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Essay

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

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INTRODUCTION

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

South Africa's National Institute of Communicable Diseases (NICD) reported its first confirmed case on March 5, 2020. Since then, the number of recorded cases has

1 'COVID-19 Cases Top 10 000 in Africa' (*WHO|Regional Office for Africa*), https://www.afro.who.int/news/covid-19-cases-top-10-000-africa (accessed Apr. 13, 2020).

2 'COVID-19' (*Africa CDC*), https://africacdc.org/covid-19/ (accessed Apr. 13, 2020). WHO Africa numbers are different as the WHO only captures WHO countries. WHO Africa states that there have been 86,115 confirmed cases, 4206 deaths, and 88,776 recovered as of June 16, 2020. WHO Africa, https://www.afro.who.int/ and https://who.maps.arcgis.com/apps/opsdashboard/index.html#/0c9b3a8b68d0437a8cf28581e9c063a9. For more on the AU response, see Marguerite Massinga Loembé and others, 'COVID-19 in Africa: The Spread and Response' [2020] Nature Medicine 1.

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

steadily increased, but not at the exponential rate that was initially expected.[4] To date (June 16, 2020), 73,533 confirmed cases and 1568 deaths have been reported by the NICD. With the arrival of COVID-19, the initial advice to South Africans focused on regular hand washing and social distancing. However, the declaration of COVID-19 as a pandemic by the World Health Organization (WHO) on March 11, 2020, the global daily rise in reported cases, but crucially, the first case of community transmission in South Africa recorded, prompted President Cyril Ramaphosa and his government to act. Although the number of cases at the time remained relatively low (61 confirmed cases; 0 death), a national State of Disaster was declared on March 15, 2020, and a series of measures limiting the rights of South Africans were announced.

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

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

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

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

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

8 The estimated overall HIV prevalence rate is approximately 13.1% among the South African population. The total number of people living with HIV is estimated at approximately 7.52 million in 2018. 'Statistical Release' 26; 'The Numbers: HIV and TB in South Africa · It is estimated that there are around 3-million people living with HIV in South Africa who are not receiving treatment. Spotlight' (*Spotlight*, July 4, 2018) https://www.spotlightnsp.co.za/2018/07/04/the-numbers-hiv-and-tb-in-south-africa/ (accessed Apr. 8, 2020). They constitute around 38% of those living with HIV. See https://www.unaids.org/en/regionscountries/countries/southafrica. According to the 2018 WHO Global TB Report, roughly 78,000 people died of TB in South Africa in 2017—of these 56,000 were HIV positive and 22,000 were not.

9 Academy of Science in South Africa, *ASSAf Statement on the Implications of the Novel Coronavirus (SARS-CoV-2; COVID-19) in South Africa*, https://www.assaf.org.za/files/2020/ASSAf%20Statement%20Corona%20Virus%202%20March%202020%20web.pdf

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

healthcare systems in some high-income countries (HICs) are overwhelmed. Preventing and containing the spread of COVID-19 in South Africa was thus a critical priority.

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

Despite these socio-economic realities, South Africa's COVID-19 response needed to focus on containing and slowing down the spread of the virus. It is unsurprising that the regulations promulgated under the State of Disaster mainly focused on severely limiting the freedom of movement and assembly of its citizens. It was clear from the outset that this would have a considerable economic impact, and on March 31, South Africa was downgraded to junk status with the South African Rand falling to a record low.[14] President Ramaphosa was left with a choice of sacrificing the economy to slow the spread of the virus or putting the economy first and risk exposing an already weakened healthcare system and population suffering from other comorbidities to the virus. Faced with this choice, his decision to lockdown the country cannot be criticized and may prove decisive in containing and slowing down the spread of the virus. Considering the time it took to reach its borders, South Africa had time to prepare a COVID-19 response and draw on the importance of its community-informed response to other epidemics. However, despite the impact that these regulations were going to have on civil society, the lack of public deliberation and community engagement in developing these regulations is concerning. Furthermore, the criminalization of non-compliance with these public health measures seeks to undermine their aims, has the potential to

11 Informal settlements and human rights in South Africa (2018). Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Socio-Economic Rights Institute of South Africa. See https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf

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

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

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

increase stigma and discrimination of the disease, and fails to address the real issue: ensuring that the population has the means to comply with the regulations. Combined, these factors question whether South Africa has learned from its response to its HIV epidemic. In outlining the first month of South Africa's COVID-19 response, this paper will critique the lack of engagement and the criminalization of non-compliance and discuss their potential impact.

