Constitutional Court Review 2021
Volume 11, 533–560
https://doi.org/10.2989/CCR.2021.0019

Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence

SAFURA ABDOOL KARIM & PETRONELL KRUGER

ABSTRACT: The relationship between the guarantee of human rights and the provision of public health is complex and characterised by tensions between states' obligations that are often framed as incompatible or mutually exclusive. The COVID-19 pandemic has brought this tension to the fore once again since the emergence of the HIV pandemic in the 1980s. It offers an opportunity to understand how this relationship has evolved during a contemporary epidemic. Since the 1829 Cholera pandemic, and the resulting missions to investigate pandemics, many public health interventions were implemented without any regard for human rights and public health objectives were prioritised at any cost. However, the creation of a right to health through various documents such as the Universal Declaration of Human Rights and World Health Organisation's Constitution initiated a shift towards greater consideration of human rights within the public health space. The most profound shift in the relationship between public health and human rights came with the adoption of instruments such as the Siracusa Principles and Declaration of Alma-Ata, which placed human rights at the fore of public health responses. The next major development came from the framework conceived by Mann et al who defined the role of human rights and health as complementary. This article utilises this history as a lens through which to analyse the approach to human rights and public health adopted by South Africa's judiciary over the first year of the COVID-19 pandemic when a diversity of decisions emerged. This COVID-19 jurisprudence offers scholars the opportunity to investigate how the relationship between public health and human rights functions during a pandemic, and to determine whether the conceptual development that has evolved over five centuries has translated into judicial decision-making.

KEYWORDS: communicable diseases, pandemic response, public health law, right to health

AUTHORS: Safura Abdool Karim* – Senior Researcher, SAMRC/Wits Centre for Health Economics and Decision Science (PRICELESS SA), Wits School of Public Health, University of Witwatersrand. ORCiD: 0000-0002-4843-9907
Petronell Kruger – Senior Researcher, SAMRC/Wits Centre for Health Economics and Decision Science (PRICELESS SA), Wits School of Public Health, University of Witwatersrand. ORCiD: 0000-0003-0624-2847
*Correspondence: safura.abdoolkarim@gmail.com

ACKNOWLEDGEMENTS: The authors thank the editors of *Constitutional Court Review* XI and the anonymous reviewers for their careful consideration of and feedback on our manuscript. This research received support from the SAMRC/Wits Centre for Health Economics and Decision Science – PRICELESS SA (grant number 23108).

I THE COVID-19 PANDEMIC AND SOUTH AFRICA'S RESPONSE

Following the first reports of the SARS-CoV-2 virus in December 2019, the COVID-19 pandemic has had a drastic impact on how societies function globally.[1] Many countries introduced stringent public health interventions such as quarantines, travel restrictions and national lockdowns to try and contain the spread of the virus.[2] However, government actions and their efficacy in responding to the pandemic have varied considerably, particularly in light of the lack of information about the virus and the drastically changing epidemiological and data landscape.[3] In this context, evaluating the impact of public health responses, and determining whether the human rights limitations that accompanied them were justified, has been challenging.

South Africa's response to the COVID-19 epidemic was swift. On 15 March 2020, just ten days after the country's first case was diagnosed, the government announced its plan to implement a national lockdown under powers provided by the Disaster Management Act 57 of 2002.[4] The regulations promulgated under this Act provided for the adoption of expansive public health measures during the course of the lockdown. They include the prohibition of public gatherings, the suspension of most economic activity other than essential services, the introduction of mandatory testing, with compulsory isolation and quarantine for those who test positive or have been in contact with others who have tested positive.[5] Regulation 11I(2) makes provision for the imposition of a fine and/or six months imprisonment for the contravention of specified lockdown regulations.[6] The government response to the pandemic was couched almost entirely within the Disaster Management Act.[7]

The government's decision to utilise the Disaster Management Act rather than declaring a state of emergency in terms of the Constitution[8] meant, importantly, that constitutional rights were not suspended during the state of disaster. Consequently, limitation of these rights resulting from the COVID-19 pandemic needed to be justified in terms of section 36 of the Constitution.[9] In terms of the section, all the limitations need to be reasonable and justifiable

1 T Burki 'China's Successful Control of COVID-19' (2020) 20 *Lancet Infectious Diseases* 1240, 1240.

2 Ibid.

3 Blavatnick School of Government *Coronavirus Government Response Tracker* (March 2020), available at https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker; International Monetary Fund *Policy Responses to COVID19* (2 July 2021), available at https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19.

4 National Institute of Communicable Diseases, available at https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/. Declaration of a National State of Disaster: Disaster Management Act 57 of 2002 in GN 313 *GG 43096* (15 March 2020) ('Declaration of National State of Disaster').

5 Regulations issued in terms of s 27(2) of the Disaster Management Act, 2002 in GN 318 of *GG 43107* (18 March 2020). Also see SS Abdool Karim 'The South African Response to the Pandemic' (2020) 382 *New England Journal of Medicine* e95, e96.

6 Ibid.

7 Declaration of a National State of Disaster.

8 Section 37(1)(a)–(b) of the Constitution of the Republic of South Africa, 1996 ('Constitution').

9 Section 36 of the Constitution provides that: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including– (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

in an open and democratic state based on values such as democracy, human dignity, equality and freedom.

The first case challenging the validity of the national lockdown was brought by the Hola Bon Renaissance Foundation. It was filed in the Constitutional Court within a few days of the implementation of the first lockdown.[10] The case was swiftly dismissed by the Court. However, it was the first of a slew of cases related to the lockdown and its implications for constitutional rights.

The terrain of the contest over the implication for human rights of public health responses has been fraught with complexity and uncertainty that has evolved over time and developed further with each human rights crisis. Just as the HIV epidemic significantly shaped the relationship between public health and human rights during most of the last four decades, it is likely that the COVID-19 pandemic will become the crucible in defining the role of human rights in modern infection control. This article considers the jurisprudence that has emerged from the South African courts over the course of the government's response to COVID-19, particularly during the national lockdown, with a view to understanding how courts respond to pandemics and what the future may hold for human rights in pandemic responses.

This article begins by sketching out the history of public health measures and human rights, defining three phases of their relationship and pinpointing which of these phases align most closely with South Africa's constitutional dispensation. We then provide an overview of judicial decisions in COVID-19 cases, categorising the cases within each of the three phases and analysing what these decisions indicate about South Africa's current approach. Finally, we conclude by highlighting some of the shortcomings and strengths of the judiciary's response, focussing on what lessons can be learnt for future public health emergencies.

