

OP-ED

Is the incremental loosening of the lockdown being done in a rational manner?

By Anton van Dalsen • 5 May 2020



📷 A 24-hour police roadblock checking the permits of motorists on the N2 near Khayelitsha in Cape Town. (Photo: Roger Sedrus / Gallo Imag...

📧 [Subscribe](#) 140k

The credibility of the government's general approach – which was treated with a great deal of understanding and compliance initially – is slowly but steadily being eroded.



Listen to this article

8:23

Alert Level 4 of the national state of disaster has been in force as from 1 May 2020, in terms of the regulations issued on 29 April 2020. What we are seeing is that the credibility of the government's general approach – which was treated with a great deal of understanding and compliance initially – is slowly but steadily being eroded.

Measures under level 4 of the lockdown regulations include the following:

- The obligation to wear a cloth face mask in public;
- Business premises to limit customers at all times;
- Physical distancing at the workplace and restrictions on face-to-face meetings;
- Special measures by employers for higher risk employees;
- Persons are in principle confined to their place of residence, except to perform an essential service, to work in defined sectors, to buy permitted goods, to transport children, to walk/jog/cycle between 06h00 and 09h00 within a radius of 5km from home (but not in organised groups);
- A curfew from 20:00 to 05:00 daily, excepting essential services;
- A prohibition on movement between provinces, metro areas and districts;
- A resumption of public transport;
- A prohibition on gatherings (excepting funerals of a limited size and workplace meetings);
- Closure of religious, cultural, sporting and entertainment venues, including public parks;
- No sale of liquor or tobacco; and
- Persons able to work from home should do so.

The provisions of the Disaster Management Act

The Constitution sets out that basic individual rights may be limited only by a law which is applicable to all, and which is seen as reasonable and justifiable, taking all relevant factors into account. It is therefore within the context of these constitutional provisions that the new regulations which have been issued in terms of the Disaster Management Act need to be evaluated. This Act provides for a variety of measures which the government can apply in the face of a national disaster, including the standard catch-all provision "other steps that may be necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster".

The Disaster Management Act provides that the power it grants the government may only be used to:

- Assist and protect the public;
- Provide relief to the public;
- Protect property;
- Prevent or combat disruption; and
- Deal with the destructive and other effects of the disaster.

The Disaster Management Act provides that a national state of disaster lapses three months after it has been declared – but it may be extended for a month at a time by the relevant minister, without any parliamentary approval.

How should we view the latest developments? Three aspects are raised below.

First, the problematic situation relating to the enforcement of quarantine:

Sections 6 and 7 of the regulations which are now in force do not make a happy pair.

Section 6 (essentially the same as in the previous regulations) has received much criticism in the past

weeks because it contains the potential for officials to attempt to force persons who want to self-isolate, and have the facilities to do so, to go to state-run isolation facilities. Section 7 is a revised (and much better) version and contains the possibility of self-isolation. However, the drafters of the new regulations have not deleted the now superseded Section 6 in the process. This may obviously lead to all sorts of complications.

In this context, Section 10(1)(b) of the regulations provides for the state to prepare sites for quarantine and isolation for people who cannot do so at home. This reinforces the assumption that officials cannot simply cart you off to a state-run facility without further ado (even if it could theoretically be attempted under Section 6, which contains the wording of the previous regulations).

In any event, simple common sense would tell one that it does not achieve anything to force people to go to state-run facilities (which may soon be overrun in any event) if they can isolate at home.

Second, is the incremental loosening of the lockdown being done in a rational manner?

The initial steps taken by the government have been treated with a great deal of understanding and compliance by the South African public and the business sector. This was the result of not only an appreciation of the seriousness of the situation but also of the fact that there are no established guidelines for such an event.

However, the stage has now been reached where serious questions are being asked of the government, especially the executive.

It is generally accepted that the initial lockdown bought South Africa time to prepare itself (especially the health services) by lowering the rate at which Covid-19 has spread during this initial period – but this does not offer a solution for any length of time. As Prof Salim Abdool Karim puts it:

“The exponential curve is almost inevitable.”

If this is accepted, the following question cannot be avoided: at what stage should government accept that after achieving the initial objectives, the lockdown should be reduced in a substantial manner, so as to avoid the economy being damaged to such an extent that recovery becomes practically impossible in the short to medium term? It is not at all clear that this question, with all its implications, has received sufficient attention, even if Level 4 shows some loosening of the lockdown provisions.

The nature of certain measures taken by the government, which have been extended under the new Level 4, also raises the question as to whether there is a real appreciation of what is actually being achieved. A prime example is that of the ban on tobacco sales. The government seems to be blissfully unaware of the entrepreneurial flair of the black market, together with the serious dent which such a prohibition makes to government tax revenue. The limited nature of the justifications of this ban which have been trotted out by government do not hold much water and signify a decidedly unworldly and naïve approach.

The effects of the lockdown on the informal sector also need to be raised in this context – where obvious and serious deprivation is being experienced in a sector which has no way of softening the blow.

The credibility of the government’s general approach is therefore slowly but steadily being eroded.

Third is the degree to which fundamental individual rights are affected by the regulations, justifiable in all cases.

While little opposition was initially raised to the serious inroads made on everyday constitutional rights, criticism in this regard has increased substantially. Once again, if such inroads are logically tied to a strategy which is seen as unavoidable and logical, there will be little criticism.

However, we are not dealing with a state of emergency, which has clear implications for basic individual rights, and which, as a consequence, can only be declared in terms of the Constitution, in accordance with a clearly specified parliamentary process. The Constitution specifies that an initial state of emergency is limited to 21 days, which may only be declared by an Act of Parliament. Extensions are limited to three months at a time, with the initial extension requiring a majority of 50% in the National Assembly, and further extensions needing a 60% majority.

This contrasts with the requirements for the declaration and extension of a national state of disaster, which is subject only to ministerial discretion. The degree to which individual freedoms can be affected by such measures is, however, clearly limited by the Constitution – and such limitation is only permissible if it is reasonable and justifiable.

In proceeding, the government needs to apply its mind with great care, first in order to avoid potentially disastrous economic consequences and second to deal with increasingly strident political and legal questioning of the nature and extent of the regulations. **DM**

Anton van Dalsen is Legal Counsellor at the Helen Suzman Foundation. This article first appeared on the foundation’s website, [here](#).