECD facilities in the country differ in terms of level and quality of operations. These services are primarily provided by private sector providers, day parents, non-profit organizations, and through community development programmes which provide the centres with gardens, parks, books, libraries, toy, and book community playgroups, and sometimes emotional and mental support for children, teachers and parents. However, these were not available to vulnerable

[420] Peterman op cit note 411 at 12.
[421] United Nations policy brief 3.
[422] *Ibid. page 3 and 6.*
[423] *Ibid., 6.*
[424] *Ibid.*
[425] Basic education budget brief: South Africa: 2020
[426] *Ibid., 7.*

and most rural communities who are forgotten on the periphery.[427] The Basic Education budget brief has stated that "Furthermore, there had not been enough focus on the learning losses, inadequate access to the internet especially in low-income households, and the "current squeeze on resources for the social sectors is likely to continue over the medium term", rolling back the educational quality gains achieved in the last decade"[428].

Children have been the forgotten group in the Covid crisis, and this is because they initially were seen to be safe from the virus, as it mostly affected the older age-groups; until the Delta variant manifested. However, ECD learners have been adversely affected by the virus in a multitude of ways and if the South African government wants to prevent even more disparities between children of different economic classes, as well as the stunting of the social-emotional growth of children, and their access to basic education. More awareness around this social group, and more of a solid effort needs to be made to prioritize and protect the future generation.

Lauren Kohn[429] argues that our culture shift from one of authoritarianism under apartheid to one of justification under a constitutional order, a proportionality or balancing of competing rights and interests including the balancing of community versus individual needs. She argued that 'where schools adopted a one-size-fits-all approach to pandemic regulation, they were acting in a disproportionate manner that flies in the face of our constitutional value system — and, potentially, fundamental rights'[430].

Section 7(1) of the Constitution centralises the Bill of Rights as the 'cornerstone of democracy in South Africa' and enshrines the rights of all people in our country and upholds the democratic values of equality, freedom, and human dignity. Therefore, these values should have been prioritised and at the centre of the Department of Education's response to children and school closures; 'considering the uniqueness of how each small child finds their place in the world by forming human connections, while simultaneously shaping their own identities. Where schools disproportionately disconnect children through rolling closures or

[427] Basic education budget brief,7.
[428] Ibid., 17.
[429] Lauren Kohn: A reflection on the implications of Covid-19 measures for learners from a constitutional law perspective, 1 September 2021. Accessed 03/08/21 https://www.dailymaverick.co.za/opinionista/2021-09-01-a-reflection-on-the-implications-of-covid-19-measures-for-learners-from-a-constitutional-law-perspective/
[430] Ibid.

excessive adherence to overly strict "safety protocols", they potentially infringe the human dignity of the learners'[431].

She adds that section 28(2) of the Constitution sets out that the child's best interests is of paramount importance in any and every matter which concerns a child. This refers to the individual child and what they might need in said situation as opposed to the collective and adopting a one-size-fits-all policy. Furthermore, section 28(c) provides that every child must have access to basic shelter, nutrition, social and healthcare services which is in many cases only provided for by schools. Therefore, when a child is forced to stay at home, they are deprived of the right to food and social support and not just education. Therefore, balance and proportionality are required, in that again when rights are limited per section 36, it must be done so in the least invasive way, reasonably and justifiably. Furthermore, where there are less restrictive means to achieve the curbing of the spread of Covid, while considering the effects of lockdown on ECD learners, this should have been done so. Such as excessive mask wearing, sanitizing at every point, more aggressive screening and whatever steps required to allow the continuation of schools, as well as physical safety and health.

What we should learn from the pandemic and the South African response to it, is that although centralised oversight is required, the management and implementation of responses is best decentralised.[432] Many social scientists, philosophers, historians, academics, and interest groups have noted that the restrictive reliance on sole scientific evidence has been detrimental to the socio-economic landscape of South Africa. The limit of scientific research is especially seen in terms of legal ethics and rights considerations and balancing interests during the pandemic.[433] When one considers that older people were more susceptible to the virus, as opposed to young children; the country chose or subconsciously chose to prioritise the older generation over the wellbeing of young and developing children and thus, failed to balance competing interests in a justifiable, and fair manner and without consulting the very citizens involved and affected. It is noted that 'ethicists, and specifically philosophers of justice, argue about how to allocate benefits and burdens in ways that are fair'[434].