NATIONAL STATE OF DISASTER

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

The Constitution does not make provision for the executive power to declare a State of Disaster. This is made possible through the Disaster Management Act 2002. This Act gives the relevant Minister the power to limit certain rights and freedoms within South Africa through the promulgating of regulations. A State of Disaster lasts for 3 months (unless it is terminated) and can be extended by the Minister 1 month at a time. Although rights may be limited, they cannot be derogated from, and any regulations promulgated must conform to the Bill of Rights. The courts can declare a State of Disaster invalid (and indeed the current State of Disaster was challenged and dismissed by the Constitutional Court[15]) or any regulations promulgated under the State of Disaster (on June 2 the regulations were struck down as unconstitutional[16]).

15 'ConCourt Kicks out NGO's Legal Challenge against 21-Day Coronavirus Lockdown', https://www.iol.co.za/news/politics/concourt-kicks-out-ngos-legal-challenge-against-21-day-coronavirus-lockdown-45768339 (accessed Apr. 8, 2020).

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

Unlike the State of Emergency, there is no clear oversight role for Parliament in a State of Disaster. Parliament is not precluded from meeting during this time, but limitations on the freedom of assembly may affect the ability of Parliament to convene.

To meet the criteria under the 2002 Act for a 'disaster', there must be the presence of a disaster that is defined as a 'progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause death, injury or disease; damage to property, infrastructure or the environment; or disruption of the life of a community'. COVID-19 clearly falls within the definition of a disaster under the 2002 Act and on March 15, 2020, President Ramaphosa granted Dr Nkosazana Dlamini-Zuma, the Minister of Cooperative Governance and Traditional Affairs, the power to limit certain rights and freedoms within South Africa. A series of restrictions were announced on the same day, with further restrictions announced on March 23, 2020.[17] Among others, the regulations criminalized the spread of disinformation, prohibited the sale and transportation of cigarettes and alcohol from midnight on March 26 for 3 weeks (that was further extended by 2 weeks on April 9, 2020[18]), and controlled the prices of certain essential products. For the purposes of this article, we will focus on the restrictions to the freedom of movement and assembly.

RESTRICTIONS ON THE FREEDOM OF MOVEMENT AND ASSEMBLY

Strategies for containing the spread of COVID-19 that have been implemented elsewhere focus on social distancing, isolating, limiting the movement of citizens, and testing and quarantining of those who have tested positive. Such measures are at the heart of South Africa's response. Initially gatherings were restricted to 100 individuals, and establishments that served alcohol could have no more than 50 individuals. As of midnight on March 26, all gatherings, including gatherings for prayer, were prohibited for 3 weeks, with the exception of funerals that were limited to 50 individuals. As of midnight on March 26, all but essential movement were prohibited for 3 weeks (and extended until April 31), in what is known locally as a lockdown. The leaving of a home was only permitted to buy essential goods, seek medical attention, buy medical products, collect social grants, attend a funeral of no more than 50 people, access public transport for essential services, or attend work that is deemed to be an essential service during specified times. The leaving of a house for exercise or to walk a dog was prohibited, and the movement between provinces and districts was prohibited. These restrictions were extended by a further 2 weeks on April 9, and the total 'hard' lockdown period lasted until April 30.

The regulations introduced also state that anyone who is suspected of having COVID-19 or has been in contact with a person who has tested positive for COVID-19 cannot refuse testing. If confirmed positive, they cannot refuse treatment, isolation,

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No_21542-2020.pdf (accessed June 16, 2020). For more on this case, see M Labuschaigne, 'Ethicolegal Issues Relating to the South African Government's Response to COVID-19', 13 South African Journal of Bioethics and Law, (2020), http://www.sajbl.org.za/index.php/sajbl/article/view/630 (accessed June 16, 2020).

