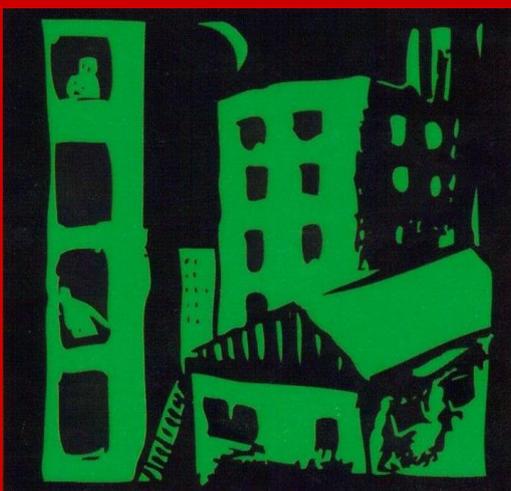
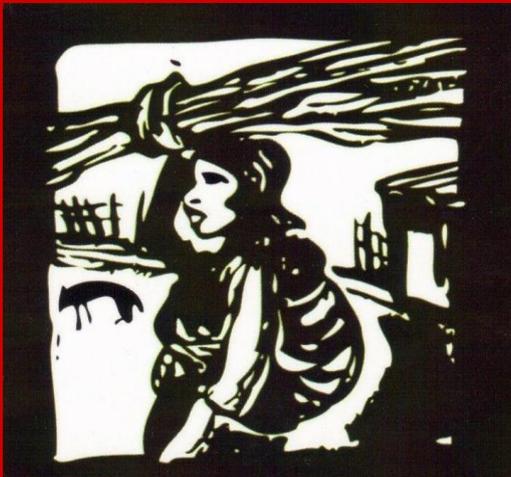


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**An assessment of
the constitutionality
of the COVID-19
regulations against
the requirement to
facilitate public
participation in the
law-making and/or
administrative
processes in South
Africa**

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ABSTRACT

The purpose of this article is to critically assess the constitutionality of the COVID-19 regulations against the backdrop of the constitutional mandate to facilitate public participation in the law-making

process in South Africa. This assessment is conducted by outlining the scope and content of public participation. This will be followed by an exposition of the legal framework that provides for the duty to facilitate public participation in South Africa. Thereafter, the scope and content of the duty to facilitate public participation is assessed against the conduct of the government in promulgating the COVID-19 regulations. The authors argue that the disregard for and limited nature of public participation during the process leading up to the enactment of the COVID-19 regulations amount to a material subversion of the core tenets of our constitutional democracy and largely renders the COVID-19 regulations unconstitutional for lack of procedural compliance with the demands of the Constitution. The authors provide a few recommendations to remedy the unconstitutionality of the regulations and further propose guidelines to facilitate public participation in cases of future pandemics and/or disasters of this nature.

Keywords: COVID-19, public participation, reasonableness, Constitution of the Republic of South Africa, unconstitutional.

1 INTRODUCTION

It has been said that “conversation is the soul of democracy”.¹ Over the centuries, the phrase has become less of a soundbite and more of an adage, backed up by a plethora of confirmatory evidence.² But if conversation is the soul, then participation must be its body and, by implication, an element without which democracy cannot exist. From its inception, the strength of South Africa’s constitutional democracy has largely rested on the participation of the people. In his concurring judgment in *Doctors for Life International v Speaker of the National Assembly (Doctors for Life (2006))*³, Sachs J asseverated that, during the constitution-making process, the Constitutional Assembly did not emphatically promote public involvement in law-making as a means to demonstrate “a rhetorical constitutional flourish”.⁴ Sachs J postulated :

“The Assembly itself came into being as a result of prolonged and intense national dialogue. Then, the Constitution it finally produced owed much to an extensive countrywide process of public participation. Millions of South Africans from all walks of life took part. Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy.”⁵

¹ Shah DV “Conversation is the soul of democracy: expression effects, communication mediation, and digital media” (2016) 1 *Communication and the Public* 12 at 12; Katz E & Lazarsfeld P *Personal influence: the part played by people in the flow of mass communication* New York: Free Press (1955) at 36; Valenzuela Y, Kim Y & de Zúñiga HG “Social networks that matter: exploring the role of political discussion for online political participation” (2012) 24 *International Journal of Public Opinion Research* 163 at 163.

² See Shah (2016) at 12; Valenzuela, Kim & de Zúñiga (2012) at 163.

³ 2006 (12) BCLR 1399 (CC) .

⁴ See *Doctors for Life* (2006) at para 227.

⁵ See *Doctors for Life* (2006) at para 227.

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In the years following its inauguration, our constitutional dispensation has been ceaselessly tested. The strength of the South African democracy was put to the test once again when COVID-19 emerged. The COVID-19 which is caused by the SARS-CoV-2 virus was first detected in December of 2019, in Wuhan, China, when three patients were admitted and diagnosed with pneumonia, related to a string of acute respiratory illness cases which had emerged in the region.⁶ The emergence of COVID-19 is arguably the worst health crisis to hit the world since the Spanish Influenza.⁷ The quick-spreading rate of the fatal illness has left many countries scrambling for ideas and methods to contain the pandemic. The situation intensified and progressed with great haste from thereon, leading the World Health Organisation (WHO) to declare COVID-19 a pandemic on 11 March 2020.⁸

COVID-19 has since inevitably spread over the South African borders, with the first confirmed case being reported on 5 March 2020.⁹ From how the virus progressed and affected other countries, it became quite clear that the South African government needed to take active measures and react quickly to prevent a possible catastrophe. The South African government's response mechanism has been to declare a national state of disaster and to enact COVID-19 regulations in terms of the Disaster Management Act (DMA).¹⁰ As a result of the COVID-19 regulations, the government instituted a countrywide lockdown. The manner in which the Covid-19 issue has been dealt with by the government has raised a lot of concerns, not only about the capability of our public health system to contain the emerging health crisis within the Republic, but also about the legality of the regulations themselves. What has become apparent is that the measures implemented by the government to combat the spread of the COVID-19 virus have largely been unilateral, effectively excluding the people in decision and law-making processes.

The aim of this article is to critically analyse the constitutionality of the COVID-19 regulations which effected the national lockdown, against the constitutional obligation

⁶ Nyamutata C "Do civil liberties really matter during pandemics? Approaches to coronavirus disease (COVID-19)" (2020) 9 *International Human Rights Law Review* 62 at 70.

⁷ Johnson NP & Muelle J "Updating the accounts: global mortality of the 1918–1920 'Spanish' influenza pandemic" (2002) 76 *Bulletin of the History of Medicine* 105 at 105; Daly P, Gustafson R & Kendall P "Introduction to pandemic influenza" (2007) 49 *British Columbia Medical Journal* 240 at 240; Zimmer SM & Burke DS "Historical perspective – emergence of influenza A (H1N1) viruses" (2009) 361(3) *The New England Journal of Medicine* 279 at 279.

⁸ Cucinotta D & Vanelli M "WHO declares COVID-19 a Pandemic" (2020) 9(1) *Acta Biomed* 157 at 157.

⁹ See Spotlight Editors "Covid-19: Timeline of a virus' *Spotlight*" available at <https://www.spotlightnsp.co.za/2020/03/02/covid-19-timeline-of-a-virus/> (accessed 2 March 2020), Wiysonge CS "South Africa's War on COVID-19" available at <https://www.thinkglobalhealth.org/article/south-africas-war-covid-19> (accessed 20 April 2020), South African History Online "COVID-19 Timeline 2019-2020" available at <https://www.sahistory.org.za/article/covid-19-timeline-2019-2020> (accessed 17 April 2021).

¹⁰ Act 52 of 2002 .

imposed on the State to facilitate public participation in the law-making process. This article will mainly argue that the COVID-19 regulations are irreconcilable with the Constitution, in that the procedure that was undertaken by the government to promulgate the regulations was tainted by the glaring absence of, and/or limited, public participation.¹¹

The discussion is divided into six parts. Part I is an introduction. Part II contains a conceptualisation of public participation and outlines the significance and general relevance of public participation in the legislative and/or administrative processes. Part III sets out the legal framework from which the duty to facilitate public participation may be sourced in South Africa and expounds on the nature and character of this duty. Part IV provides a brief synopsis of the state of disaster which has been declared in terms of the DMA, and briefly outlines the sequence of events leading up to the enactment and implementation of the COVID-19 regulations, as well as provides an assessment of the extent to which the constitutional duty to facilitate public participation was discharged. Part V sets out the authors' observations and lessons that may be learnt from the government's response mechanisms to the COVID-19 pandemic. Part VI is the conclusion.

2 THE SCOPE AND CONTENT OF PUBLIC PARTICIPATION

Owing to its contextual nature, public participation generally has no universally ascribed definition.¹² In the absence of a uniform definition, public participation has been subjected to a wide variety of meanings. From a survey of most of the definitions, it is evident that public participation refers to the involvement or inclusion of people in decisions that affect them,¹³ and that in the context of governance, public participation refers to the inclusion and involvement of the public in the decision-making and/or the law-making process.¹⁴ Public participation is an amalgamation of two elemental components: the "public" component and the "participation" component.

The "public" has been cited as quite a fluid faction that is largely determined by the issue at hand.¹⁵ In the South African context, the "public" generally refers to citizens and

¹¹ Constitutionality of conduct assesses the legality of such conduct with regard to both substance and procedure. If the procedure does not conform to the constitutional standard, the entire law or conduct will be invalid. It was confirmed that the duty to provide for public participation is a procedural consideration.

¹² Phooko MR "Conflict between participatory and representative democracy: a call for model legislation on public participation in the law-making process in South Africa" (2017) 38 *Obiter* 517 at 519.