II THE ROLE OF HUMAN RIGHTS IN PUBLIC HEALTH RESPONSES TO COMMUNICABLE DISEASES: AN OVERVIEW

Tensions often exist between individual human rights and the achievement of public health objectives. Sometimes measures adopted in response to outbreaks can limit human rights in the attempt to achieve public health objectives;[11] for example, restrictions on freedom of movement and trade during a lockdown to reduce human mobility and thereby limit the spread of disease constitute violations of human rights. This was particularly prevalent in traditional public health responses to communicable diseases.[12] Examples of the extreme measures that give rise to these tensions are illustrated by the isolation of ships and the people on board for 40 days to prevent the spread of the Black Death during the 1300s , which included preventing access to food and water.[13] Another example is the creation of stigmatised and under-serviced leper colonies.[14] However, modern approaches to disease control recognise that human rights and public health efforts can complement each other, especially where efforts work towards realisation of the

[10] News24 Wire 'NGO Challenges Constitutionality of Lockdown, Files Constitutional Court Papers' *The Citizen* (29 March 2021), available at https://citizen.co.za/news/south-africa/courts/2261928/ngo-challenges-constitutionality-of-lockdown-files-constitutional-court-papers.

[11] BM Meier, DP Evans & A Phelan 'Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease' (2020) 82 *Infectious Diseases in the New Millennium* 217, 253.

[12] LO Gostin & LF Wiley *Public Health Law: Power, Duty, Restraint* (3rd Ed, 2016) 13-5.

[13] PS Sehdev 'The Origin of Quarantine' 35 (2002) *Clinical Infectious Diseases* 1071, 1072.

[14] JH Levison 'Beyond Quarantine: a History of Leprosy in Puerto Rico, 1898–1930s' (2003) 10 *História, Ciências, Saúde-Manguinhos* 225, 226.

right to health.[15] This can result in improved access to health care and infrastructure; improved disease surveillance and reporting; and the implementation of improved methods to control the spread of disease.[16] States have obligations under human rights principles, including the right to health, to respond to and control epidemics and outbreaks within their borders and, some argue, beyond their borders.[17] Consequently, efforts to realise human rights to health can be understood as complementary to public health responses to communicable diseases. After all, where public health goals are achieved, healthy individuals are enabled to enjoy their right to health, life, bodily integrity and dignity more fully.

In other respects, however, certain human rights and modern public health goals – and related mechanisms – may yet create tension between human rights and public health measures. In South Africa, where the spreading of fake news concerning COVID-19 is considered a criminal offence, an individual's right to freedom of expression is constrained, though this limitation is justifiable under section 36 of the Constitution, given the potential harms caused by the spread of misinformation, including the threat to public health. A public health measure therefore has to be justifiable according to the domestic laws of the implementing country. Public health measures therefore interact with the existing legal frameworks consisting of everyday laws, policies, behaviours and freedoms. In this way, public health measures have the effect of promoting certain rights, but also sometimes limiting or even infringing other human rights. While this interplay has existed since the development of quarantine restrictions and the birth of modern public health regulations, this tension was viewed for the first time through the human rights framework during the HIV epidemic, when the right to privacy was used to prevent discrimination against vulnerable groups including homosexual men.[18]

In recent years, the international spread of diseases has been a particular concern and has often caused panic in areas trying to prevent an outbreak.[19] This has led to the implementation of disproportionately aggressive public health measures such as trade and travel restrictions, and the placement of invasive quarantines on travellers.[20] During the COVID-19 epidemic, the South African government also introduced criminal offences that sanctioned those who exposed people to the SARS-CoV-2, a measure that had a disproportionate impact on poorer communities who could not observe social distancing and hygiene measures due to overcrowding and poor sanitation infrastructure.[21] If not adopted correctly, measures such as these can often perpetuate the stigmatization of and discrimination associated with outbreaks of communicable diseases. Further tensions exist in the realm of public health measures aimed at detection of diseases. The use of compulsory testing can run counter to the principles of informed consent; and disclosure of such information can infringe the right to privacy. This

[15] JM Mann, LO Gostin, S Gruskin, T Brennan, Z Lazzarini & HV Fineberg 'Health and Human Rights' (1994) 1 *Health and Human Rights* 6, 8. See also A Clapham *Realizing the Right to Health* (2009) and LO Gostin *Global Health Law* (2014) 245.

[16] Meier, Evans & Phelan (note 11 above) at 253.

[17] Ibid.

[18] Ibid.

[19] JG Hodge, L Barraza, G Measer & A Agrawal 'Global Emergency Legal Responses to the 2014 Ebola Outbreak: Public Health and the Law' (2014) 42 *The Journal of Law, Medicine & Ethics* 595, 597.

[20] DP Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4 *Chinese Journal of International Law* 325, 392.

[21] Abdool Karim (note 5 above) at 110, 112.

raised concern during the COVID-19 epidemic when there were efforts to scale up testing in South Africa that included compulsory testing.[22]

So far, we have discussed how interventions to control the spread of communicable diseases can infringe or limit individual rights. However, it is important to recognise that these measures, while limiting the individual rights of affected individuals, also work to protect a number of other rights, particularly, those linked to the social determinants of health such as the right to work, education, dignity and life as well as the collective right to health of the broader population.[23] The right to health places certain obligations on states to respect, protect and fulfil the health of individuals.[24] Part of a state's duties under this framework is to prevent, detect and control outbreaks of infectious diseases within its borders; to assist in preventing them from spreading outside its borders and arguably; to assist other states to prevent, detect and control outbreaks within their borders where assistance is needed.[25] These duties require states to have the capacity to detect outbreaks; to report these outbreaks at the local, regional, national and international levels, as well as respond to the outbreaks with treatments, vaccines and other public health measures. However, there is a need to also consider the human rights implications of these public health measures. Given the fundamental role of states in realising the human right to health, a critical component of ensuring that any public health measures enacted are complimentary to human rights obligations by ensuring that an optimum level of restrictive measures are adopted to achieve the necessary public health goal while limiting their impact on individual rights. This includes implementing measures that respect individual rights as far as possible by adopting measures based on evidence. This approach not only ensures minimal interference with human rights; it also minimizes the effects of human rights infringements that can serve to undermine public health efforts such as stigma and mistrust in public health systems.[26]

III THE THREE PHASES OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND PUBLIC HEALTH RESPONSES

When reflecting on the history of public health responses to epidemics and human rights, it is possible to view this history as having three distinct phases. These three phases can be used to understand the different ways in which human rights and public health responses interact and how judicial systems may approach tensions between them. The three phases are discussed chronologically in this part, but as will become apparent in later parts of this article, their application to real world public health crises is not homogeneous; and often courts and governments can apply these phases simultaneously or even regressively within epidemics.

