



LOCKDOWN:

WHAT ARE MY RIGHTS?



INTRODUCTION

Government declared a national state of disaster on **15 March 2020** to address the magnitude and severity of the COVID-19 pandemic. This state of disaster will lapse after three months unless it is terminated earlier, but can be extended for one month at a time.¹

The President announced an initial 21-day lockdown on **23 March**. A state of emergency has not yet been declared.² This means that the rights protected in the Bill of Rights remain in force, but can be limited – provided that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom.³

This report catalogues the restrictions that were placed on the rights and freedoms that are included in the Bill of Rights. It is of vital importance that our Constitutional rights are protected during this time of crisis. The price of freedom is eternal vigilance; we must keep a watchful eye on Government to ensure that it does not abuse its powers. Unreasonable limitations of our rights must be challenged. Once the crisis is over, the current restrictions must be reversed to ensure that we return to a free and prosperous South Africa. New regulations occur frequently, however, and this report will be updated accordingly.

FREEDOM OF MOVEMENT, RESIDENCE AND ASSEMBLY

Rights

Everyone has the right to freedom of movement. They have the right to enter, leave and reside in South Africa.⁴ Everyone has the right to assemble, demonstrate, picket and present petitions peacefully and unarmed.⁵

Limitations

Municipalities were directed to close all public facilities that do not provide essential services. These include swimming pools, beaches, libraries, community halls, recreation centres, museums, galleries, markets, parks and events.⁶ Community gatherings, weddings and other celebrations are prohibited. Funerals may continue, but the mourners are limited to close family and restricted to 50 people.⁷

No permits will be issued for marches, protests and the handover of petitions.⁸

Every person is confined to their place of residence, unless strictly for the purpose of performing essential services, obtaining essential goods or services, collecting social grants or pensions, or seeking emergency, lifesaving or chronic

medical attention.

Movement between provinces and between metropolitan and district areas is prohibited, except for essential workers, transportation of cargo and mortal remains, or to attend funerals.⁹

Cases

A bride and groom were arrested in Richards Bay on 5 April together with their 50 wedding guests and the pastor who conducted the ceremony, because they breached the prohibition on wedding celebrations.¹⁰

ECONOMIC ACTIVITY

Rights

Every citizen has the right to choose their trade, occupation or profession freely.¹¹

Limitation

All businesses and other entities must cease operations during the lockdown, except any businesses or entities that manufacture, supply or provide essential goods or services. Retail shops and shopping malls must be closed, except where essential goods are sold. Retail stores that sell essential goods are prohibited from selling any other goods.¹²

CHILDREN, FAMILY AND EDUCATION

Rights

Every child under the age of 18 years has the right to family care or parental care, or to obtain alternative care when removed from the family environment. They have the right to be protected from maltreatment, neglect, abuse or degradation, and may not be detained, except as a measure of last resort, and then they must be kept separately from other detained people who are older than 18 years. A child's best interests are of paramount importance in every matter concerning the child.¹³

Everyone has the right to a basic education and access to further education.¹⁴

Limitations

Schools and partial care facilities are closed until **15 April 2020**.¹⁵

Children in child and youth care centres may not be released or receive visitors. People in old age homes, frail care facilities and facilities for persons with disabilities may not be released or receive visitors.¹⁶

¹ Section 27(5) of the Disaster Management Act 57 of 2002.

² Section 37 of the Constitution.

³ Section 36 of the Constitution.

⁴ Section 21 of the Constitution.

⁵ Section 17 of the Constitution.

⁶ Section 6.5.2(a) of the Disaster Management Act 57 of 2002; directions made by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

⁷ Section 8 of the Disaster Management Act 57 of 2002; directions made on 2 April 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

⁸ Section 6.5.2(b) of the Disaster Management Act 57 of 2002; directions made on 25 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

⁹ Disaster Management Act 57 of 2002; directions made on 2 April 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

¹⁰ *BBC News*: 2020. Coronavirus: South African bride and groom arrested over lockdown wedding, 6 April. Available at <https://www.bbc.com/news/world-africa-52183152>. Accessed on 8 April 2020.

¹¹ Section 12 of the Constitution.

¹² Section 118 of the Disaster Management Act 57 of 2002; directions made on 28 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

¹³ Section 28 of the Constitution.

¹⁴ Section 29 of the Constitution.

¹⁵ Section 6 of the Disaster Management Act 57 of 2002; directions made on 18 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

¹⁶ Section 6 of the directions of the Minister of Social Development in terms of Regulation 10(5) of the Regulations published in the Government Gazette 43107, Government Notice 318 of 18 March 2020.

Children must remain in the custody of the parent who they were with when the lockdown period started. They are prohibited from moving between parents.¹⁷ Courts can make orders regarding foster care, adoption, the removal of children who need care and protection, the placement of children in child and youth care centres, and international child abduction cases.¹⁸

JUSTICE AND COURTS

Rights

Everyone has the right to a fair public hearing before a court to resolve a legal dispute.¹⁹

An arrested person has the right to be brought before a court within 48 hours and to be charged, or to be informed of the reason for the continuation of their detention, or to be released.²⁰

A detained person has the right to know why they are detained and to consult with a lawyer. They have the right to challenge the lawfulness of their detention and be released if they are unlawfully detained. They have the right to communicate with and be visited by their family, religious counsellor and doctor.²¹

Limitations

Entry into the courts and court precincts is only allowed for urgent and essential matters.²²

The Sheriff may only serve and execute orders in urgent and essential cases. These include orders relating to COVID-19, domestic violence protection orders, harassment protection orders and claims which are prescribing. Eviction orders are suspended during lockdown.²³