¹³ Creighton JL *The public participation handbook: making better decisions through citizen involvement* San Francisco: Jossey-Bass (2005) at 7; Wang X "Assessing public participation in US cities" (2001) 24 *Public Performance & Management Review* 322 at 322.

¹⁴ Maphazi N, Raga K, Taylor JD & Mayekiso T "Public participation: a South African local government perspective" (2013) 6 *African Journal of Public Affairs* 56 at 57; Puhl R "Participation – as a central right of service users in Germany" in Adwan S & Wildfeuer AG (eds) *Participation and reconciliation: preconditions of justice* Leverkusen : Verlag Barbara Budrich (2011) 71 at 71.

¹⁵ See Creighton (2005) at 22.

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all individuals who are lawfully present in the Republic.¹⁶ Generally, the “public” is characterised as a faction of the electorate that has a vested interest in the issue at hand¹⁷; however, the “public” may also include individuals who act on behalf of or advocate for the faction with a vested interest.¹⁸ It is also believed that “people participate when they perceive themselves to have a significant stake in the decision being made”¹⁹; thus the “public” is emblematic of “stakeholders”.²⁰ These “stakeholders” may present themselves as individuals, members of certain groups and communities, or collectively as groups and individuals.²¹

The “participation” component of public participation has been defined as “[t]he action or fact of having or forming part *of* something; the sharing *of* something”.²² In the same vein, participation has further been defined as “[t]he process or fact of sharing in an action, sentiment, etc.; (now *esp.*) active involvement in a matter or event, *esp.* one in which the outcome directly affects those taking part”.²³ It must be understood that “participation”, in the context of the subject matter of this article, is a highly contentious issue and goes beyond the formal definition.²⁴ It has been described as a continuum, primarily comprised of a meeting, wherein there is dissemination of information to the public, the public is allowed to express their views and opinions and be heard on what decision should be taken, as well as reaching consensus between the administrators, law makers and the public on the course of action to be taken.²⁵ However, this is not an exhaustive list of the composition of participation.

¹⁶ It must be noted that, in the South African context, political rights are exclusively reserved for South African citizens and persons who are legally present in South Africa.

¹⁷ See Creighton (2005) at 22.

¹⁸ See Coenen FHJM “Chapter 1 Introduction” in Coenen FHJM (ed) *Public participation and better environmental decisions* New York : Springer (2009) 1 at 3.

¹⁹ See Creighton (2005) at 23.

²⁰ See Creighton (2005) at 23. The International Labour Organisation (ILO) has defined the “public” as “a vast and heterogeneous group of people or stakeholders”; see The Team of Specialists on Participation in Forestry “Public participation in Europe and North America” *Report of the Team of Specialists on Participation in Forestry* available at <http://www.unece.org/fileadmin/DAM/timber/docs/publications-other/report-participation.pdf> (accessed 27 May 2021).

²¹ Scott R “An analysis of public participation in the South African legislative sector” (2009), available at <http://hdl.handle.net/10019.1/1837> at 26 (accessed 10 February 2021).

²² See *Oxford English Dictionary* “Participation”, available at <http://www.oed.com/view/Entry/138245> (accessed 17 August 2021).

²³ See *Oxford English Dictionary* ‘Participation’, available at <http://www.oed.com/view/Entry/138245> (accessed 17 August 2021).

²⁴ See Creighton (2005) at 8; Maphazi et al (2013) at 58.

²⁵ See Creighton (2005) at 8.

Public participation's *raison d'être* largely rests on the broader endeavour to preserve democracy,²⁶ a notion to which public participation owes its existence.²⁷ The formation of a democracy was predicated on the idea of electing individuals to represent the will and interests of the electorate and to make critical decisions.²⁸ This formulation of democracy was made in the context of small communities and did not envisage the large population and government sizes that exist today, nor did it envisage an increase in the complexity of the decisions that governments are seized with in the modern age.²⁹ As a consequence of these unaccounted for factors, modern governments place heavy reliance on deferring or delegating decisive power to administrators and/or law makers.³⁰ This presents considerable challenges to the fabric of democracy, being the representation and expression of the will of the people.³¹ Public participation achieves the overarching democratic objective by creating a nexus between the will of the people and the decisions taken by administrators, through fostering a discourse between these factions in the decision-making process. This effectively keeps the administrators apprised of "the relative importance the public assigns to the values choices that underlie a particular decision".³²

It is noteworthy that public participation and political participation, although commonly used synonymously, are more akin to sisters than twins.³³ In general terms, political participation refers to activities undertaken by the public with the primary

²⁶ Public participation, as an element of political participation, is not exclusive to democratic governing systems, as there is still public participation in absolute monarchies, dictatorships and autocratic regimes, although the level of public participation will be distinct from the level present in a democracy. See Carpentier N *Media and participation: a site of ideological-democratic struggle* Bristol: Intellect Ltd (2011) at 15; Setlalentoa BMP & Segun EO "Political participation of female social workers in South Africa" (2017) 15(2) *Gender & Behaviour* 8524 at 8526.

²⁷ Acasandre A "Public participation in the decisional process in Bucharest" (2020) 6 *Logos Universality Mentality Education Novelty Section: Political Sciences and European Studies* 1 at 3; Niemelä S "Towards an Evaluation of Finland's Citizen Participation Policy Programme" in Organisation for Economic Co-Operation and Development *Evaluating public participation in policy making* France : OECD (2005) 19 at 22; Pearce J "Introduction" in Pearce J (ed) *Participation and democracy in the twenty-first century city* London : Palgrave Macmillan UK (2010) 1. See also Tshoose CI "Dynamics of public participation in local government: a South African perspective" (2015) 8 *African Journal of Public Affairs* 13 at 14.

²⁸ See Creighton (2005) at 14 & 17.

²⁹ See Creighton (2005) at 14.

³⁰ See Creighton (2005) at 14.

³¹ See Creighton (2005) at 14-15.

³² See Creighton (2005) at 17. From a conceptual point of view, it can be seen that public participation is not intended to be restricted to just the legislative process, but also applies to administrative decisions and/or processes, especially those decisions that fall within the realm of public administration. See Creighton (2005) at 7. See page 31 of the Guide on Public Participation in the Public Service available at <http://www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf> (accessed 7 July 2021).

³³ See Nyathi L "Public participation: what has the Constitutional Court given the public?" (2010) 12 *Law, Democracy & Development* 102 at 102.

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objective and/or consequence “of influencing government action or some political outcomes”.³⁴ The synergy between public participation and political participation primarily stems from the fact that public participation is a component of political participation.³⁵ The concepts differ in that public participation is relatively straitened and is generally comprised of a “range of interactions between government and civil society to design, implement, and evaluate policies”.³⁶

This is in contrast with political participation, which encompasses other forms of participation, such as: voting in elections and engaging in all other electoral activities; participation in campaigns; engaging in political discourse in public forums online and offline; lobbying and participating in protest action, rallies, boycotts and demonstrations; engaging in public consultation engagements, signing petitions, and even political apathy, amongst other forms of participation.³⁷ All the aforementioned activities may involve public participation, but they are not all within the domain of public participation. It must be further noted that public participation and citizen participation, although linked in some vein, are also not interchangeable, as the former encapsulates a broader and more inclusive process, whereas the latter constricts participation to just those people who are formally recognised as citizens. The undertaking of public participation may yield considerable and varied benefits, such as: improved quality and efficiency of the government’s decisions;³⁸ increased legitimacy of the decisions; enhanced public education;³⁹ and increased good governance.⁴⁰

³⁴ See Valenzuela, Kim & de Zúñiga (2012) at 164.

³⁵ For purposes of this article, “public participation” and “political participation” may be used interchangeably.

³⁶ See Coenen (2009) at 3.

³⁷ See Setlalentoa & Segun (2017) at 8524 & 8526. Setlalentoa & Segun posit : “It is apparent that almost every activity by some citizens somehow can be understood sometimes as a form of political participation.” See also De Zúñiga HG, Molyneux L & Zheng P “Social media, political expression, and political participation: panel analysis of lagged and concurrent relationships” (2014) 64 *Journal of Communication* 612 at 613; Pickard S *Politics, protest and young people. Political participation and dissent in 21st century Britain* London: Palgrave Macmillan UK (2019) at 62-63.

³⁸ Maphazi et al (2013) at 59. See Callahan K *Elements of effective governance: measurement, accountability and participation* New York: Routledge (2006) at 158; Bruch C “Evolution of public involvement in international watercourse management” in Bruch C, Jansky C, Nakayama M & Salewicz KA (eds) *Public participation in the governance of international freshwater resources* Tokyo : UNU Press (2005) 21 at 23; Sebola MP “Communication in the South African public participation process: the effectiveness of communication tools” (2017) 9 *African Journal of Public Affairs* 25 at 27; Pennock JR *Democratic political theory* New Jersey: Princeton University Press (1979) at 441-442.

³⁹ See OECD at 86; Wang (2001) at 324; Maphazi et al (2013) at 59-60.

⁴⁰ See Maphazi et al (2013) at 59-60.