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

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

or quarantine. Similar provisions already exist in the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions gazetted in June 2017 under the National Health Act 2003. Under this regulation, if a person refuses to consent to the testing, treatment, isolation, or quarantine of a notifiable medical condition, the head of a provincial department can apply to the High Court to require the mandatory testing, treatment, isolation, or quarantine of that individual. Failure to comply may result in imprisonment not exceeding 12 years, a fine, or both. The COVID-19 regulations, however, go further, and while an application to the magistrate's court for the mandatory testing, treatment, isolation, or quarantine is made, that person can be placed in isolation or quarantine for 48 hours. Furthermore, the power to make this application is vested in the hands of an 'enforcement officer', defined as including a member of the South African Police Service (SAPS), the South African National Defence Force (SANDF), a peace officer, and not the head of a provincial department.

Through the restrictions on movement and assembly, it was anticipated or expected that the transmission of the virus would be hindered. However, these restrictions extend beyond the restrictions on freedom of movement and assembly imposed under the apartheid government. Although these restrictions were introduced in response to a public health emergency and is a completely different context to apartheid, the restrictions on the freedom of movement in the lockdown period have been met with some apprehension. The CEO of the South African Human Rights, Tseliso Thipanyane, describes the measures introduced as similar to those associated with a State of Emergency and argues that President Ramaphosa was reluctant to use that term due to its association with apartheid.[19] Considering the almost total limitation on the right of assembly (with the exception of a funeral) and the severe limitations on the freedom of movement, the effect of these measures is indeed more akin to a State of Emergency in the context of these rights. Furthermore, in the first week of April, South Africans learned of the government's plan to decrease the population in 29 critically overcrowded information settlements across the country by relocating thousands of residents from their homes in an attempt to slow the spread of the coronavirus.[20] Residents that opposed this relocation find it reminiscent of apartheid's forced removal in 1968 of over 60,000 residents of Cape Town's District Six area (after the apartheid government's declaration of District Six as a whites-only area). Conditions at temporary camps for the duration of COVID-19 lockdown for 2000 homeless people to slow down the spread of the virus are a cause for concern. Many of these homeless people have said they have been forced to move to the temporary camps.[21]

The restrictions on freedom of movement are within the powers granted under the 2002 Act and in line with the World Health Organization (WHO) recommendations on curbing the spread of the virus. The declaration of a State of a Disaster and the

19 'Human Rights Suspended in Face of Covid-19 Disaster' (*SowetanLIVE*), https://www.sowetanlive.co.za/news/south-africa/2020-03-23-human-rights-suspended-in-face-of-covid-19-disaster/ (accessed Apr. 8, 2020).

20 'Covid-19: Household Screenings Begin as Experts Warn about False Picture of Crisis' (*TimesLIVE*), https://www.timeslive.co.za/sunday-times/news/2020-04-05-household-covid-19-screenings-begin-as-experts-warn-about-false-picture-of-crisis/ (accessed Apr. 8, 2020).

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

subsequent regulations can be reviewed and declared invalid by a court, and the measures should conform to the Rule of Law. However, it is the reliance on the criminal law for non-compliance with the restrictions that we consider to be unnecessary and contrary to good public health policy, but also fails to consider the socio-economic realities for non-compliance.

CRIMINALIZATION OF PUBLIC HEALTH MEASURES: POTENTIAL IMPACTS

South Africa, and indeed Africa, is no stranger to epidemics. On August 8, 2014, the WHO declared a Public Health Emergency of International Concern (PHEIC) in response to the West Africa Ebola epidemic that went on for over 2 years. South Africa currently has a generalized HIV epidemic and is battling a TB epidemic, and considerable investment has gone into its prevention, testing, and treatment campaigns. While every epidemic is different, the importance of community engagement is clear in developing any response to an epidemic, and interventions that succeed are likely to be informed by the community. During the Ebola epidemic, the WHO guidance initially prohibited traditional burial practices for containment purposes, but these guidelines had to be changed and were modified in conjunction with the affected communities.[22] South Africa similarly learned that prevention, testing, and treatment campaigns must involve the community and community-based services are essential in achieving results.[23] Public engagement is thus essential at both a macro level in the formation of policy and at a micro level whereby community engagement can help support the implementation of policy.