No awaiting trial detainees held in correctional centres and police holding cells may be brought to any court or court precinct, unless for a first appearance, a bail application and a matter where special arrangements were made with the judicial officers involved in the matter.²⁴

Lawyers are only allowed to travel to court if they appear in matters that were classified as urgent. They may travel to a police station to arrange police bail after confirmation from the investigation officer.²⁵

FREEDOM OF EXPRESSION

Rights

Everyone has the right to freedom of expression, including freedom of the press and other media, and freedom to receive or send information or ideas.²⁶

Limitations

It is an offence to intentionally misrepresent that someone is infected with the corona virus.²⁷

It is an offence to publish any statement with the intention to deceive any other person about COVID-19, the COVID-19 infection status of any person, or any measure taken by the Government to address COVID-19. An offender can be fined and/or imprisoned for up to six months.²⁸

Cases

A man was arrested in Cape Town on 7 April for creating and sharing a video that claimed that government would be sending out 10 000 workers to perform door-to-door tests for COVID-19. He called on people to refuse to be tested on the basis that the tests might be contaminated with the virus.²⁹

PRIVACY

Rights

Everyone has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed.³⁰

Limitations

The Director-General of Health has the power to compel internet and cell phone service providers to reveal the location or movements of any person known or reasonably suspected to have contracted COVID-19 and anyone they may have been in contact with. This information may only be used by authorised personnel to address, prevent or combat the spread of COVID-19 through the contact tracing process. A report with the names of those who were monitored must be submitted to a retired judge. The information must be destroyed after six weeks. Everyone who was monitored must be notified within six weeks after the end of the national state disaster.³¹

SAFETY AND DIGNITY

Rights

Everyone has inherent dignity and enjoy the right to have their dignity respected and protected.³²

Everyone has the right to freedom and security of person, which includes the right not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial, to be free from all forms of violence from either public or private sources, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way.³³

¹⁷ Section 6 of the directions of the Minister of Social Development in terms of Regulation 10(5) of the Regulations published in Government Gazette 43107, Government Notice 318 of 18 March 2020.

¹⁸ Section 5 of the directions in terms of regulation 10(2) of the Regulations published in the Government Gazette 43107, Government Notice 318 of 18 March 2020 made by the Minister of Justice and Correctional Services after consultation with the Chief Justice, 31 March 2020.

¹⁹ Section 34 of the Constitution.

²⁰ Section 35 of the Constitution.

²¹ Section 35 of the Constitution.

²² Section 2(b) of the directions in terms of Regulation 10(2) of the Regulations published in Government Gazette 43107, Government Notice 318 of 18 March 2020 made by the Minister of Justice and Correctional Services after consultation with the Chief Justice on 31 March 2020.

²³ Section 2(b) of the directions in terms of Regulation 10(2) of the Regulations published in Government Gazette 43107, Government Notice 318 of 18 March 2020 made by the Minister of Justice and Correctional Services after consultation with the Chief Justice on 31 March 2020.

²⁴ Section 5 of the directions in terms of regulation 10(2) of the Regulations published in Government Gazette 43107, Government Notice 318 of 18 March 2020 made by the Minister of Justice and Correctional Services after consultation with the Chief Justice on 31 March 2020.

²⁵ Section 9 of the directions in terms of regulation 10(2) of the Regulations published in Government Gazette 43107, Government Notice 318 of 18 March 2020 made by the Minister of Justice and Correctional Services after consultation with the Chief Justice on 31 March 2020.

²⁶ Section 16 of the Constitution.

²⁷ Section 11(4) of the Disaster Management Act 57 of 2002; directions made on 18 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

²⁸ Section 11(5) of the Disaster Management Act 57 of 2002; directions made on 18 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

²⁹ Grobler, R. 2020. *Man who posted fake 'contaminated Covid-19 test kits' video arrested*. News24, 7 April. Available at <https://www.news24.com/SouthAfrica/News/man-who-posted-fake-contaminated-covid-19-test-kits-video-arrested-20200407>. Accessed on 8 April 2020.

³⁰ Section 14 of the Constitution.

³¹ Section 11H of the Disaster Management Act 57 of 2002; directions made on 2 April 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

³² Section 10 of the Constitution.

³³ Section 12 of the Constitution.

Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, to security in and control over their body and not to be subjected to medical or scientific experiments without their informed consent.³⁴

Limitations

A person who suffers from COVID-19, has been in contact with a carrier or is suspected to have the virus may not refuse consent to a medical examination. This includes the taking of a bodily sample, admission to a health establishment or a quarantine or isolation site, or submission to mandatory prophylaxis, treatment, isolation or quarantine.³⁵

Cases

There have been reports of the SAPS using brutal measures to enforce the lockdown.³⁶ The Independent Police Investigative Directorate (IPIID) received complaints about people being assaulted and killed by the SAPS. By 26 March, IPIID had already logged 14 assaults, one rape and eight deaths as a result of SASPS action.³⁷

CONCLUSION

The reasonableness of these limitation on the Bill of Rights will be evaluated on an ongoing basis. While the seriousness of the health crisis should not be underestimated, the importance of respecting our Constitution must not be forgotten.

Counsel for AfriForum
Mark Oppenheimer

³⁴ Section 12 of the Constitution.

³⁵ Section 4 of the Disaster Management Act 57 of 2002; directions made on 25 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2).

³⁶ Knoetze, O. 2020. *Police kill three people in three days of lockdown. This is normal for South Africa*. GroundUp, 1 April 2020. Available at <https://www.groundup.org.za/article/police-kill-three-people-three-days-lockdown-normal-south-africa-data-reveals/>. Accessed on 8 April 2020.

³⁷ See <https://www.documentcloud.org/documents/6824649-IDATED-IPIID-CASES-26-MARCH-20-at-MIDNIGHT-to-02.html>.