It is worth noting that South Africa's constitutional democracy has a dual formulation, consisting of representative democracy and participatory democracy.⁴¹ Representative democracy is a form of participation wherein governing and decisive State power is effectively ceded by the people (the electorates), to democratically elected individuals and bodies.⁴² Such democratic elections are generally characterised by universal suffrage and the elected individuals and bodies are seized with exercising the powers bestowed upon them on behalf of and for the benefit of the public.⁴³ Representative democracy is predicated on the notion that the burden of daily public governance and administration is too demanding and impractical to involve the public in all aspects. Ultimately, representative democracy is the very minimum level of democratic participation afforded to citizens as it is only constricted to elections and is generally dormant until then.⁴⁴

Participatory democracy pertains to directly involving the public (primarily the electorate) in the process of governance, particularly the law-making and decision-making process.⁴⁵ Through this involvement, the public may express its "inputs in the proposed law or policy and indicates whether or partially in support or opposed to the legislation".⁴⁶ The process entails written and oral submissions from the public; however, the process does not require consensus between the public and the government, nor does it require absolute consideration and incorporation of such views into the final decision or law.⁴⁷ The primary basis of participatory democracy is that "politics should be a continuing activity and not just be confined to voting in elections at regular intervals".⁴⁸ The emphasis of this article will be placed more on participatory democracy and the mechanisms contained therein.

3 PUBLIC PARTICIPATION IN THE SOUTH AFRICAN LEGAL ORDER

Public participation is deeply embedded in the South African Constitution.⁴⁹ From the initial phases to the completion of the drafting process, the post-apartheid constitution-making process consisted of large-scale involvement of the public through civil society

⁴¹ Phooko MR "What should be the form of public participation in the law-making process? An analysis of South African cases" (2014) 35 *Obiter* 39 at 39-40.

⁴² See Phooko (2017) at 519.

⁴³ See Phooko (2014) at 39-40 and Phooko (2017) at 519.

⁴⁴ Smith TG *Politicizing digital: theory, the internet, and renewing Democracy* London: University of Westminster Press (2017) at 72.

⁴⁵ See Phooko (2014) at 39-40 & Phooko (2017) at 519.

⁴⁶ See Phooko (2014) at 39-40 & Phooko (2017) at 519.

⁴⁷ See Phooko (2014) at 39-40 & Phooko (2017) at 519.

⁴⁸ Southall R "Public participation: the political challenge in Southern Africa" (2010) 9 *Journal of African Elections* 1 at 9-10.

⁴⁹ See Phooko (2014) at 519; Nyathi (2010) at 102; Smith (2017) at 72; Southall (2010) at 9-10.

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and interested groups,⁵⁰ as well as through individual participation.⁵¹ This participatory process is reflected in the Preamble of the final version of The Constitution of the Republic of South Africa, 1996 (Constitution), which begins with the words “*We, the people ...*”⁵², effectively demonstrating the collective nature of the foundation of our constitutional democracy. The Preamble also outlines that the adoption of the Constitution is premised on the vital notion of “*the will of the people*”, further echoing the inclusive and participatory nature of our democratic dispensation.⁵³

The Constitution does not express public participation as particularized;⁵⁴ however, the Constitution does impose a duty on the various spheres and branches of government to facilitate and implement public participation in the decision-making and law-making processes.⁵⁵ Most notably, sections 59 (1)(a), 72 (1)(a), and 118 (1)(a) mandated the National Assembly, the National Council of Provinces, and the provincial legislatures, respectively, to facilitate public involvement in the legislative and other processes of these bodies and their committees and councils.⁵⁶ There are other auxiliary constitutional provisions that are complementary to the public participation.⁵⁷

3.1 Public participation and administrative action

It is imperative to note that the duty to facilitate public participation is broad and extends to all branches, spheres and functionaries of government. Section 195 (1)(e) of the Constitution highlights that “[p]ublic administration must be governed by the democratic values and principles enshrined in the Constitution”, which include the principle that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making”. From the phrasing of this section, it is evident that the duty falls on those exercising public administrative actions and not just the legislature.

⁵⁰ Wanki JN “The value of participation and legitimacy in the constitution-making processes of post-independence Cameroon and post-apartheid South Africa” (2017) 50 *Comparative and International Law Journal of Southern Africa* 109 at 119-123. Note that African communities have held traditional public participation forums, such as, *imbizo*, *lekgotla* and *bosberaad*, well before the constitutional era; see *Doctors for Life* (2006) at para 101.

⁵¹ See Wanki (2017) at 121.

⁵² The Preamble is particularly significant as it provides an explanation of the circumstances in which the Constitution is being adopted, who is adopting the Constitution, why it is being adopted, and the status and role of the Constitution. See Orgad L “The preamble in constitutional interpretation” (2011) 8 *International Journal of Constitutional Law* 714 at 714-738.

⁵³ See Constitution.

⁵⁴ Fuo ON “Public participation in decentralised governments in Africa: making ambitious constitutional guarantees more responsive” (2015) 15 *African Human Rights Law Journal* 167 at 172.

⁵⁵ See Phooko (2014) at 518.

⁵⁶ See Constitution.

⁵⁷ See ss 16, 17, 18, 19, 21 & 33 of the Constitution. See also Gauteng Provincial Gazette 266 of 12 September 2013.

The force of section 195 (1)(e) of the Constitution is further bolstered by section 33 of the Constitution, which provides for the right to lawful, reasonable and procedurally fair administrative action. The Promotion of Administrative Justice Act 3 of 2000⁵⁸ (PAJA), which has been enacted to give effect to section 33 of the Constitution, further incorporates the duty to facilitate public participation in the decision-making process at sections 3 and 4, subject to such a decision constituting administrative action. With respect to the subject matter of this article, it must be noted that the decision to promulgate regulations falls within the scope of administrative action and is subject to the provisions of the PAJA,⁵⁹

Section 3 (1) of the PAJA reiterates the requirement for administrative action to be procedurally fair. Further provisions of section 3 demarcate specific requirements that administrators are obligated to comply with for the purposes of ensuring that their administrative actions are procedurally fair in terms of the PAJA. It must be noted that section 3 of the PAJA is applicable where administrative decisions affect specific persons.⁶⁰ Section 4 of the PAJA applies to administrative decisions that affect the public at large. Section 4 (1) of the PAJA outlines that an administrator who takes administrative action that materially impacts the rights of the public must give effect to the requirement of procedural fairness by either: holding a public hearing or inquiry; following a notice and comment procedure; employing a cumulation of both the public hearing and the notice and comment; or following a different procedure which may be empowered by any empowering provision or deemed appropriate, provided that such a procedure is fair and aligns with the requirements of procedural fairness under section 3 of the PAJA.

Section 4 (4)(a) of the PAJA stipulates that if an administrator elects to not hold a public hearing or inquiry, their election may be subject to an assessment of reasonability and justifiability in the light of all the relevant factors. It is noteworthy that section 4 (1) expressly employs the word “must”, effectively indicating that the requirements contained therein are peremptory.⁶¹ In so doing, the provisions of section 4 (1) effectively mandate the inclusion and involvement of the public in the decision-making process, which effectively amounts to a duty to engage in public participation

⁵⁸ PAJA.

⁵⁹ See Hoexter C *Administrative law in South Africa* 2 ed Cape Town : Juta (2012) at 200; *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others* 2006 (1) BCLR 1 (CC) at para 142; *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 at para 142. Henrico characterises the process whereby the Executive enacts subordinate or delegated legislation as legislative administrative action. See Henrico R “Legislative administrative action and the limited extent of public participation” (2020) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 496 at 496.

⁶⁰ Brynard DJ “Procedural fairness to the public as an instrument to enhance public participation in public administration” (2011) 19(4) *Administratio Publica* 100 at 102-103. King P & Reddell C “Public participation and water use rights” (2015) (18)4 *Potchefstroom Electronic Law Journal* 944 at 945.

⁶¹ See Brynard (2011) at 105.

where the decision in question “materially and adversely” impacts the rights of the public.⁶²

3.2 The scope and content of the duty to facilitate public participation

Apart from imposing a duty to facilitate public participation in the law - and policy-making process, as well as mandating that access to the sittings of the legislative branch of government be granted to the public and media, the Constitution does not provide further guidance on what is required to adequately discharge the duty to facilitate public participation. The absence of these perimeters has resulted in the lack of a fixed model for discharging this constitutional obligation.⁶³

The Constitutional Court, in the *Doctors for Life* case, postulated that, by not providing clear demarcations for the discharge of this duty, the Constitution intended to leave it open to discretion.⁶⁴ The Constitutional Court further indicated that the discretion applies to the “standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes”.⁶⁵ Further, in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others*⁶⁶ (*New Clicks* (2006)) the Constitutional Court stated that “[t]he forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation”⁶⁷ and that in certain instance, as is the case with the PAJA,⁶⁸ the enabling statute may provide explicit guidance on the procedures to undertake to execute the duty.⁶⁹

In *Doctors for Life*, the Constitutional Court astutely pointed out that both Parliament and the provincial legislatures have consistently accepted, that the conventional method of discharging the duty to facilitate public participation is through the submission of written or oral representations or a cumulation of both.⁷⁰ The Supreme Court of Appeal (SCA), in *King & others v Attorneys Fidelity Fund Board of Control & another*⁷¹ (*King* (2006)) indicated that public participation could be achieved

⁶² Henrico posits that the strength of this duty depends on the surrounding circumstances and must be assessed on an ad hoc basis. See Henrico (2020) at 508.

⁶³ Judicial jurisprudence generally provided more insight into the exact content and nature of the duty to facilitate public participation.

⁶⁴ See *Doctors for Life* (2006) at paras 122-123.

⁶⁵ See *Doctors for Life* (2006) at para 124.

⁶⁶ See *New Clicks* (2006).

⁶⁷ See *New Clicks* (2006) at para 630.

⁶⁸ Section 4 PAJA.

⁶⁹ See *New Clicks* (2006) at para 630.

⁷⁰ See *Doctors for Life* (2006) at para 142.