At a macro level, any guidance must be contextualized to take account of local healthcare systems, beliefs, and traditions. For the COVID-19 measures to succeed, it is necessary to know what different communities need to meet these measures, and an important component is community engagement. South Africa should draw on its considerable experience in conducting community engagement to ensure that the regulations address COVID-19 and do not result in stigma and discrimination or disproportionately affect the poor and perpetuate health inequity. A community-centered response for COVID-19 is thus essential.[24] While President Ramaphosa clearly stated in his March 2020 address to the nation that he consulted with business and industry, there appears to be a lack of consultation with those living in cramped

22 Akin Abayomi et al., 'African Civil Society Initiatives to Drive a Biobanking, Biosecurity and Infrastructure Development Agenda in the Wake of the West African Ebola Outbreak', 24 Pan African Medical Journal, (2016), http://www.panafrican-med-journal.com/content/article/24/270/full/ (accessed Feb. 13, 2020); Suerie Moon et al., 'Will Ebola Change the Game? Ten Essential Reforms before the next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola', Lancet 2204, 386 (2015); Amaya M. Gillespie et al., 'Social Mobilization and Community Engagement Central to the Ebola Response in West Africa: Lessons for Future Public Health Emergencies', Global Health: Science and Practice 626, 4 (2016).

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

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

informal settlements who will struggle to comply with these restrictive measures. The lockdown deprives those working in the informal sector from employment and access to a wage. Generally living hand to mouth, they are unlikely to have savings. Indeed, in the *De Beer* decision that held some of the lockdown regulations to be unconstitutional, the Court referred to the millions of informal workers who have lost their livelihood, forced to watch their children go hungry, and stripped of their 'rights of dignity, equality, to earn a living and to provide for the best interests of her children'.[25]

Approximately 17 million South Africans rely on social grants as their only income, constituting one in five persons. Social grants take different forms and include a child support grant, disability grant, older person grant, foster care grant, relief of distress, and a care-dependency grant, among others afforded in terms of the Social Assistance Act 13 of 2004.[26] However, with many more South Africans now left unemployed, there will be more within the family relying on these grants.[27] While a number of relief measures aimed at mitigating the impact of the measures were announced, including an increase in some of the social grants, it is estimated that 45 per cent of South African workers are not eligible to access some of the funds that were made available.[28]

The South African government's response is characterized by an overreliance on and faith in the power of the criminal law. This militarized response was very evident, with President Ramaphosa appearing in military fatigues on the night the lockdown started. Failure to comply with some of the lockdown restrictions may result in imprisonment of up to 6 months, a fine, or both. The South African National Defence Force (SANDF) has also been bestowed with additional powers. Under the 2002 Act, financial, human, and other resources may be released and directed toward the resolution of the disaster. During the March 23 address, President Ramaphosa announced that he had directed the SANDF to be deployed to support the SAPS. The presence of the military in enforcing the lockdown soon became a familiar scene in many streets across South Africa, and they quickly moved to enforce the regulations. An entire group of almost 50 wedding guests, including the bride and groom, were arrested in the first week of April for breaking the ban on public gatherings,[29] and two doctors who tested positive

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

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

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

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

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

for COVID-19 were forced into quarantine at a medical facility.[30] However, on June 2, the North Gauteng High Court issued an order prohibiting government from forcing those who test positive for COVID-19 into state quarantine facilities if they are able to self-isolate. The High Court held that a person is 'only required to be quarantined or isolated at a state facility, or other designated quarantine site, when that person is unable to self-isolate, or refuses to do so, or violates the self-quarantine or self-isolation rules'.[31] Within the first few days of the lockdown, there were reports of the SANDF and SAPS using rubber bullets[32] and allegations of abuse.[33] Eight people were reported to have been killed by the police during the first week of the lockdown in enforcing the COVID-19 regulations, which at that time was more than the number of deaths related to the virus.[34]

It is not just the heavy handiness of the enforcement and the power given to the SAPS and SANDF that we take issue with but the regulations that have criminalized knowingly exposing and transmitting COVID-19 to others. The criminalization of the transmission of HIV, for example, is considered to be bad policy that is lacking in any evidence base and only serves to stigmatize the disease and discriminate against those who have it,[35] leading to potential human rights abuses.[36] In the context of pandemics, there is the concern that criminalization could have severe health-related effects on the population, undermine and exacerbate public health challenges caused by the pandemic,[37] and have a devastating impact on already marginalized, stigmatized, or criminalized communities.[38] South Africa fortunately resisted any attempts to criminalize HIV, but it is unclear why there has been a different response to COVID-19. Rather than incentivise citizens to get screened or tested for COVID-19 is likely to drive those who have or suspect they have COVID-19 underground.

