



African Policing Civilian Oversight Forum

Submission

Thematic Report on the Declaration of States of Emergency and State of Disaster Laws and Practice in Africa

31 August 2021

We refer to the invitation of the African Commission on Human and Peoples' Rights (the Commission) for submissions to the thematic report on declarations of states of emergency and states of disaster laws and practice in Africa, dated 25 June 2021. APCOF welcomes the opportunity to make this submission, and provides the following information regarding the Declaration of a National State of Disaster in South Africa: (1) the making and extension of the declaration; (2) substantive elements of the declaration; (3) sanctions imposed for violation of the declaration; (4) impact of the declaration on human rights; and (5) recommendations. This submission builds on our previous submissions to the Commission in response to the work of the Focal Point to report on declarations and state of emergency and disaster laws and practices in Africa under resolution 447. These are available on request.

1. Declaration of a National State of Disaster in South Africa

The declaration of a national state of disaster, in accordance with section 27(1) of the Disaster Management Act 57 of 2002 (the Act), was initially made on 15 March 2020. Since then, it has been repeatedly extended on a month-by-month basis, in accordance with section 27(5)(C) of the Act, to regulate the management of COVID-19. In terms the provisions of the current extension,

African Policing Civilian Oversight Forum

Building 23B, Suite 16, Waverley Business Park, Wyecroft Road, Mowbray, Cape Town, 7925

PostNet Suite 63 Private Bag x11, Mowbray, 7705

Tel: +27 21 447 2415

www.apcof.org.za

Trust no. IT1900/2012

Trustees: C Heyns, P Tlakula, T Gandidze (Chair), E van der Spuy, G Cronje (Treasurer), A Van Wyk

the national state of disaster is set to remain in place until 15 September 2021.

South Africa has been under a national state of disaster more than 18 months without the involvement of the National Assembly – a body mandated by the Constitution to maintain oversight over the exercise of national executive authority – in the rolling extensions under section 27(5)(c) of the Act. Legislative amendments have been proposed by opposition political leaders to, inter alia, allow legislative organs to exercise oversight and accountability functions during a state of disaster, amend the duration of a state of disaster and limit the initial period of a state of disaster to 21 days, similar to regulatory provisions that govern the declaration and management of a state of emergency.

2. Substantive Elements contained in the declaration

As the Commission is aware, regulations adopted to address, prevent and combat the spread of COVID-19 in South Africa establish and classify lockdown against 5 alert levels, alert levels 1, 2, 3, 4, and 5. In the intervening period (May – August 2021), the declaration was extended 4 times: 31st May; 16th June; 28th June and 26th July, the elements of which we explain in detail below.

Adjusted alert level 2 was in place between 31 May and 15 June. The objective of this alert level was to ensure physical distancing and restrictions on leisure and social activities, to prevent the resurgence of the virus. Under this adjusted alert level, the wearing of a face mask was mandatory for every person when in public place, excluding children under the age of six years. All faith-based or religious gatherings and social, political and cultural gatherings were permitted but limited to 100 persons or less for indoor venues, and 250 persons or less for outdoor venues. Gathering at workplace for work purposes was allowed, subject to strict adherence to all health protocols and social distancing measures. Evictions and demolition of places of residence were prohibited, unless a court order that authorized the eviction or demolition was obtained. All visits by members of the public to: correctional centers; remand detention facilities; police holding cells; military detention facilities; health establishments and facilities – other than for purposes of receiving treatment or medication; and older persons residential facilities’ were prohibited except to the extent and in a manner directed by the relevant cabinet minister. The sale of liquor for off-site and on-site consumption was permitted under certain defined circumstances, while consumption of liquor in public place, except in licensed on-site consumption premises, was prohibited. Businesses were allowed to operate, except for a specific class that was subjected to

exclusion, and while all persons who were able to work from home were required to do so, generally people were allowed to perform any type of work outside their homes and to travel to and from work for work purposes, subject to certain conditions. Interprovincial travel was permitted and travel to and from the country was also allowed, subject to certain conditions. In addition, during this adjusted alert level, public facilities such as cinemas, theaters, restaurants, shebeens, taverns, beaches and public parks were required to close at 22h00, while a night curfew of between 23h00 and 04h00 was announced.