⁷¹ See *King* (2006).

through the submission of commentary and the making of representations⁷²; however, facilitating public participation through these methods is neither peremptory nor exhaustive.⁷³ The SCA further stated that an election to involve the public by merely informing them of the processes, decisions taken and rationale may suffice to discharge the duty to facilitate public participation.⁷⁴ In the light of the preceding cases, it is apparent that law-makers or decision-makers have a leeway to conduct public participation. It is also apparent that this discretion is not without constraints.

3.1.1 The material requirements for discharging the duty to facilitate public participation

Although a much longer leash has been given in respect of the method and modality of discharging the obligation to facilitate public participation, the exercise of this discretion must still comply with the overarching material requirement of reasonableness.⁷⁵ Reasonableness in this context will be assessed objectively and within the context of the prevailing circumstances under which the discretion was exercised.⁷⁶ What is reasonable will also be determined in the light of several factors, such as, “[t]he nature and importance of the legislation and the intensity of its impact on the public”;⁷⁷ “what the legislature assessed as being the appropriate method”;⁷⁸ as well as the financial and temporal implications of the elected method and degree of public participation, among other factors. It must be noted, however, that the subversion of undesirable financial and temporal consequences is not an acceptable justification for “inadequate opportunities for public involvement”.⁷⁹

The requirement of overall reasonableness naturally begets two subsidiary duties: (a) the duty to provide meaningful opportunities for public participation in the law-making process and (b) the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.⁸⁰

3.1.2 The duty to provide meaningful opportunities for public participation in the law-making process

⁷² This was also recognised as a conventional method of public participation; however, it was noted that public hearings or consultation have increasingly become more prominent in the public participation sphere of public affairs; see *Doctors for Life* (2006) at paras 142-143.

⁷³ See *King* (2006) at para 22.

⁷⁴ See *King* (2006).

⁷⁵ *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (10) BCLR 968 (CC) (*Merafong* (2008)) at para 53; *Doctors for Life* (2006) at para 125.

⁷⁶ See *Doctors for Life* (2006) at para 127.

⁷⁷ See *Doctors for Life* (2006) at para 68; *Merafong* (2008) at para 27.

⁷⁸ *Matatiele Municipality & others v President of the Republic of South Africa & others* 2007 (1) BCLR 47 (CC) (*Matatiele 2* (2007)) at para 68.

⁷⁹ See *Doctors for Life* (2006) at para 128.

⁸⁰ See *Doctors for Life* (2006) at para 129.

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Meaningful public participation is achieved when the interested parties are “manifestly shown the respect due to them as concerned citizens”⁸¹ and the law-makers are given the “benefit of all inputs that will enable them to produce the best possible laws”.⁸² This effectively positions meaningful public participation as having both a practical and symbolic value. In order to achieve the goal of providing meaningful opportunities for public participation, certain conditions must be met. One of these conditions is that those who have a vested interest and are most likely to be impacted by the decision should be engaged.⁸³ In *Matatiele Municipality & others v President of the Republic of South Africa & others* (*Matatiele 2* (2007)), the Constitutional Court stipulated :

“The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”⁸⁴

Another condition for meaningful public participation is the provision of public education to enable the public to participate.⁸⁵ This entails the dissemination of information that is necessary to enable the public to have an appreciation of the subject matter and an understanding of their rights in relation thereto.⁸⁶ Meaningful public participation also requires a “ a two-way process ”⁸⁷ in which both the public and the law-makers engage in dialogue and in which the public is given an opportunity to be heard. In *Doctors for Life* the Constitutional Court remarked :

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.”⁸⁸

The Constitutional Court, in *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* ⁸⁹ (*Merafong* (2008)) reiterated that public participation is meaningful where there is a “willingness to consider all views expressed by the public”, even opinions that are not congruent with those of the government.⁹⁰ However, considering these views does not create an obligation to be bound by them, as

⁸¹ See *Doctors for Life* (2006) at para 171.

⁸² See *Doctors for Life* (2006) at para 171.

⁸³ See Phooko (2014) at 533, Callan R & Graham P (eds) *Democracy in the time of Mbeki* Cape Town : Institute for Democracy in South Africa (2005) 128.

⁸⁴ 2007 (1) BCLR 47 (CC) at para 68.

⁸⁵ See *Doctors for Life* (2006) at para 131.

⁸⁶ See *Doctors for Life* (2006) at para 131.

⁸⁷ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & others* 2008 (5) BCLR 475 (CC) at para 14.

⁸⁸ See *Doctors for Life* (2006) at para 235.

⁸⁹ 2008 (10) BCLR 968 (CC).

⁹⁰ See *Merafong* (2008) at para 51.

“being involved does not mean that one’s views must necessarily prevail”.⁹¹ The Constitutional Court reasoned that public participation in law-making, as envisaged by the Constitution, “is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them”.⁹²

Another key condition for meaningful public participation is that the public must be given an adequate opportunity to prepare and make representations.⁹³ This also requires the participation process to take place prior to the decision being effectively made and not when the decision is already underway.⁹⁴ In *Doctors for Life*, the Constitutional Court stressed that an endeavour to conduct public participation cannot be characterised as reasonable if it is presented and offered “at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made”⁹⁵. The Constitutional Court further emphasised that conducting a public participation process after the final decision has been made would be tantamount to a dereliction of duty.⁹⁶

3.1.3 The duty to take measures to ensure that people have the ability to take advantage of the opportunities provided

The Constitutional Court stressed that the facilitation of public participation would be meaningless unless the process secured the public’s actual participation.⁹⁷ This would entail: giving all interested parties “notice of and information about the legislation under consideration and the opportunities for participation that are available”⁹⁸ ; holding hearings, meetings or sittings where the public is invited to be a part of such gatherings; and giving the public an opportunity to give commentary by making submissions, whether orally or in writing.⁹⁹ These hearings must be conducted in a manner that promotes and reflects openness, transparency and accountability, and they must be accessible to the public.¹⁰⁰ Public involvement at such hearings may only be subverted where “it is reasonable and justifiable to do so in an open and democratic society”.¹⁰¹

⁹¹ See *Merafong* (2008) at para 50.

⁹² See *Merafong* (2008) at para 50.

⁹³ *City of Cape Town & other v Robertson & other* [2004] ZACC 21, 2005 (2) SA 323 (CC) at para 18.

⁹⁴ See *Phooko* (2014) at 44.

⁹⁵ See *Doctors for Life* (2006) at para 171.

⁹⁶ See *Beja & others v Premier of the Western Cape & others* 2011 (10) BCLR 1077 (WCC).

⁹⁷ See *Doctors for Life* (2006) at para 135.

⁹⁸ See *Doctors for Life* (2006) at para 131.

⁹⁹ See *Doctors for Life* (2006) at paras 136-137.

¹⁰⁰ See *Doctors for Life* (2006) at para 136.

¹⁰¹ See *Doctors for Life* (2006) at para 136.

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4 PUBLIC PARTICIPATION AND THE COVID-19 REGULATIONS

One of the key legislative frameworks that came into play with the emergence of the COVID-19 pandemic is the DMA.¹⁰² Section 1 of the DMA, which regulates a state of disaster, defines a disaster as:

“a progressive or sudden, widespread or localised. natural or human-caused occurrence which (a) causes or threatens to cause (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) disruption of the life of a community; and (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.”

Section 2(1) of the DMA limits its scope of application to situations that fall within a disaster as defined in section 1 and does not apply to situations that may constitute a disaster but can be effectively remedied by legislation or during an officially declared state of emergency. The DMA, in section 23, further classifies a disaster as either local, provincial or national. Section 27(1) of the DMA confines the circumstances under which a national disaster may be declared to where the “existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster” or where the circumstances demand such a declaration.

It is noteworthy that the state of disaster and the state of emergency are distinguishable. A state of emergency is derived directly from the Constitution,¹⁰³ as opposed to the state of disaster which is sourced from the DMA. The state of emergency may only be declared where the life of the nation is under threat by war, invasion, general insurrection, disorder, natural disaster or other public emergency and where such a declaration is necessary for the restoration of peace and order.¹⁰⁴ Section 37(1) of the Constitution creates a criterion of two pre-conditions which must exist before a state of emergency may be declared: the first is that there must be a threat to the life of the nation, and the second is that the necessity for the restoration of peace and order

¹⁰² It must be noted that a state of national disaster had never been declared prior to the COVID-19 pandemic, See also Van Staden M “Civil Liberty During a State of Disaster or Emergency in South Africa: The case of the Coronavirus Pandemic” *Free Market Foundation* available at <https://www.freemarketfoundation.com/dynamicdata/documents/martin-van-staden-civil-liberty-during-a-state-of-disaster-or-emergency-in-south-africa.pdf> (accessed 9 April 2021).

¹⁰³ See s 37 of the Constitution; Devenish GE “The demise of *salus republicae suprema lex* in South Africa: emergency rule in terms of the 1996 constitution” (1998) 31 *The Comparative and International Law Journal of Southern Africa* (1998) 142 at 145.