The first phase, which we have termed the 'non-recognition of human rights phase' can be understood as an approach to public health divorced from human rights concerns more broadly. In this approach, public health objectives are given primacy with no regard to their impact on human rights in general. Public health goals are not linked to the promotion of any human rights; they are seen as an exception to or separate from human rights. This approach

[22] P Kruger 'Compelled Testing for the Novel Coronavirus' (2020) 110 *South African Medical Journal* 1, 2.

[23] Mann et al (note 15 above) at 8.

[24] Universal Declaration of Human Rights (1948); Constitution of the World Health Organisation (1946).

[25] LO Gostin, BM Meier, R Thomas, V Magar & TA Gebhreyesus '70 Years of Human Rights in Global Health: Drawing on a Contentious Past to Secure a Hopeful Future' (2018) 392 *Lancet* 2731, 2735.

[26] Meier, Evans & Phelan (note 11 above) 253; Mann et al (note 15 above) at 8.

persisted from the 14th century through to a large part of the twentieth century where public health measures were imposed to prevent the spread of disease without consideration for their impact on human rights.[27]

The second phase, which we have termed the 'conflict between rights and public health', emanates from advocacy surrounding the HIV epidemic which placed the rights that could be negatively affected by these measures in the foreground of the public health response.[28] In some instances, one could argue that public health objectives became secondary to human rights, particularly civil and political rights, with the efficacy of measures being diluted to ensure greater respect for the rights of infected persons. Broadly speaking, this conceptualisation of public health and human rights sees the two concepts as mutually exclusive and in tension or conflict with one another. The fulfilment of human rights may lead to compromises in public health responses or vice versa.

The third phase does not have its origins in the application of human rights to epidemic responses per se, but to a theoretical model which proposes viewing public health and human rights as complementary and mutually reinforcing.[29] Given the interdependence of constitutional rights,[30] and specific interdependence between the right to health and other determinants of health,[31] we argue, later in this article, that this complementary approach is most closely aligned with South Africa's constitutional dispensation and ought to be the approach adopted by our judiciary.

A Non-recognition of human rights

Efforts to control the spread of diseases date back over many centuries. Quarantine was initially used in efforts to combat the Black Death, yellow fever and other communicable diseases dating back to the 14th century by separating infected individuals from the general population.[32] Even before Louis Pasteur proposed germ theory that explained the science behind the way in which diseases move from person to person, ports in Europe had been imposing quarantines on sailors entering their cities as a means of controlling the spread of disease.[33] Sailors would be held in isolation on neighbouring islands and observed to see whether they would develop symptoms.[34] Similar measures, were adopted in cities to prevent the spread of cholera and yellow fever during the 19th century.[35] However, these measures did not involve a coordinated response to outbreaks implemented by a government but were instead implemented on an ad hoc basis.[36] The use of sanatoriums for the treatment and control of diseases such as tuberculosis also began

[27] Fidler (note 20 above) at 392.

[28] Gostin et al (note 25 above) at 2732.

[29] Mann et al (note 15 above) at 23.

[30] M Minkler & S Sweeney 'On the Indivisibility and Interdependence of Basic Rights in Developing Countries' (2011) 33 *Human Rights Quarterly* 351, 396; S Liebenberg & B Goldblatt 'The Interrelation Ship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 *South African Journal of Human Rights* 335, 361.

[31] M Pieterse 'The Interdependence of Rights to Health and Autonomy in South Africa' (2008) 125 *South African Law Journal* 553, 572.

[32] Gostin & Wiley (note 12 above) at 16.

[33] N Howard-Jones *The Scientific Background of the International Sanitary Conferences 1851– 938* (1975) 9.

[34] Ibid.

[35] Ibid.

[36] Ibid.

during the mid-19th century. They were used to isolate infected individuals from society.[37] Despite their historic origins, the use of restrictive measures such as isolation, quarantine and travel restrictions continue to form part of the modern armamentarium of public health responses, all of which were key interventions during both the Ebola and COVID-19 epidemics.[38] While the use of quarantine and isolation still occur today, historically, little consideration has been given to the infringement of individual rights such as freedom of movement, individual autonomy and privacy in their implementation.

In the early and mid-19th century, there were attempts by several nations to establish a base level of responses required from governments in dealing with outbreaks of disease, particularly cholera. In 1851, the International Sanitary Regulations (the ISR) were adopted at the International Sanitary Conference in Paris and laid the foundation for the creation of the World Health Organization.[39] However, given that there had been little or no recognition of human rights during this time, the interplay between human rights and public health was not considered in the formation of these documents. In this sense, though this first phase had its origins in the 14th century, it may find itself resurrected in public health crises.

B Recognition of a right to health

The 1946 World Health Organisation Constitution provided the first recognition that health was a human right, stating 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'. Even in this early conceptualisation of the right, the WHO Constitution recognised the right to health as more expansive than simply the 'absence of disease' but instead an entitlement to 'the highest attainable standard of physical and mental health'. The Universal Declaration of Human Rights was then adopted in 1948 and created a set of universal rights which should be achieved for all nations and their citizens. Article 25 stated that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family' which envisioned health as part of a set of interdependent human rights such as access to food, clothing, housing and social security. The International Covenant on Economic, Social and Cultural Rights (the ICESCR) developed the right to health even further, recognising 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and mandating that states take steps to achieve the full realization of these rights, including steps in relation to the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'.[40]

At the same time that the ICESCR was established, the International Covenant on Civil and Political Rights, which included a range of civil and political rights including the right to self-determination and the right to the protection of physical integrity, liberty and security of persons, was concluded. While it made provision for these rights to be limited, they could only be limited in a time of public emergency which threatened life. Consequently the development of the right to health ran parallel with a growing realization that public health measures, particularly those taken during public health emergencies, could limit other human rights,

[37] JR Bignall 'Treating Tuberculosis in 1905: The First Patients at the Brompton Hospital Sanatorium' (1977) 58 *Tubercle* 43, 52.

[38] Ibid.