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

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

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

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

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

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

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

37 'Governing Global Health Emergencies: The Role of Criminalization—PRIO Blogs', https://blogs.prio.org/2020/03/governing-global-health-emergencies-the-role-of-criminalization/ (accessed Apr. 8, 2020).

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

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

Furthermore, criticism of the national response has been met with public attacks rather than engagement with the concerns raised. When a phased relaxation of lockdown regulations was announced and various sets of contradicting and confusing rules were outlined by the respective portfolio ministers, various experts raised their concerns and expressed their opinions. Prof Glenda Gray, the president of the South African Medical Research Council (MRC) as well as COVID-19 ministerial advisory committee member, particularly came under fire when she criticized the government's phased relaxation of lockdown approach as 'nonsensical and unscientific' to the media. This in turn led to the South African Health Minister, Dr Zweli Mkhize, to release a statement in response to Prof Gray's public attack of government as well as a request an investigation of Gray's conduct by the MRC. The investigation was later on dropped, and Prof Gray was cleared of any transgressions following the response and right of academic freedom outcry from the scientific community.[42]

Banning other suitably qualified experts from speaking with the press will only further limit the dissemination of reliable information, which is important in stopping the spreading of disinformation and combatting any stigma. These experts can provide much-needed up-to-date information on testing and treatment. There have been reports that employers are threatening to dismiss employees who cannot provide

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

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

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

42 Azarrah Karrim and Sarah Evans, 'EXCLUSIVE | Unscientific and Nonsensical: Top Scientist Slams Government's Lockdown Strategy' (*News24*), https://www.news24.com/news24/southafrica/news/unscientific-and-nonsensical-top-scientific-adviser-slams-governments-lockdown-strategy-20200516 (accessed June 19, 2020); 'Statement of the Minister of Health Launch of Mobile Laboratories National Health Laboratory Services 1 April 2020' (*SA Corona Virus Online Portal*, Apr. 1, 2020), https://sacoronavirus.co.za/2020/04/01/statement-of-the-minister-of-health-launch-of-mobile-laboratories-national-health-laboratory-services-1-april-2020/ (accessed Apr. 13, 2020); Staff Reporter, 'MAVERICK CITIZEN: 250 Senior Academics Issue Statement to Support Prof Glenda Gray and "the Principle of Academic Freedom"' (*Daily Maverick*, May 24, 2020), https://www.dailymaverick.co.za/article/2020-05-25-250-senior-academics-issue-statement-to-support-prof-glenda-gray-and-the-principle-of-academic-freedom/ (accessed June 19, 2020).

evidence that they do not have the virus.[43] The South African Health Minister has rightly warned that such measures will likely lead to discrimination, but with none of the employees meeting the (then) testing criteria it exposes a lack of knowledge on this key issue. Testing is free in the public sector, but in the month since the first case was announced, the public National Health Laboratory Service (NHLS) only conducted 6000 tests in total despite projections that they will conduct 5000 tests per day. The rollout of mobile testing units on April 1, 2020, for mass community-based testing began to address this,[44] but the reality is that 80 per cent of all tests have been conducted in private labs that charge between R900 ($47) and R1400 ($73) per test.[45] As of June 16, a total number of 1,148,933 tests were conducted in both the public and private sectors, out of a population of 59.83 million.[46]

CONCLUSION

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

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

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43 'Coronavirus: Mkhize Warns against Stigmatisation in the Workplace' (*News24*, Mar. 19, 2020), https://www.news24.com/SouthAfrica/News/coronavirus-mkhize-warns-against-stigmatisation-in-the-workplace-20200319 (accessed Apr. 8, 2020).

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

45 'Will It Be Enough? Inside South Africa's Plan to Ramp up Coronavirus Testing' (*Bhekisisa*, Apr. 3, 2020), https://bhekisisa.org/health-news-south-africa/2020-04-03-will-it-be-enough-inside-south-africas-plan-to-ramp-up-coronavirus-testing/ (accessed Apr. 6, 2020).

46 Sacoronavirus.co.za/2020/06/15/update-on-covid-19-15th-june-2020/ (accessed June 26, 2020).

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