¹⁰⁴ The state of emergency can never be aimed at “the maintenance of the political *status quo* and the well-being of the government of the day”, see Devenish (1998) at 145. The State of Emergency Act 64 of 1997 has been enacted, pursuant to s 37(1) of the Constitution, to provide further guidance where a state of emergency has been declared and it largely echoes and expands upon the provisions of s 37 of the Constitution.

must necessitate such a declaration.¹⁰⁵ Section 37(1) outlines that a state of emergency may be legitimately declared “only in terms of an Act of Parliament”, meaning that the directives of the State of Emergency Act must be complied with. There can never be a *de facto* state of emergency.¹⁰⁶ Failure to meet these procedural requirement renders the state of emergency illegitimate and unlawful.¹⁰⁷

This distinction is particularly relevant in respect of the emergency powers granted to the government under each of the emergency protocols. Under a state of emergency, special emergency powers to enact emergency regulation to address the threat, the content of which may include derogations from the Bill of Rights, are accorded to the executive branch of government.¹⁰⁸ A derogation can be characterised as the State’s authority, conferred by the law, to “suspend certain civil and political liberties”, which States are obligated to respect, protect, promote and fulfil, for purposes of effectively addressing a crisis. Such suspension is generally justifiable as it is primarily aimed at restoring a state of normality.¹⁰⁹

The derogations are permissible to the extent that the derogations are: necessary and required by the emergency, along with being consistent with international law standards. A derogation from the rights contained in the table of non-derogable rights, located in section 37(5) of the Constitution, is not permitted. In *Certification of the Constitution of the Republic of South Africa, 1996 (Certification Judgment (1996))*¹¹⁰, the Constitutional Court held that any derogation must be done with rationality and

¹⁰⁵ In respect of the first condition, there must be an authentic, actual or imminent threat to the life of the nation, although there is great uncertainty as to the precise magnitude of the threat, see Devenish (1998) at 146-147. With regard to the second condition, the first consideration is that a state of emergency is an exceptional course of action or a measure of last resort, meaning that the ordinary laws, processes and legal system of the country must be inadequate to sufficiently extinguish the threat. Once the necessity falls away, the ordinary laws, processes and legal system of the country must be reinstated, see Devenish (1998) at 147 and 149.

¹⁰⁶ See Devenish (1998) at 146.

¹⁰⁷ See Devenish (1998) at 146.

¹⁰⁸ Section 37(4) of the Constitution. The constitutional supremacy, as enshrined in ss 1 (c) & 2 of the Constitution, will subsist during a state of emergency. Consequently, there can be no authorisation and institution of martial law or exercise of Presidential prerogative powers, which are arguably outdated and inapplicable in any case as they are common law principles which cannot be reconciled with our constitutional democracy and its foundational values and provisions. Only the powers conferred by the Constitution may be exercised. Furthermore, the doctrine of the rule of law must also be observed during a state of emergency, and as a result the Executive cannot enact laws that proscribe conduct retrospectively or laws that are aimed at insulating persons, particularly State officials, who commit unlawful acts. See Devenish (1998) at 145 & 152.

¹⁰⁹ Tapp P “To derogate or not to derogate, that is the question: a comparison of derogation provisions, alternative mechanisms comparison of derogation provisions and their implications for human rights” *Chicago Unbound* available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1116&context=international_immersion_program_papers (accessed 19 October 2019).

¹¹⁰ 1996 (10) BCLR 1253 (CC) .

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thoughtfulness.¹¹¹ The implications of derogations are such that certain rights may be wholly suspended and such suspension need not comply with section 36 of the Constitution.¹¹² This is in contrast with where a state of disaster has been declared, as a state of disaster does not make provision for or permit derogation from the Bill of Rights. This implies that, under a state of disaster, any limitation of the rights contained in the Bill of Rights may only be done in terms of section 36 of the Constitution.¹¹³

4.1 The national lockdown and the COVID-19 regulations

On 5 March 2020 it was reported that South Africa had its first confirmed COVID-19 case.¹¹⁴ In response, the South African government proceeded to declare a state of national disaster on 15 March 2020, in accordance with section 27(1) of the DMA.¹¹⁵ This declaration was swiftly followed by the enactment of the Regulations Issued in terms of section 27(2) of the DMA, 2002 (COVID-19 Regulations of 18 March 2020) by the Minister of Cooperative Governance and Traditional Affairs (CoGTA) on 18 March 2020.¹¹⁶ The COVID-19 Regulations of 18 March 2020 introduced a series of wide-scale restrictions on many activities and civil liberties.¹¹⁷

The Minister of CoGTA, on the advice of the National Coronavirus Command Council,¹¹⁸ effected a nationwide lockdown, which would take effect on 26 March 2020

¹¹¹ See *Certification Judgment* (1996) at para 95. In view of the constitutional mandate contained in s 39, to employ a purposive and value-based interpretation of the Bill of Rights, the suspension or derogation of rights must be narrowly interpreted, see Devenish (1998) at 157.

¹¹² See Van Staden “Civil Liberty” at 9.

¹¹³ See Van Staden “Civil Liberty” at 9. South African jurisprudence makes provision for other emergency powers to be invoked during times of crisis. See s 203 (“State of national defence”) of the Constitution, and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

¹¹⁴ *Freedom Front Plus v President of the Republic of South Africa & others* [2020] 3 All SA 762 (GP) at para 8.

¹¹⁵ Disaster Management Act - Declaration of a National State of Disaster of 15 March 2020 (GN 313) and Disaster Management Act - Classification of a national disaster of 15 March 2020 (GN 312); and *Mohamed & others v President of the Republic of South Africa & others* 2020 (7) BCLR 865 (GP) at para 11.

¹¹⁶ Regulations Issued in terms of section 27(2) of the Disaster Management Act, 2002 of 18 March 2020 (GN 318 of 18 March 2020); *Esau & others v Minister of Co-Operative Governance and Traditional Affairs & others* [2021] ZASCA 9 (*Esau* (2021)) at para 22; *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy & others* [2020] 9 BLLR 929 (LC) (*Association* (2020)) at para 7.

¹¹⁷ See COVID-19 Regulations of 18 March 2020.

¹¹⁸ The National Coronavirus Command Council (NCCC) is an advisory body that was established for purposes of making recommendations and to coordinate the government’s response to the COVID-19 pandemic. The NCCC is chaired by the President and composed of 20 of the 28 cabinet ministers. Since its establishment, the legality of the NCCC has been called into question. One of the leading concerns is that the NCCC may be exercising decisive powers and effectively usurping the functions the Cabinet.

and subsist for 21 days.¹¹⁹ This national lockdown was accompanied by the DMA, 2020: Amendment of Regulations Issued in Terms of Section 27(2) of 25 March 2020 (COVID-19 Amendment Regulations of 25 March 2020),¹²⁰ which amended the COVID-19 Regulations of 18 March 2020 and introduced more stringent restrictions on movement, conduct of business and trade, gatherings and other civil rights and liberties.¹²¹ Between 25 March 2020 and 29 April 2020, the COVID-19 Amendment Regulations of 25 March 2020 were subjected to a series of amendments. Some notable amendments consisted of an extension of the duration of the national lockdown and the relaxation of some of the regulations pertaining to the sale of certain products.¹²² On 23 April 2020, the President announced the introduction of a “risk-adjusted approach” to the COVID-19 restrictions to the national lockdown.¹²³ This “risk-adjusted approach” effected a variation of the restrictions in the form of levels, with the most restrictive being level 5 and the least restrictive being level 1. The President also announced the commencement of level 4, which was set to commence on 1 May 2020. On 29 April 2020, the Regulations Issued in Terms of Section 27(2) of the DMA, 2002 of 29 April (COVID-19 Regulations of 29 April 2020) were promulgated to give effect to the new risk-adjusted level 4.¹²⁴

4.1.1 Public participation during the COVID-19 regulatory process

It is noted that, during the timeframe between 17 March 2020 and 23 March 2020, the President conducted a series of meetings with different groups. On 17 March 2020 the President held a meeting with the National Command Council on COVID-19, during

See Pietersen JM “The nexus between public administration and disaster management: a case of Covid-19 in South Africa” (2020) 3(1) *Africa Journal of Public Sector Development and Governance* 40 at 51-52 & Marianne Merten “Who is in charge – the NCCC or the Cabinet? Ramaphosa unveils the blurring of democratic practice at the highest level” *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-06-10-who-is-in-charge-the-nccc-or-the-cabinet-ramaphosa-unveils-the-blurring-of-democratic-practice-at-the-highest-level/> (accessed 12 August 2021).

¹¹⁹ See *Esau* (2021) at para 23; The Presidency “From the desk of the President, Monday, 23 March 2020” available at <http://www.thepresidency.gov.za/from-the-desk-of-the-president/desk-president%2C-mondays%2C-23-march-2020> (accessed 23 March 2020). This event is generally referred to as the “national lockdown”. The national lockdown has been extended several times and at the time of writing still subsists.

¹²⁰ DMA, 2020: Amendment of Regulations Issued in terms of Section 27(2) of 25 March 2020 (GN R398 of 25 March 2020).

¹²¹ See *Association* (2020) at para 7; *Khosa & others v Minister of Defence and Military Defence and Military Veterans & others* 2020 (7) BCLR 816 at para 28.

¹²² See *Esau* (2021) at paras 26-27.

¹²³ See *Esau* (2021) at para 30.

¹²⁴ See *Esau* (2021) at para 31.

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which a plan to contain and mitigate the spread and impact of COVID-19 was devised.¹²⁵ On 18 March 2020, the President held a meeting with the leaders of all the political parties which have Parliamentary representation to discuss the implications of COVID-19 on the South African population.¹²⁶ The President also held a meeting with a group of religious leaders on 19 March 2021 to discuss what roles religious leaders could play and how they could use their influential positions in society to aid in the efforts to mitigate and contain the COVID-19 outbreak.¹²⁷ Subsequent meetings were held by the President with trade union representatives and leaders of the business sector in an effort to obtain their support for the mechanism and plans that were devised to address the COVID-19 outbreak.¹²⁸

During the course of the national lockdown, particularly on 25 April 2020, the executive branch of government also undertook a process of engaging the public in the regulatory process.¹²⁹ The public engagement process largely consisted of a call for comments and submission on the “draft framework for sectors”, which was drafted by the Department of Cooperative Governance and Traditional Affairs, for purposes of obtaining the views of the public on the proposed list of activities that were set to be permitted during level 4.¹³⁰ The public was permitted to send in their comments from 25 April 2020 at 12:00 to 27 April 2020 via email.¹³¹ Approximately 70 000 submissions were received by the close of the submission deadline.¹³²

4.2 Was the duty to facilitate public participation in the law-making process observed during the COVID-19 regulatory process?