[39] Fidler (note 20 above) at 392.

[40] Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1996.

specifically civil and political rights.[41] In 1984, the Siracusa Principles gave greater definition to the circumstances under which rights granted under the International Covenant on Civil and Political Rights could be limited.[42] Specific provision was made for using public health as a ground for limiting rights when there was a serious threat to the health of the population or individual members in that population.[43]

C Rights in conflict with public health

Following the Declaration of Alma-Ata on Primary Health Care at Alma-Ata in the USSR on 12 September 1978, which reaffirmed the centrality of the right to health in responding to public health crises, and the burgeoning HIV epidemic in the 1980s, there was a transformation in the way human rights were linked to public health responses.[44] When the HIV epidemic initially began, the virus was largely an unknown. The modes of transmission were unclear and there were no means to treat it. Groups already marginalized and stigmatized in society, such as sex workers, people who inject drugs and men who have sex with men were at high risk of infection.[45] Fear pervaded the public discourse and intense stigma developed around the disease. Discrimination against HIV-positive individuals continued to grow. This discrimination and stigma led to many people avoiding HIV tests.[46] Because there were no treatments, emphasis was placed on preventing the disease from spreading. Interventions for prevention focused on individual behaviours and, in some instances, placed limits on individual autonomy such as compelling individuals to get tested as well as laws that compelled HIV positive persons to disclose their status to sexual partners.[47]

As the epidemic progressed, a multiplicity of rights were infringed and violated, often with the effect of undermining public health objectives. For example, many countries introduced laws that criminalized the non-disclosure of HIV status to sexual partners or made HIV a notifiable condition which required national health authorities to be informed of any positive patients immediately. This increased the stigma around HIV.[48] Once treatments were developed, further difficulties emerged around which individuals were able to access treatment, which often depended on their economic status.[49] Governments in low resource settings would have to prioritize which patients could have access to treatment.[50] The stigma

[41] Gostin et al (note 25 above) at 2735; Meier, Evans & Phelan (note 11 above) at 253.

[42] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, 1985 E/CN.4/1985/4 (the Siracusa Principles).

[43] Ibid at article 25.

[44] Gostin et al (note 25 above) at 2735.

[45] BM Meier, KN Brugh & Y Halima 'Conceptualizing a Human Right to Prevention in Global HIV/AIDS Policy' (2012) 5 *Public Health and Ethics* 263, 264.

[46] S Gruskin, EJ Mills & D Tarantola 'History, Principles and Practice of Health and Human Rights' 370 (2007) *Lancet* 449, 450.

[47] P O'Byrne 'Criminal law and public health practice: Are the Canadian HIV disclosure laws an effective HIV prevention strategy?' (2012) 9 *Sexuality Research and Social Policy* 70, 72.

[48] S Burris & E Cameron 'The Case Against Criminalization of HIV Transmission' (2008) 300 *Journal of the American Medical Association* 578, 580.

[49] C J Colvin & M Heywood 'Negotiating ARV Prices with Pharmaceutical Companies and the South African Government: A Civil Society/Legal Approach' in E Rosskam & I Kickbusch *Negotiating and Navigating Global Health: Case Studies in Global Health Diplomacy* (2011).

[50] AO Sykes 'TRIPS, Pharmaceuticals, Developing Countries, and the Doha Solution Symposium: Public Health and International Law' (2002) 3 *Chicago Journal of International Law* 47.

and fear surrounding the disease made people unwilling to be tested or disclose their status. The adoption of criminalization statutes, and the fact that workplace discrimination was permissible, also disincentivised individuals from being tested.[51] These issues were compounded by the fact that the disease disproportionately affected vulnerable populations. As a result, protecting the rights of vulnerable populations and the rights of HIV positive persons became closely linked with achieving public health objectives. Later, when effective treatments were developed, their inaccessibility to a majority of those affected defeated both public health and human rights objectives. In response to the challenges faced by marginalised groups and the way in which stigma and fear undermined efforts to control the epidemic, activists advocated for public health responses that respected human rights.[52] This ultimately reshaped the relationship between public health and human rights from one of inherent juxtaposition to a complementary approach where public health and the advancement of human rights were often linked.[53] As a result, the goals of public health began to intersect and align with those of human rights during the progression of the epidemic. In this context, rights were seen as something that needed to be prioritised, even if they undermined the efficacy of traditional, restrictive public health interventions.

Even the formulation of the right to health started to follow this more nuanced approach. For example, in 2000, the Committee on Economic Social and Cultural Rights emphasized that the right to health includes concrete steps to prevent, control and treat epidemic diseases like education programmes, epidemiological surveillance, data collection and implementation and enhancement of immunization programmes.[54] Placing public health measures not as limitations on rights, but as mechanisms – and even obligations – within the ambit of recognised rights.

D A new way of thinking: public health and human rights as complementary?

The interrelationship between public health and human rights that emerged during the HIV epidemic laid the foundation for viewing the two concepts as complementary, but in practice, many continued to view public health interventions, particularly restrictive interventions, as being in conflict with human rights.[55] However, in 1994, Jonathan Mann et al proposed considering human rights as a dimension of public health goals.[56] The three-part framework they developed explicitly included human rights as part of the effort to address the epidemic and cemented the marriage of human rights and public health.[57] Since its publication, this

[51] Burris & Cameron (note 48 above) at 580.

[52] Mark Harrington 'From HIV to Tuberculosis and Back Again: A Tale of Activism in 2 Pandemics' (2010) 50 *Clinical Infectious Diseases* 260.

[53] Gostin et al (2018) (note 25 above) at 2735.

[54] Committee on Social, Economic and Cultural Rights 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (2000) E/C.12/2000/4 at para 16.

[55] For example, General Comment. No 34 on Article 19 of the ICCPR, the Human Rights Committee is quite clear in protecting opinions on all matters including scientific opinions and denounces the criminalization of such opinions (para 9). This conflicts clearly with government restrictions and penalties on dis- and misinformation campaigns which adversaries and challengers have unleashed against the COVID-19 response globally.

[56] Mann et al (note 15 above) at 6.