Adjusted alert level 3 lasted between 16 June and 27 June. The aim of this alert level was to enforce restrictions on many activities, including at work places and socially, to address the high risk of transmission. The provisions of the regulatory instrument that established and maintained alert level 3 contained distinct textual similarities with those of the instrument that regulated alert level 2, with the following adjustments. All faith-based or religious gatherings and social, political and cultural gatherings and community engagements hosted by leaders to deal with emergency matters that impacts on the management, treatment and prevention of COVID-19 were permitted but limited to 50 persons or less for indoor venues and 100 persons or less for outdoor venues. The sale of liquor by licensed premises for off-site consumption was only permitted from 10h00 to 18h00 from Mondays to Thursdays, excluding Fridays, Saturdays, Sundays and public holidays, while the sale of liquor by a licensed premises for on-site consumption was permitted until 20h00. Certain establishments including restaurants, cinemas, theaters, casinos, gyms and fitness centers were required to close at 21h00, and a night curfew of between 22h00 and 04h00 was announced.

Adjusted alert level 4 was in place between 28 June to 25 July. The objective of this adjusted alert level was to adopt extreme precautions to limit community transmission and outbreaks, while allowing some activities to resume. Under this adjusted alert level, the wearing of a face mask remained mandatory for every person when in public place, excluding children under the age of six years. Schools and institutions of higher education were closed for contact classes from 30 June. All gatherings were prohibited except for funerals, when at a work place or when buying or obtaining goods and services. Evictions and demolition of places of residence remained prohibited, unless a court order that authorized the eviction or demolition was obtained. Any place or premise normally open to the public where religious, cultural, entertainment, recreational or similar activities – which were prohibited in terms of the regulations – may take place were closed. Restaurants were allowed to sale food and non-alcoholic gatherings for off-site

consumption only. The prohibition of all visits by members of the public to: correctional centers; remand detention facilities; police holding cells; military detention facilities; and health establishments and facilities – other than for purposes of receiving treatment or medication were lifted to the extent and in a manner directed by the relevant cabinet minister. The sale, dispensing and distribution of liquor was prohibited. Businesses were allowed to operate, except for a specific class that was subjected to exclusion, and while all persons who were able to work from home were required to do so, generally persons were allowed to perform any type of work outside their homes and to travel to and from work for work purposes, subject to certain conditions. Interprovincial travel for leisure to and from the province of Gauteng was prohibited, and travel to and from the republic was allowed subject to certain conditions. A night curfew of between 21h00 and 04h00 was announced.

Adjusted alert level 3 was announced on 26 July and is currently in effect. Information regarding the substantive elements of this adjusted alert level is set out above.

3. Sanctions imposed for violating provisions of the declaration

The regulation prescribes the imposition of a fine or a period of imprisonment not exceeding six months, or both fine and imprisonment, for violations of their provisions, including failure to wear a face mask. APCOF remains concerned about the securitization of the pandemic and the use of criminal law principles to address public health and safety challenges. In the intervening period, the Minister of Police informed parliament that a total of 411, 309 people have been arrested for breaching the regulations since March 2020.¹ APCOF is particularly concerned about continued arrest of people for failure to wear a face mask², which we note promotes the criminalization of poverty, particularly in the light of South Africa's history of structural inequality and widespread poverty.

4. Impact of the declaration on the exercise of fundamental human rights

As APCOF indicated in its previous two submissions to the ACHPR, the enforcement of COVID-19 regulations continues to have disproportionate impact on the poor and other vulnerable and historically marginalized groups. As the Commission is aware, South Africa is a highly unequal society, characterized by high levels of poverty, unequal distribution of income and social

¹ <https://businesstech.co.za/news/lifestyle/481707/over-400000-people-have-been-arrested-for-breaking-south-africas-covid-19-rules/>.