In the view of the authors, the events leading up to the promulgation of the regulations that effected the national lockdown demonstrate an abandonment of the constitutional duty to facilitate public participation in the law-making process by the executive branch

¹²⁵ The Presidency “President to meet with political parties to combat COVID-19” available at <http://www.thepresidency.gov.za/press-statements/president-meet-political-parties-combat-covid-19> (accessed 17 March 2020).

¹²⁶ The Presidency “President to meet with political parties to combat COVID-19” available at <http://www.thepresidency.gov.za/press-statements/president-meet-political-parties-combat-covid-19> (accessed 17 March 2020).

¹²⁷ Hunter Q “Ramaphosa asks religious leaders to help contain spread of coronavirus” available at <https://www.timeslive.co.za/politics/2020-03-19-ramaphosa-asks-religious-leaders-to-help-contain-spread-of-coronavirus/> (accessed 19 March 2020).

¹²⁸ Mvumvu Z “Covid-19: 'This is the time for patriotism' - Lekota after meeting Ramaphosa” available at <https://www.timeslive.co.za/politics/2020-03-22-covid-19-this-is-the-time-for-patriotism-lekota-after-meeting-ramaphosa/> (accessed 19 March 2020).

¹²⁹ *Esau & others v Minister of Co-operative Governance and Traditional Affairs & others* 2020 (11) BCLR 1371 (WCC) (*Esau* (2020)) at para 150.

¹³⁰ See *Esau* (2021) at paras 31 & 67.

¹³¹ See *Esau* (2021) at para 72.

¹³² See *Esau* (2021) at para 99; *Esau* (2020) at para 135.

of government. The promulgation of regulations largely constitutes an administrative act and this effectively requires the administrator who has been charged with the duty to promulgate the regulations to also engage the public in the decision-making process. It must be recalled that the public, as defined in the context of public participation, encapsulates stakeholders, those persons who have a vested interest in a particular subject matter and who are likely to be considerably impacted by the outcome of a specific decision.¹³³

In the context of the COVID-19 regulations, the public encompasses the wide South African populace.¹³⁴ The engagement of this populace was glaringly absent. There was no call or invitation for the public to comment or make submissions during the promulgation of the COVID-19 Regulations of 18 March 2020 and the COVID-19 Amendment Regulations of 25 March 2020. The public was also largely left uninformed about the processes undertaken by the government during this time until after the regulations had already been promulgated. The flagrant disregard for the public participation process is even more considerable, in the light of the fact that the content of the COVID-19 regulations materially affects the enjoyment of fundamental human rights.¹³⁵ The conduct of the government, in this regard, cannot be reconciled with its constitutional duty to facilitate public participation in the law-making process.

However, while it is acknowledged that the government held meetings and consultations with the leaders of different industries and groups, to extol or eulogise these deeds as constitutive of public participation would largely be a false equivalence. The leaders of political parties with parliamentary representation, organised religious groups and the business sector do not represent the entire South African population or its sentiments. In fact, limiting consultations to the leaders of these groups ostensibly excludes a considerable amount of the population.¹³⁶ At the very least, the representatives of the people had to go back and consult with their constituencies before taking a position. It was correctly held in *Matatiele 2 (2007)*¹³⁷ that the legislature failed to actually hold the public hearings or invite representations on the issue. In this case the Court emphasised that the Constitution required public participation in the law-making process in order to offer the public an opportunity to

¹³³ See Creighton (2005) at 23.

¹³⁴ The COVID-19 pandemic affects everyone indiscriminately and the decisions taken in relation thereto will inevitably impact everyone.

¹³⁵ For example, a citizen was not allowed to buy most goods that did not constitute essentials, with the exception of groceries and medical supplies. The regulations also affected other forms of trade and business practices, expression, movement, the right to assemble, and other associated rights.

¹³⁶ Amongst the excluded are: members of political parties who are unrepresented in Parliament; those who do not ascribe to any religious affiliations or who ascribe to unorthodox/unconventional religious practices or whose religious practices do not follow a conventional structure or hierarchy so as to allow clear leadership or representation; and sole traders or those whose trade practices do not adopt leadership structures.

¹³⁷ *Matatiele Municipality & others v President of the Republic of South Africa & others* 2007 (6) SA 47 (CC).

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influence the decision of law-makers. This meant that the law-makers had to consider the representations of the public and then make informed decisions based on such representations. This case therefore illustrates that even though the people are represented by their elected representatives, the representatives still have a duty to consult with the masses. In other words, elected representatives are still accountable to the people and may not unilaterally make decisions without the mandate of the electorate.

It must be further noted that these meetings were held with the President. Although the President is the head of the executive branch of government, the COVID-19 regulations were not effected by the President but rather by the Minister of CoGTA. This effectively implies that even if the meetings were to be accepted as an exercise of public participation through representation, the process would still fall short on account of the fact the representations were not made to the decision-maker/administrator.

Furthermore, other than through abridged and curated media briefings, the conduct and content of these meetings was not broadcast or publicised in a manner that would have enabled the public to participate by way of public information. By implication, these meetings were substantially exclusive and to some extent clandestine or covert. The same process was adopted during the recent lockdown of 30 May 2021 and excluded the business sector. For example, the business sector indicated that the “government’s decision to ban alcohol sales and sit-down dining” was taken without prior consultation with it.¹³⁸ On this basis, the authors are of the view that these meetings held with a few selected people could not reasonably be considered as discharging the duty to facilitate public participation.

4.2.1 Public participation during the April regulatory process and the *Esau* case

The question of whether the government has effectively discharged its constitutional duty to facilitate public participation also came to the fore in the SCA in *Esau & others v Minister of Co-Operative Governance and Traditional Affairs & others (Esau (2021))*¹³⁹. The case was primarily about a challenge, by a wide range of applicants/appellants, to the policy and administrative decisions that were taken by the Minister of CoGTA, the Minister of Trade, Industry and Competition, and the President, as it related to the promulgation and content of the regulations of 29 April 2020. Both the Western Cape division of the High Court of South Africa, in *Esau & others v Minister of Co-operative Governance and Traditional Affairs & others (Esau (2020))*,¹⁴⁰ and the SCA (*Esau (2021)*) were seized with deciding on several issues, including the question of whether the

¹³⁸ Slater D “Govt still remiss in its consultation with private sector on Covid-19 lockdown, says BLSA” available at <https://www.engineeringnews.co.za/article/govt-still-poorly-consulting-with-private-sector-on-impacts-of-covid-19-lockdowns-says-blsa-2021-07-05> (accessed 10 July 2021).

¹³⁹ [2021] ZASCA 9.

¹⁴⁰ 2020 (11) BCLR 1371 (WCC).

Minister of CoGTA had adequately discharged the duty to facilitate the public participation process.

The applicants/appellants made the submission that the public participation process that was embarked upon between 27 April 2020 and 29 April 2020 was far too truncated to constitute an adequate discharge of the public participation mandate, as the 48-hour time span was too short to enable members of the public to make submissions. The applicants/appellants made the further submissions that it was implausible for the Minister of CoGTA to have considered 70 000 submissions that were made when the regulations of 29 April 2020 were promulgated, as there was only a 48-hour time span between 27 and 29 April 2020, which was too short for the task. These submissions were opposed by the Minister of CoGTA.

The High Court largely ruled against the applicants/appellants on these aspects. With regard to the submission that it was implausible for the Minister of CoGTA to have considered the 70 000 submissions in the 48-hour time span before the regulations of 29 April 2020 were published, the High Court held that “the number of public comments were 70 000 does not detract from the allegation that they were indeed considered”¹⁴¹ as the submissions were “collated by teams of personnel” who then consolidated them into a report for the Minister’s consideration.¹⁴²

In respect of the submission that the time allocated for the public participation process was inadequate, the High Court reasoned that, in respect of the decision to institute lockdown, there could be no prior public participation process as “there was simply not enough time and opportunity”.¹⁴³ The High Court further acknowledged that the public participation process that the Minister of CoGTA embarked upon between 25 and 27 April 2020 was truncated; however, this was not procedurally unfair as prevailing exigencies demanded “swift and decisive action”.¹⁴⁴ The High Court outlined that the Minister of CoGTA engaged “with other organs of state, spheres of government, the Centre, NAT JOINTS, [and] stakeholders” and that the Minister was cognisant of the complaints and suggestions that were presented ; these “consultations and feedback sessions form part of a public participation process”. The High Court also indicated that, in any case, there was no obligation on the Minister of CoGTA to embark upon a public participation process as the DMA did not prescribe such an endeavour.¹⁴⁵ The High Court added :

“It is not for the Courts to prescribe to the National Executive precisely how truncated a public participation process it should follow because each situation would have to be determined on its own set of unique and relevant circumstances.”¹⁴⁶

¹⁴¹ See *Esau* (2020) at para 139.

¹⁴² See *Esau* (2020) at para 139.

¹⁴³ See *Esau* (2020) at para 142.

¹⁴⁴ See *Esau* (2020) at paras 150-151.

¹⁴⁵ See *Esau* (2020) at paras 160-161.

¹⁴⁶ See *Esau* (2020) at para 171.