[57] Ibid at 5.

framework of a complementary relationship has become the touchstone for conceptualising a modern relationship between public health and human rights.[58]

The first part of the framework outlines the relationship between a state's actions in respect of public health – such as policies, programmes and actions – and human rights.[59] A state's responsibility in public health matters consists of three functions; assessing the health needs and problems of the population, developing and implementing responses to address these problems and needs.[60] The manner in which the state fulfils these functions can, however, result in violations of human rights. A state may be deemed to infringe the right to physical integrity and security of the person through mandatory testing and treatment. The right to privacy may be violated through the release of personal information. A state's actions can even amount to discrimination where it fails to address the health problems of particularly vulnerable populations or denying these populations access to care – and can adversely impact the realization of rights by marginalized groups.[61] The second part of the framework considers the health impacts of human rights violations, illustrated most clearly in the context of severe human rights violations such as torture or executions.[62] However, Mann et al contend that virtually all human rights violations can also have a negative impact on a person's health, whether directly (such as unsafe working conditions that can violate a right to work under 'just and favourable conditions' and result in serious injury, or even death, to employees) or more indirectly (such as the way in which violations of the right to dignity may have more diffuse, but still significant, impacts on the health of individuals and communities).

The third part of the framework, which is the particularly novel component, argues that health and human rights are complementary approaches to addressing and promoting human well-being. This link is particularly important when it comes to addressing the social determinants of health such as poverty and inequality. In this way, Mann et al argue that the promotion and protection of human rights is intrinsically linked to the protection and promotion of health.[63]

This 'Mannian' understanding of the link between public health and other rights has seen some uptake by international bodies. The African Commission on Human and Peoples' Rights have acknowledged that 'COVID-19 carries profound human rights consequences in the short to the long term',[64] linking public health interventions with rights in the African Charter on Human and People's Rights including the protection of the right to life (art 4) and the right to enjoy the best attainable state of physical and mental health (art 16),[65] but also the right of access to information (art 9),[66] the right to be free from discrimination (art 2) by taking into

[58] Gostin & Wiley (note 12 above) at 15.

[59] Mann et al (note 15 above) at 5.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts, ACHPR/Res. 449 (LXVI) (2020), available at a https://www.achpr.org/sessions/resolutions?id=480.

[65] Ibid.

[66] African Commission on Human and Peoples Rights 'Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa' (2020) encourages measures to avoid the spread of mis- and disinformation, available at https://www.achpr.org/pressrelease/detail?id=483.

account the disproportionate impact of COVID-19 on the poor and unhoused,[67] and even acknowledging some of the longer term socio-economic impacts on society such as access to food.[68] Similarly, the United Nations Human Rights treaty bodies similarly acknowledged the impact of COVID-19 not only on the right to life, bodily integrity and health, but the exacerbation of discriminatory practises against women (specifically the girl-child) and refugees in the realms of social assistance, labour and education,[69] the rights of persons with disabilities to access food and supportive services which might be interrupted by COVID-19,[70] general disruptions to the food system and consequent price hikes,[71] and even the impact on community and cultural life.[72]

By using the framework of Mann et al to consider the interplay between health and human rights in the context of communicable diseases, the importance of adjusting public health measures to include human rights as a means of improving health overall is shown clearly. Practically, this concept of complementarity does not always function as Mann et al conceptualised it and, in certain instances, public health measures may conflict with certain rights, and not just function to realise them.

There is an underlying thread that can also enable one to localise the broader conceptual model described above to the South African context, namely the operation of proportionality in each of the phases. At a conceptual level, the three phases are concerned with the manner in which the proportionality of a public health response is assessed in terms of section 36 of the Constitution, the limitation clause. Phase 1 focuses primarily on the severity of the epidemic or public health concern and perhaps, to a limited extent, on whether the interventions will be effective in addressing the threat. The second phase, which can also be understood to link to the section 36 limitations analysis which takes place when rights are limited, is concerned with whether the public health benefits can justify incursions on human rights – framing this in terms of requiring a justification for the infringement of rights. The third phase may not be

[67] Ibid.

[68] A Dersso 'Statement by Commissioner Solomon Ayele Dersso, Chairperson of the African Commission on Human and Peoples' Rights' (12 August 2020), available at https://www.achpr.org/pressrelease/detail?id=529 which states: 'Forth, it has become clear that the unprecedented nature of the impact of COVID-19 not only on health but also other areas of life means that this pandemic is not a temporary event that will easily pass in a short time. Most notably, the socio-economic and humanitarian fall out of COVID-19 is widespread and severe. For us, the African Commission, perhaps this is one of the most serious and more enduring challenges that can have catastrophic human rights consequences as tens of millions are pushed to extreme poverty and many others face hunger and starvation.' Although it should be noted that it is unclear whether the Commissioner was referring solely to the impact of the COVID-19 response.

[69] UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the UN Special Rapporteur on the human rights of migrants 'Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants' (26 May 2020), available at https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf

[70] United Nations Office of the High Commissioner 'Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility' (1 April 2020), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E.

[71] Committee on Economic, Social and Cultural Rights 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights' (6 April 2020), available at https://www.ohchr.org/Documents/HRBodies/CESCR/STM_COVID19.docx.

[72] Ibid.

incompatible with a section 36 analysis of phase 2 but does not frame the issues as rights versus health, but rather as balancing competing rights against each other or perhaps weighing them collectively as mutually reinforcing.[73] The next part of this article considers how health-related cases have managed this relationship and whether there is support for a particular framing of this relationship within our jurisprudence.

IV APPLICATION OF THE PHASES OF PUBLIC HEALTH AND HUMAN RIGHTS IN SOUTH AFRICAN JURISPRUDENCE

While the COVID-19 pandemic is often labelled unprecedented, it is not the first time that South African courts have been required to adjudicate the government's response to an epidemic. Before delving into the jurisprudence related to COVID-19, it is worthwhile to consider the role human rights have played in other public health responses and pandemics in South Africa. Though the rights implicated in any public health response can be expansive, this part focusses specifically on case law related to the HIV epidemic in South Africa.

The jurisprudence developed during the HIV epidemic became a touchstone for a human rights-based approach to the epidemic and played a significant role in concretising the role of human rights in public health responses globally.[74] In *Treatment Action Campaign*,[75] the Court recognised both the severity of the HIV epidemic as well as the government's competing duties to realise other socio-economic rights, stating:

> We are also conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them.

In the context of this case, these rights were, to some extent viewed as competing rather than complementary and mutually reinforcing. However, the case was nonetheless of significant importance with the judiciary intervening to compel the state to provide treatment. Though the Court recognised the need to defer to the other branches of the government, it also definitively rejected the applicability of the 'non-recognition of rights' phase in the context of South Africa's democracy. The Court outlined its responsibility to uphold the Constitution, even in the context of a pandemic, as follows:

> The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so.[76]

[73] K Young 'The Right-Remedy Gap in Economic and Social Rights Adjudication: Holism Versus Separability' (2019) 69 *University of Toronto Law Journal* 124 which has a comprehensive discussion of how rights may be considered holistically when adjudicating rights-based challenges.