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[431] Kohn op cit note 429.,

[432] Sayed, Y., Singh, M. and Mort, T., 2021. COVID-19 and the 'new normal'in education: Exacerbating existing inequities in education. *African Safety Promotion: A Journal of Injury and Violence Prevention*, *19*(1), pp.18-42. 21.

[433] *Ibid., 24.*

[434] *Ibid.*

The unfairness of this 'trade-off' is unavoidable, as 'Children are the victims of the measures taken to halt the spread of COVID-19. They have been denied basic rights of access to healthcare and education. Schools have been closed, and for many vulnerable pupils this has meant an experience of isolation, anxiety, and hunger'[435] Moreover, while the lockdown did reduce the spread of the Covid-19 virus the '"potential impact that an excessive and poorly implemented response to COVID-19 may have by interrupting of essential mother-child services in low-income countries could indirectly lead to 235 500 – 1 157 000 additional child deaths over a 6-month period"'[436]. Therefore who is consulted and what is considered important evidence in policy making suggests that South Africa took a non-democratic and unconstitutional approach to regulation and policy making.[437] Therefore, while the closure of schools may have been considered to be the most appropriate action taken to mitigate the spread of Covid-19 at the time, the failure to implement context-sensitive policies has been have been grave on unequal societies like South Africa who should have taken more time and care to remember that policies have different effects and consequences for different sectors in a deeply unequal society like ours.[438]

5.2. CONCLUSION:

Ultimately, more participation with appropriate stakeholders and proper rationality and limitations analyses would have mitigated the adverse consequences on the most vulnerable, and largest groups of society. In addition to recognising the right to just admin action, and a better public participation process being included would not only provide a more transparent and more informed approach to enforcing lockdown have been more beneficial to the majority of South Africans but also could have effectively saved more lives due to lockdown regulations compliance and trusting government and department of health process in terms of testing, treatment, and vaccinations. If anything, the adverse consequences on women and children at the most not only show a failure of good governance but also once again show the dire consequences of not following democratic processes and undermining the rule of law. It can also be said that the lack of care exercised by government can be considered as the endangerment of the lives of its citizens. Ultimately, breaching both constitutional rights to safety and security, as well as ratified international convention obligations.

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[435] Sayed op cit note 432 at 25.
[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid., 30.*

Chapter 6:

6.1. CONCLUSION:

Ultimately, it is clear that the DMA regulations should not have passed constitutional scrutiny as they contravene the right to just administrative action as well as limit or suspend fundamental rights to movement, safety and security, freedom from torture. As well as rule of law considerations in a justificatory democracy in that not enough public participation was facilitated in the regulation-making process. This was not only a breach of the administrative right to procedural fairness, and rationality but was also for those reasons unreasonable. Furthermore, where the cases of these regulations were taken by members of the public for judicial review, their rights of access to courts were contravened as too much deference was exercised in the analysis of the constitutionality of these regulations further curtailing constitutionally mandated rights as well as a breach of the doctrine of separation of powers and the lack of checks and balances.

It is clear that the pandemic should have been handled under a state of emergency to keep constitutional safeguards in order, however if they executive insisted on a disaster it should have had similar constitutional safeguards to a state of emergency, as the distinction between rights limitation and suspension in light of the pandemic lockdown regulations under level five and criminal consequences for non-compliance shows that constitutional rights were violated and the rule of law was disrespected. This shows the vast consequences of unchecked unilateral executive power and unfettered discretion.

Lastly, the socio-economic effects on the working and poorer classes, women, and children show more reason as to why public participation was needed in the lawmaking process, but also why we needed a decentralized approach and more time instead of rushing to keep up with other countries and impose a hard lockdown. The negative effects on children and increase in gender-based violence could have been mitigated had they been prioritized in the pandemic, and had all stakeholders been consulted.

It is regrettable that a pandemic not only brought intense and horrific loss of lives, as well as altered the way in which people interact forever, but it also undermined the rule of law and citizens respect and confidence in the state institutions and the legitimacy of constitutional supremacy and the rule of law. It is hoped that the country as a whole there will be more fairness and a duty of care exercised, and that we will learn from this engagement so that in

the case where a disaster or emergency arises, we are better prepared but we are also more cognizant of how executive power or public power is exercised and its direct effects on the electorate.

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