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Indeed, the courts have always made it clear that they will not determine a process for those tasked with conducting public participation and that it was up to the executive arm of government on how they discharge such a constitutional obligation. Interestingly, the High Court found that

“...regulation 16(2)(f) of the level 4 regulations was invalid to the extent that it permitted only three forms of exercise to be taken, during a limited period in a specific location; and that items 1 and 2 of Part E of Table 1, read with regulation 28(3) of the level 4 regulations, were invalid to the extent that they prohibited the over-the-counter sale of hot food”.¹⁴⁷

The High Court was alive to the fact that “[w]hen the COGTA Minister called for representations prior to making the level 4 regulations, her guidelines did not contain the prohibition on selling hot food ...”.¹⁴⁸

In other words, there was no public consultation on this aspect. This part of the judgment is welcome as it demonstrates the High Court’s ability to ensure that administrative processes comply with the duty to facilitate public participation. Ultimately, the High Court dismissed the application. The decision of the High Court was appealed by the applicants/appellants and subsequently heard by the SCA. The SCA largely concurred with the ruling of the court a quo, and stated:

“When the nature of the process is viewed holistically in the context of the DMA, the circumstances prevailing in respect of this particular disaster, the lockdown regulations that had been in force, and the intention to ameliorate some of the economic and social harshness of the lockdown regulations, I am of the view that the two-day period afforded to members of the public within which to make representations was reasonable. It cannot be said, in other words, that by restricting members of the public to two days within which to make representations, the COGTA Minister acted in a procedurally unfair manner.”¹⁴⁹

In respect of the truncated time frame and short period for the acceptance of submissions, the SCA reasoned that the appropriateness of the time frame and deadline for the acceptance of submissions largely depends on the context, and in some instances, as was the case in *MEC, Department of Agriculture, Conservation and Environment & another v HTF Developers (Pty) Ltd*, 48 hours was deemed adequate time to make submissions.¹⁵⁰ The SCA further outlined that, since the DMA did not stipulate a “procedure for the making of regulations in terms of section 27”,¹⁵¹ the Minister of CoGTA had a wide discretion, which she exercised adequately in the light of the prevailing urgent circumstances and the need to alleviate the plight of the South African

¹⁴⁷ See *Esau* (2020) at para 159.

¹⁴⁸ See *Esau* (2020) at para 150.

¹⁴⁹ See *Esau* (2021) at para 100.

¹⁵⁰ See *Esau* (2021) at para 96.

¹⁵¹ See *Esau* (2021) at para 97.

populace, which was under “draconian economic and social restrictions”.¹⁵² The SCA also rationalised its ruling by indicating that the Minister of CoGTA had previously indicated that due to the “unique and unexpected a disaster: if a measure was not, in retrospect, appropriate to the purposes of the DMA, it could at short notice be repealed or amended”.¹⁵³ The SCA further reasoned:

“The two-day period for the furnishing of representations was shown to be adequate ex post facto: more than 70 000 submissions were made to the COGTA Minister in the time allowed. What is more, the deadline for submissions was flexibly applied and a number of representations received after the deadline were also considered.”¹⁵⁴

The authors are inclined to disagree with both the High Court and the SCA judgments in the *Esau* case, in respect of their rulings and reasoning on the duty to facilitate public participation, for several reasons. The main rationale for disassociating ourselves from the decisions of both the High Court and the SCA is the fact that both decisions relied on the absence of a prescribed procedure for public participation in the DMA. It must be noted that the duty to facilitate public participation in the law-making process is sourced directly from the Constitution as the supreme law of the country. We submit that a constitutionally endorsed and obligatory procedure cannot be applied at the mercy of the administrators. It is not for the administrators to whimsically cherry-pick a decision-making procedure beyond that constitutionally endorsed. The framework of the Constitution is clearly and unambiguously set out in peremptory terms, in that the legislator and/or other bodies that are entrusted with law-making powers should facilitate public participation in the law-making process.

The duty to facilitate public participation is also sourced from the subsidiary legislative framework, the PAJA, which imposes the duty to involve the public in legislative administrative actions that will materially and adversely affect them. In *Zondi v MEC for Traditional and Local Government Affairs (Zondi (2005))*¹⁵⁵ the Constitutional Court confirmed that, where a statute bestows administrative powers to a decision-maker and authorises them to exercise administrative action, such an enabling statute must be read together with the provisions of the PAJA.¹⁵⁶ By implication, where the decisions of an enabled decision-maker constitute administrative action, such administrative action must be consistent with the PAJA. As previously canvassed, the act of promulgating regulations is administrative in nature, and consequently, and in accordance with sections 3 and 4 of the PAJA, it attaches an obligation to facilitate public participation.

In our view, it is no excuse that there is no prescribed procedure for public participation in the DMA. Instead, this indicates that unfortunately our representatives

¹⁵² See *Esau* (2021) at paras 97-98.

¹⁵³ See *Esau* (2021) at para 98.

¹⁵⁴ See *Esau* (2021) at para 99.

¹⁵⁵ 2005 (4) BCLR 347 (CC).

¹⁵⁶ See *Zondi* (2005) at para 101.

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have since 1996 to date failed to promulgate enabling legislation giving effect to the constitutional duty to facilitate public participation in the law-making process. We submit that there is a duty on Parliament to promulgate legislation that will give effect to the provisions dealing with public involvement in the enactment of legislation. The failure to do so has resulted in various cases dealing with the subject of public participation because there is a legal lacuna. Consequently, there is no uniform procedure to which to adhere. In essence, it means that South Africa has defective legislation that purports to prevent disaster outside the prescripts of the Constitution. In our view, the decisions of both the High Court and the SCA should not stand as they depart from South Africa's well-established jurisprudence on the scope and content of public participation. The Constitution is clear in that the government is based on the will of the people. On this basis, the reasoning that the Minister of CoGTA was not required by the DMA to facilitate public participation cannot stand, as the Minister's obligations under the DMA do not invalidate the underlying mandate of the Constitution and the demands of the PAJA.

The Courts further stressed that the Minister has a discretion in respect of how the duty would be discharged, went on to indicate that the 48-hour time span was sufficient for the public to make submissions, and relied on the fact that over 70 000 people were able to make submissions within a 48-hour period. The Courts correctly stated that the Minister of CoGTA had a discretion in relation to how the duty could be discharged, but that discretion is still subject to the requirement of reasonableness. As outlined, reasonableness requires the administrator/decision-maker to grant the public a meaningful opportunity to participate and that that included sufficient time to make submissions. We are of the view that, contrary to the reasoning of the Courts, the 48-hour time span cannot be said to be reasonable owing to the fact that the stakeholders in the matter are a population of approximately 59, 62 million people.¹⁵⁷ Logic dictates that it would take longer than 48 hours for a population of this size to make submissions. It must further be noted that 70 000 people make up less than one per cent of the entire South African populace and thus cannot be considered as reflective of public participation. Therefore, in our view, this falls far too short of the required standard of reasonableness. As was correctly stated, albeit in a different context, by the Court in *Government of the Republic of South Africa & others v Grootboom & others*: "...A programme [and/or administrative process] that excludes a significant segment of society cannot be said to be reasonable...".¹⁵⁸ The reasonable test is used to ascertain whether the facilitation of public involvement was adequate in a given case.

To this end Nkabinde J has said that the "court's role is to embark on a reasonableness enquiry so as to determine whether there has been the degree of public

¹⁵⁷ Statistics South Africa "2020 Mid-year population estimates' *Statistics South Africa*" available at <http://www.statssa.gov.za/?p=13453> (accessed 9 July 2020).

¹⁵⁸ *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46; 2000 (11) BCLR 1169 (*Grootboom* (2001)) at para 43.

participation required by the Constitution”.¹⁵⁹ In her view, the need to strike “a balance between the need to respect parliamentary autonomy on the one hand, and the right of the public to participate in the legislative process on the other, is crucial”.¹⁶⁰ Further, the Court, albeit in a different context dealing with those affected with access to housing indicated :

“Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test [of reasonableness]”.¹⁶¹

Many vulnerable people, such as those who live from hand to mouth through collecting recyclable material from waste, were left in the cold.¹⁶² Martha Fedorowicz *et al* have eloquently captured the effects of COVID-19 as follows:

“The COVID-19 pandemic may have expanded that list to include people who have had to take on additional child care, work, or schooling responsibilities to support their family and people who have lost their jobs, become food insecure, or become housing instable. These groups should not be left out of engagement efforts, so it will be critical to consider the new circumstances that your community members find themselves in before launching an engagement and to meet people where they are given present circumstances.”¹⁶³

We submit that the measures aimed at combating COVID-19 should be inclusive and accommodate the most vulnerable members of society. This is a challenge affecting everyone regardless of their geographical location. In our view, the number of responses were minimal compared to the size of the South African population. In addition, consultation largely catered for those who had access to email to the exclusion of the marginalised people who have no access to the internet amongst other resources.

The authors also disagree with the Courts’ reliance on urgency and exigency to justify the Minister of CoGTA’s role in conducting a limited public participation process. While it is understood that the prevailing circumstances were such that the government was expected to take swift action, the fact that the promulgation of all the lockdown regulations took place during a state of disaster and not a state of emergency cannot be ignored. This implies that, as canvased earlier, the Minister’s constitutional duty, as an administrator, to facilitate public participation was not suspended. In fact, Constitutional Court precedent in *Minister of Public Works & others v Kyalami Ridge*

¹⁵⁹ *Poverty Alleviation Network & others v President of the Republic of South Africa & others* 2010 (6) BCLR 520 (CC) (*Poverty Alleviation* (2010)) at para 35.

¹⁶⁰ See *Poverty Alleviation* (2010) at para 35.

¹⁶¹ See *Grootboom* (2001) at para 44.