² <https://www.iol.co.za/news/politics/police-and-soldiers-to-arrest-those-not-wearing-covid-19-masks-in-gauteng-premier-david-makhura-6820c481-af10-447c-9cbe-9ff1e268a2a0>.

economic marginalization. The outbreak of COVID-19, its wider social and economic impact, and the enforcement of COVID-19 regulations have brought to the fore existing structural challenges of urban poverty, inequality and exclusion and inadequate social protection programmes. APCOF note that in the month of July 2021 South Africa experienced widespread public unrest and violence in the provinces of KwaZulu Natal and Gauteng. We observe, in line with emerging consensus,³ that the unrest was partly a by-product of systemic inequality, poverty and food insecurity, amplified by disproportionate loss of jobs and livelihoods during the pandemic, diminished economic activities occasioned by preventive measures adopted to contain the spread of COVID-19, and the absence of efficient and sustainable social protection programmes. We note further that, during the unrest and violence, at least 337 people lost their lives, coupled with widespread destruction of property.⁴

Another serious concern that APCOF and other stakeholders, including parliamentary police oversight and accountability body, observed during the unrest was South African Police Service's (SAPS) failure to anticipate and effectively respond to the unrest.⁵ We note with concern that this is inconsistent with SAPS constitutional obligation to maintain public order and serve and protect all the inhabitants of the republic and their property, as embodied in section 205(3) of the Constitution of South Africa, 1996.

A further human rights challenge we have observed during the intervening period is the intensified risk of outbreak of xenophobic violence and attacks. Restricted social-economic activities during the pandemic, coupled with competition for limited economic opportunities and general public unrest, has deepened historical tensions between locals and non-nationals, and heightened the risk of xenophobic violence and attacks. On August 13, for instance, the South African Human Rights Commission expressed concerns about a video footage, circulation on social media, in which non-nationals living in Soweto, Johannesburg were threatened with violence should they re-open their businesses following the unrest in July.⁶

³ <https://www.voanews.com/africa/poverty-root-south-africa-violence-and-looting-analyst>.

<https://www.aljazeera.com/news/2021/7/14/little-to-lose-poverty-and-despair-fuel-south-africas-unrest>.

⁴ <https://www.aljazeera.com/news/2021/7/22/south-africa-unrest-death-toll-jumps-to-more-than-300>.

⁵ <https://www.news24.com/news24/southafrica/news/parliaments-police-committee-says-it-will-hold-executive-accountable-for-recent-unrest-20210722>.

⁶ <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2768-media-statement-sahrc-concerned-by-a-video-which-could-lead-to-incitement-against-non-nationals>.

5. Recommendations

APCOF calls on the ACHPR to remind South Africa of its human rights obligations under the Charter to identify and address the deep challenges of inequality and poverty, and protect the lives and property of all inhabitants of South Africa. In particular, we urge the Commission to request South Africa to:

- Ensure the full and effective implementation of the National development Plan, which aims to eliminate poverty and inequality by 2030.
- Give effect to resolution 449 and develop and implement a broad range of measures and policies that identify and address the social and economic impact of COVID-19
- Develop and implement measures that enhance South African Police Service (SAPS) and other key role players, such as Community Police Forums', early warning and response mechanisms to ensure effective prevention and management of public unrest and disorder.
- Adopt and implement comprehensive measures and programmes that are designed to foster mutual understanding, tolerance and peaceful coexistence between locals and non-nationals to prevent xenophobic violence and other hate crimes against non-nationals in an effective and sustainable manner.

Submitted by:

Sean Tait

Executive Director

African Policing Civilian Oversight Forum

Cape Town, South Africa

E: sean@apcof.org.za

T: +27 21 447 2415