[74] P Jones *AIDS Treatment and Human Rights in Context* (2009); Mark Heywood 'Shaping, Making and Breaking the Law in the Campaign for a National HIV/AIDS Treatment Plan' in P Jones & K Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 181.

[75] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721.

[76] Ibid at para 99.

In *Minister of Health, Western Cape v Goliath,*[77] the high court had to consider the definition of healthcare services, albeit as per the definition of the Health Act 61 of 2003, and whether it could order the forced isolation of a patient with extensively drug-resistant TB (XDR-TB) who had refused to be voluntarily isolated. The court adopted a purposive interpretation of the Act to allow the 'involuntary isolation of patients with infectious diseases at a State-funded healthcare facility'. In determining whether to order the isolation of the patient, it recognised that justifying an order for forced isolation required balancing the individual's rights against the broader society's rights, including the protection of the lives and health of those who could contract XDR-TB from the respondent. The court acknowledged that compulsory isolation would amount to a deprivation of freedom.[78] In conducting its section 36 limitations analysis, the court placed significant weight on international and foreign laws that allowed compulsory isolation as well as the public health consequences of allowing XDR-TB to spread and the seriousness of the illness.[79]

The decision *Goliath* has been subject to criticism, not only for its section 36 limitations analysis, but even for its definition of healthcare services, with some authors contending that isolation serves the purpose of infection control and does not constitute the provision of healthcare services.[80] This critique, however, also highlights an additional shortcoming of the *Goliath* decision that renders this definitional challenge of negligible impact – the failure to situate the broader public health crisis *Goliath* responds to within the positive obligations emanating from section 27(1)(a) of the Constitution. Pieterse & Hassim contend that the XDR-TB crisis in South Africa at that time implicated two constitutional rights:

> The right to have access to health care services in s 27(1)(a) of the Constitution obliges the state, in s 27(2), to take reasonable legislative and other measures to achieve its progressive realization, within its available resources. Section 24(a) of the Constitution entitles all citizens to 'an environment that is not harmful to their health or well-being', whereas s 7(2) requires of the state to 'respect, protect, promote and fulfil' these rights, alongside all the other rights guaranteed by the Bill of Rights (including the right to freedom and security of the person).[81]

Though the authors lay the blame for the pandemic on the state for its failure to deliver on its obligations, these obligations are framed as including a variety of public health interventions including contact tracing, testing, education and 'efforts to improve the living conditions of those susceptible to the disease' – thus including a range of public health interventions within the ambit of section 27(1)(a) read with section 24(a).

However, other decisions, such as the *S v Nyalangu*[82] and *Phiri v S*[83] judgments adopt an approach which fails to recognise any role for human rights in public health issues. In *Nyalungu*, the court was asked to consider whether an HIV-positive man who raped a woman was also guilty of the crime of attempted murder. It held that Mr Nyalungu was guilty of the crime of attempted murder and imposed a life sentence. The court recognised that it was presented with a novel issue and, in effect, was developing common law principles relating to

[77] *Minister of Health, Western Cape v Goliath & Others* [2008] ZAWCHC 41, 2009 (2) SA 248 (C).

[78] Ibid at para 37.

[79] Ibid.

[80] M Pieterse & A Hassim 'Placing Human Rights at the Centre of Public Health: A Critique of Minister of Health, Western Cape v Goliath' (2009) 126 *South African Law Journal* 231, 243.

[81] Ibid at 244.

[82] *S v Nyalungu* 2013 2 SACR 99 (T) 1.

[83] *Phiri v S* 2013 ZAGPPHC 279; 2014 (1) SACR 211.

criminal law. Section 39(2) of the Constitution clearly mandates courts when 'interpreting any legislation, and when developing the common law or customary law [to] promote the spirit, purport and objects of the Bill of Rights.' Despite this clear injunction and the court's recognition of the novelty and precedent-setting value of the judgment, the court failed to consider the rights of the accused, while also failing to consider the broader public health implications of criminalising the transmission of HIV as attempted murder. In *Phiri*, Mr Phiri appealed against a conviction of attempted murder after he failed to disclose his status as HIV positive to a sexual partner. The high court did not comment or show any concern for its further development of the crime of attempted murder and merely stated erroneously that it seemed that a misreading of the *Nyalungu* judgment had occurred because 'it was established over a decade ago by this court that such conduct constitutes attempted murder.'[84]

When exploring the impact that HIV measures have on human rights, *Hoffmann v South African Airways*[85] highlighted the role of human rights in addressing stigma and discrimination against HIV positive persons. The Court, recognised HIV as a ground of discrimination and then highlighted how the courts should address a conflict between a human right to equality and what South African Airways alleged to be an effort to protect Hoffman's health,[86] stating:

> The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.[87]

A similar approach, prioritising the rights of HIV positive persons, was adopted in *NM v Smith* which concerned how the right to privacy of HIV positive persons was infringed when their names were disclosed in a book written by the respondent.[88] The Court highlighted the interrelationship between this private information and other rights such as the right to bodily integrity and personal autonomy. The Court again highlighted the context of HIV in South

[84] Ibid at para 6.

[85] *Hoffmann v South African Airways* [2000] ZACC 17, 2001 (1) SA 1, 2000 (11) BCLR 1211.

[86] Ibid at para 30 where the Court outlines SAA's contention that the applicant was unfit to work as a flight attendant due to his HIV positive status, as follows: 'SAA refused to employ the appellant saying that he was unfit for world-wide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever or are prone to contracting infectious diseases – it is only those persons whose infection has reached the stage of immuno-suppression, and whose $CD4^+$ count has dropped below 350 cells per microlitre of blood. Therefore, the considerations that dictated its practice as advanced in the high court did not apply to all persons who are living with HIV.'

[87] Ibid at para 28.