¹⁶² See Mehra P “Pandemic leaves waste pickers out in the cold” available at <https://www.thehindubusinessline.com/specials/clean-tech/pandemic-leaves-waste-pickers-out-in-the-cold/article31282242.ece> (accessed 27 March 2021).

¹⁶³ Fedorowicz M, Arena O & Burrowes K *Community engagement during the COVID-19 pandemic and beyond. A guide for community-based organizations* Baltimore: Urban Institute (2020) at 5-6.

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Environmental Association & others (Mukhwevho Intervening) demonstrates that even in emergencies the government is still expected to fulfil its constitutional obligation to engage the public concerning decisions that will impact them.¹⁶⁴ The state of the national disaster created by the COVID-19 pandemic does not effectively permit the Minister of CoGTA to abdicate her constitutional obligations to facilitate public participation.

5 OBSERVATIONS AND LESSONS FROM THE NATIONAL LOCKDOWN

As demonstrated above, public participation is a well-established and ingrained constitutional imperative. By excluding the larger public from the process of promulgating COVID-19 regulations, the government missed an appropriate opportunity to reaffirm and fortify our democratic order. The significance of this missed opportunity is felt even more when the content of the regulations is examined against the backdrop of our history. The COVID-19 regulations contain provisions that place considerable restrictions on numerous constitutional rights. The enjoyment and exercise of some of the restricted rights have historically been withheld from a significant percentage of the population. By not involving the public in the regulatory process, the government effectively recalled historically exclusive patterns and practices, an action which is irreconcilable with our constitutional dispensation. Our constitutional democracy also rests on the foundational values of freedom, equality and human dignity.¹⁶⁵ As outlined by the Constitutional Court in *Barkhuizen v Napier* (*Barkhuizen* (2007)):¹⁶⁶

“Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.”¹⁶⁷

By excluding a large segment of the populace from the COVID-19 decision-making process, and disallowing the public from having a say in the decisions that have and continue to have a great impact on their lives, the government essentially demonstrated a flagrant disregard for the freedom and inherent dignity of the wider population.

The COVID-19 pandemic has been consequential for a multitude of divergent areas and has caused an intersection of many areas, such as, the economy, the health care industry, business and trade, law enforcement, as well as the socio-economic. By foregoing public participation, the government has effectively restricted the course of action to the limited information and expertise available to it. The public is comprised of a diverse range of people who have a wide and diverse range of skills and expertise. Providing for public participation would have been beneficial in the creation and implementation of plans to mitigate, and possibly solve, some of the auxiliary problems

¹⁶⁴ 2001 (7) BCLR 652 (CC).

¹⁶⁵ Section 1(a) of the Constitution.

¹⁶⁶ 2007 (7) BCLR 691 (CC).

¹⁶⁷ At para 57.

that have emerged as a result of the conditions created by the COVID-19 pandemic. Public participation would have enabled a wider range of experts and citizens to weigh in on the formulation and content of the regulations. By so doing, the government would have been made aware of the unconstitutionality of the regulations and given suggestions as to how the regulation could be aligned with the law without compromising their efficacy, prior to their promulgation, thereby avoiding or substantially limiting the plethora of legal proceedings that have been instituted against the government.¹⁶⁸ Moreover, public participation would have bolstered public cooperation in the implementation of measures that were decided on, as the public would have felt that they are a part of the solution. Public participation would also have led to other innovative ideas which could be implemented to make the lives of citizens much easier during the crisis.

To echo the words of the Constitutional Court in *Merafong* (2008):¹⁶⁹ “The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation.” The discretion enjoyed by the government in the pursuit of public participation during the COVID-19 pandemic would have resulted in the evolution of public administration. Research has indicated that the employment of conventional mechanisms of public involvement, such as, television, radio and newspapers, has been in considerable decline, while the use of digital platforms has increased exponentially.¹⁷⁰ In an effort to discharge its duty to facilitate public participation, the government could have introduced and employed more extensive use of digital and remote avenues, such as, social media platforms, digital meeting spaces and internet broadcasting/streaming services.¹⁷¹ In *Doctors for Life* (2006), the following was highlighted :

“The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.”¹⁷²

¹⁶⁸ There have been a considerable number of cases brought against the government in connection with the constitutionality of the COVID-19 regulations.

¹⁶⁹ At para 27.

¹⁷⁰ The nature of the COVID-19 pandemic and the fact that it spreads through contact has effectively elevated the status of remote/digital avenues and made them more desirable on a global scale.

¹⁷¹ The nature of digital platforms effectively allows them to play a dual role: to provide the public with information and to allow the public to make submissions and representations, all of which are essential elements of a meaningful opportunity to participate.

¹⁷² At para 128.

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In the light of the above, we submit that using these digital methods to advance public participation would not require a wide stretch of the imagination or grand innovation on the part of the government, on account of the fact that these mediums already exist and have already been used by the public to engage in public affairs.¹⁷³ The government can also establish an internet based software or work with existing digital intermediaries to create platforms whereby the public can access information about the government's efforts to address the COVID-19 pandemic, including any regulatory endeavours, as well as enable the public to make their representations and submissions in connection with proposed COVID-19 regulations. It is acknowledged that there is no one size fits all approach and that the government has already adopted some of the recommendations, such as using social media platforms, to spread knowledge about COVID-19 and debunk the link between 5G and COVID-19.¹⁷⁴

Research has also indicated that the formation of digital spaces has contributed to the resurgence of public participation in public affairs and has provided a more attractive option for increased representation of minorities, marginalised groups and the historically disenfranchised demographics.¹⁷⁵ Consequently, the pursuit of public participation could have also been an opportunity to further bolster overall civic engagement and wider political participation.

6 CONCLUSION

Public participation is the lifeblood of democracy. Next to voting, it is one of the primary means through which the public can be included and have a say in the decisions that will affect them. Public participation is even more instrumental to the foundation and continued survival of our constitutional democracy - by implication, the continued existence of our societal order. A general overview of the sequence of events that led to the implementation of the national lockdown by various State actors, through the promulgation of COVID-19 regulations, clearly indicates that the government acted

¹⁷³ Yang Y, Deng W, Zhang Y & Mao Z "Promoting public engagement during the COVID-19 crisis: how effective is the Wuhan local government's information release?" (2021) 18 *International Journal of Environmental Research and Public Health* 1 at 2.

¹⁷⁴ Bhengu C "Zweli Mkhize warns of fake 5G conspiracy theory, as SA's COVID-19 recovery rate surpasses 1 million" available at <https://www.timeslive.co.za/news/south-africa/2021-01-14-zweli-mkhize-warns-of-fake-5g-conspiracy-theory-as-sas-covid-19-recovery-rate-surpasses-1-million/> (accessed 15 January 2021).

¹⁷⁵ Forrester M & Matusitz M "A narrowing digital divide: the impact of the internet on youth political participation" (2010) 29 *Communicare: Journal for Communication Sciences in Southern Africa* 85 at 89. Forrester & Matusitz hold that "Internet-mediated politics tends to be more inclusive, by enabling access to more information, and providing unconstrained citizen access to the virtual public sphere, hence giving voters a voice in the wider political arena. A necessary advantage of virtual involvement is the frequent absence of demographic profiles of users in discussions. Consequently, the Internet is able to strip such political forums of demographic prejudices and inhibitors of equal participation". See Forrester & Matusitz (2010) at 89.

unilaterally in enacting and implementing the COVID-19 response mechanisms. In as far as the COVID-19 regulations of 29 April 2020 are concerned, even if it were to be widely accepted that the public participation process that the government undertook was sufficient in all other ways, the process is missing a key component, that is, reasonableness as it related to the temporal requirement, that public participation cannot be considered as legitimate if it is embarked upon after a decision has been made as it does not constitute a reasonable opportunity to participate. Thus, the government still failed to discharge its duties. By promulgating regulations without engaging the public, the government effectively disregarded an entrenched constitutional mandate and inevitably rendered the COVID-19 regulations unconstitutional for lack of procedural legitimacy and/or inclusivism.

It is a matter of utmost importance that the government should be taken to task for foregoing public participation. As the age-old proverb says: “*praemonitus praemunitus* (forewarned is forearmed)” , and part of accepting the burden of government is to always be prepared for the worst. While it can be accepted that the exact scope and magnitude of the COVID-19 pandemic could not be foreseen, the general fact that emergencies, in the general sense, are an eventuality or inevitability cannot be ignored. The existence of the COVID-19 virus was made known to the entire global community in December 2019, meaning that the government had knowledge of COVID-19 for three months prior to the promulgation of the COVID-19 regulations. Within these three months, the government should have devised mechanisms and safeguards to address the threat or even commenced with the public participation process in anticipation of the pandemic. Instead, we have seen an unprecedented scale of looting of public funds that were meant to be channeled towards the challenges caused by COVID-19.¹⁷⁶

Having the knowledge that the government had time to make the necessary preparations, the defence that the government was acting under conditions of urgency cannot be used as a shield to absolve or exonerate it for its failure to fulfil its constitutional duty to facilitate public participation prior to the promulgation of the COVID-19 regulations and prior to instituting a national lockdown. To allow a concession to be made for the government’s subversion of its duty is tantamount to permitting an erosion of the demands of the rule of law and antithetical to the fabric of our constitutional democracy.

¹⁷⁶ See Mathiba G “Corruption, public sector procurement and COVID-19 in South Africa: negotiating the new normal” (2020) 55(4) *Journal of Public Administration* 642. See also Oduor M “Africa’s Covid-19 corruption that outweighs pandemic” available at <https://www.africanews.com/2021/05/25/africa-s-covid-19-corruption-that-outweighs-pandemic//> (accessed 10 July 2021).

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