[88] *NM & Others v Smith & Others* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

Africa and the stigma faced by HIV positive persons.[89] However, the Court went further and recognised the complementary role that protecting privacy rights may have in encouraging people to seek treatment and thus improving public health, stating:

> The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS.[90]

From these cases, the Constitutional Court has explicitly rejected a non-recognition approach to human rights in the context of a pandemic. Broadly, more recent decisions appear to adopt a complementary approach to human rights and public health that aligns closely to the Mann et al framework. This framework aligns closely with the broader view of the Court, which conceptualises constitutional rights, particularly socio-economic rights, as interdependent. We now turn to consider whether the courts have followed this line of jurisprudence in the context of the COVID-19 epidemic.

V THE ROLE OF HUMAN RIGHTS IN SOUTH AFRICA'S COVID-19 JURISPRUDENCE

A Overview of COVID 19 litigation

Following the declaration of the national state of disaster and the implementation of a lockdown, several cases had been launched against the government. Initially, many cases were either dismissed, such as the application by Hola Bon Renaissance challenging the lockdown; or settled, such as the case of doctors being forcibly quarantined in Limpopo.[91] This means, firstly, that, in the early stages of the pandemic, there was little judicial intervention in the public health response to the COVID-19 epidemic and, secondly, that some litigation that did influence policies and public health responses may not have resulted in formal judgments. Despite this, there remains a rich and extensive set of decisions related to COVID-19. It should be highlighted at the outset that the categorisation of the cases does not per se speak to the correctness of their outcomes or reasoning. This article does not purport to assess the correctness of these individual decisions but rather to critique the approach adopted with regard to the relationship between human rights and public health. Furthermore, though there are several other components to the COVID-19 response which implicate further rights, our discussion of the response is confined to the case law related to the pandemic as outlined below.

[89] Ibid at para 40.

[90] Ibid at para 42.

[91] '"Disingenuous" Limpopo Health MEC releases forcibly quarantined doctors' (15 April 2020) *Medical Brief,* available at https://www.medicalbrief.co.za/archives/disingenuous-limpopo-health-mec-releases-forcibly-quarantined-doctors/; C Manyathela 'ConCourt Dismisses Application Seeking to Declare Lockdown Unconstitutional' (30 March 2020) *Eyewitness News*, available at https://ewn.co.za/2020/03/30/concourt-dismisses-application-seeking-to-declare-sa-lockdown-unconstitutional.

B Non-recognition of human rights

The earliest decisions on issues related to the COVID-19 pandemic adopted a decidedly non-interventionist approach whereby the judiciary deferred to the government's decisions without any consideration of the human rights implications of the regulations. Each case makes much of the uncertainty and novelty of the pandemic as justification for the court's non-intervention.

Decided on 27 March 2020, *Ex Parte: van Heerden*[92] was probably the first COVID-19 related judgment dealing with the South African judiciary's response to the COVID-19 lockdown regulations. Shortly after the announcement of the nation-wide lockdown, the applicant's grandfather passed away in a home fire and wished to travel inter-provincially to assist his mother with funeral arrangements. The applicant approached the high court to be granted a limited exception to travel under the lockdown rules. The court dismissed the application. The court's reasoning was terse and communicated clearly its unwillingness to evaluate or assess the government's decision to limit freedom of movement in such a radical manner, stating: 'I have extreme sympathy for the applicant but I must uphold the law. Unfortunately, presently, the law prohibits that which the applicant wants to do however urgent and deserving.'[93]

Similar levels of deference can be observed in *Gcilitshana v Director of Public Prosecutions*,[94] a case that arguably concerned an even greater infringement of rights and impacted public health negatively. The applicant had been unable to finalise his bail proceedings with hearings being delayed due to the pandemic. The case outlined in detail that COVID-19 outbreaks in the prison, and that a magistrate and a prosecutor had been required to quarantine, had meant that he was unable to obtain bail. The high court had to determine whether 'a grave injustice could occur if there is no lawfully justifiable reason to detain an arrested person.'[95] The high court intervened only in so far as ordering the magistrate to expedite the bail proceedings that would occur within the same week of the judgment. The court did not find the delay unjust, stating: '[t]his fact has to be viewed in the light of the fact that the outbreak was new, nobody has had an opportunity to deal with the situation before. It was a national disaster.'[96]

This approach failed to engage with the human rights implications of detainees being unable to access bail as well as failing to consider the public health benefits of utilising bail to reduce overcrowding in prisons. In addition, the case appeared to exceptionalise the COVID-19 pandemic as justification for adopting an approach to constitutional rights that deviated considerably from previous jurisprudence.

---

92 *Ex Parte: van Heerden* [2020] ZAMPMBHC 5.

93 Ibid at para 16. Roelofse AJ expanded somewhat on the exceptionalism of COVID-19 at paras 1–3, stating: 'Coronavirus disease (COVID-19) has taken a terrible grip of the World – it is described as an invisible enemy […] The media keeps live count the numbers of those who have perished. The drive to curb the COVID-19 menace, its global health and economic effects is unprecedented. South Africa is not spared. […] Here, the death toll is expected to rise dramatically as elsewhere in the world.'

94 *Gcilitshana v Director of Public Prosecutions* [2020] ZAECGHC 32.

95 *Majali v S* [2011] ZAGPHC 74 at para 14.

96 *Gcilitshana* (note 94 above) at para 28.

C Conflicts between public health and human rights

Despite the fact that constitutional rights were not suspended during the lockdown, and substantial infringements of civil and political rights that emanated from the lockdown and ensuing COVID-19 response were made, there were only a few cases that framed public health objectives as being in conflict with rights.

The decision *Mohamed v The President of the Republic*,[97] was one of the first judgments in which the COVID-19 lockdown was at the front and centre of the issue. A group of applicants approached the court claiming their rights to freedom of movement, freedom of religion, freedom of association and dignity were being violated by the prohibition on religious gatherings. The applicants submitted that their religion involved daily prayers in congregation and that the regulations presented them with a 'Hobson's Choice.' The respondent maintained that the prohibition on gathering was 'necessary to curb the infection rate and to manage the healthcare system to prevent it from being wholly overwhelmed and collapsing.' The court refused to grant an exemption permit for the applicants stating that –

> [T]he world over, entire countries of people have had to suffer similar inroads to their civil liberties and way of life – in this respect, South Africa is not unique or alone in its efforts. In some countries, these restrictions were placed too late and others have suffered criticism of being too draconian. What they all have in common is the presence of COVID-19 and the toll it has taken on human life in so many ways.[98]

The court formulated the applicants' individual exercise of their religion in opposition to the 'greater good' and held that –

> [E]very citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of 'the greater good', the spirit of 'ubuntu' and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.[99]

The court juxtaposed the applicant's right to freedom of religion with the rights of the public to enjoy their rights to life, access to health care, access to an environment that is not harmful to their health and wellbeing, and their rights to dignity.[100]

The case of *De Beer v Minister*,[101] was a heavily criticised judgment that invalidated the state of disaster regulations wholesale, even those provisions which may have justifiably limited certain rights, or which did not limit rights at all. The applicant in the case challenged the validity of the declaration of a national state of disaster and the pursuant regulations. The court held that the regulations 'go beyond the mere issue of saving lives, some of which, with the greatest degree of sensitivity, international experience has shown, may inevitably be lost.'[102] Broadly, the court failed to consider the implications the regulations had on rights such as the right to life and health – paying lip service with a brief reference to these rights and immediately framing the matter as an 'anguishing conundrum [of the] choice between "plague

[97] *Mohamed v The President of the Republic* 2020 (5) SA 553 (GP).
[98] Ibid at para 76.
[99] Ibid at para 75.
[100] Ibid at para 44.
[101] *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, 2020 (11) BCLR 1349 (GP).
[102] Ibid at para 6.

and famine"'.[103] Yet, despite the court's categorisation of these rights as conflicting, it did very little to investigate the limitation of rights caused by the lockdown restrictions – simply stating that 'lack of rationality would result in such a measure not constituting a permissible limitation of a Constitutional right in the context of section 36 of the Constitution'.[104] With this in mind, the court proceeded to apply the rationality test to certain regulations. The court considered a series of alternative formulations to provisions to promote other rights. For example, it questioned why night vigils were not permitted where social distancing between participants and a mandatory closed casket could render such practices safer. If restrictions on the time people could be permitted to exercise were challenged, especially if limiting the size of groups exercising together seemed more effective, the court held that restrictions on visiting spaces like parks could be replaced by regulating those visits more carefully.

The court stated 'the cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example, as well as the closure of borders' could pass muster. Despite recognising that such regulations could withstand challenges, by limiting its review to a handful of the regulations, the court declared the regulations to be unconstitutional and invalid *in toto*. Though the effect of this finding was mitigated by a suspension of invalidity and ultimately successfully appealed,[105] the approach of the court reflected a prioritisation of civil and political rights to a degree that undermined the totality of the public health response to COVID-19.

In *FITA v President of the Republic*,[106] the applicant challenged the banning of the sale of tobacco products in response to the COVID-19 pandemic on the basis that the ban was irrational and breached the principle of legality. The Minister of Cooperative Governance and Traditional Affairs argued that the ban on tobacco products served to promote and protect the rights to life and healthcare.[107] The court agreed with this characterisation, upholding the ban on the basis that it served to protect these rights:

> We hold the view that a vigorous attempt to contain the spread of the virus at all costs had to be made especially bearing in mind the high COVID-19 mortality rates and the fact that, as a developing country with limited resources as well as an already overwhelmed healthcare system, South Africa is ill-equipped to survive the full brunt of the pandemic at its peak if no concerted efforts are made to contain the virus. In line with its constitutionally mandated duties to preserve life and provide adequate health care, the State was under a duty to adopt measures to ensure that the already fragile healthcare system was not overwhelmed even further.[108]

The Court provided that it was –

[103] Ibid.

[104] Ibid.

[105] *Minister of Cooperative Governance and Traditional Affairs v De Beer* [2021] ZASCA 95, 2021 (3) All SA 723 (SCA).

[106] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* [2020] ZAGPPHC, 2020 (6) SA 513 (GP).

[107] Ibid at para 43 where the court stated: 'In our view, the medical material and other reports, inclusive from the WHO, considered by the Minister, though still developing and not conclusive regarding a higher COVID-19 virus progression amongst smokers compared to non-smokers, provided the Minister with a firm rational basis to promulgate regulations 27 and 45, outlawing the sale of tobacco products and cigarettes. This in our view is a properly considered rational decision intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country's healthcare facilities.'

[108] *FITA* (note 106 above) at para 42.

> persuaded by the Minister's submission that FITA's argument is misconceived as it ignores the context under which the regulations were promulgated. Given that an unprecedented disaster had just hit South Africa requiring swift and effective action from the State, it would be illogical to require the Minister to meet a higher threshold (that is 'strictly necessary') and require her to jump through proverbial hoops when the enactment of the regulations was for a laudable purpose.[109]

The inconsistency in framing and the different jurisprudential approaches were perhaps highlighted most clearly in the two judgments dealing with the tobacco ban. The *British American Tobacco South Africa (Pty) Ltd* decision found the tobacco ban unconstitutional, directly conflicting with the decision in *FITA* which upheld the constitutionality of the ban. Departing substantially from the deferent approach in *FITA*, Mlambo JP highlighted the need to weigh constitutional rights against public health imperatives, stating:

> It can hardly be contested that the COVID-19 global pandemic resulted in a national disaster that gave rise to the need to take urgent action. This urgent action must be contextualised against the constitutional obligation to secure the well-being of the people of South Africa.[110]

The schools and education of children has been a particularly contentious issue, particularly as the evidence on how COVID-19 affected children solidified. On 1 July 2020, in *One South Africa Movement and Another v President of the Republic of South Africa and Others*,[111] the applicants attempted to stop the re-opening of schools. The applicants argued that re-opening the schools would compromise public health and their application sought to avoid children being placed 'on the altar of economic and financial interests.'[112] They relied on the rights to life and dignity to justify their relief. Regarding the applicants' contention that the lockdown should revert to a higher level, the court commented that the 'measures the state adopts to deal with the threat posed to the right to life must in turn safeguard and protect other constitutional rights which are also affected by the COVID-19 crisis.' The court's approach was one which sought to balance public health objectives against other rights and, in its outcome, held that it would be permissible to adopt less stringent public health objectives to support the realisation of other rights:

> Thus, while the initial concern and response to the virus was largely and understandably a public health one, with time the impact of the virus on issues such as the economic survival of nations and their citizens, and the simple ability to live a meaningful and decent life, has come sharply into focus. The ability of governments, in particular those in the developing world, to respond holistically to the needs and well-being of their citizens has come under increased pressure. This has been exacerbated by the inevitable recognition over time that the virus will be with us for some time and that a cure in the form of a vaccine is still somewhere in the future.[113]

The court also endorsed the view that 'it was possible to protect both lives and livelihoods, without choosing one over the other' in justifying the adoption of a less restrictive public health measure.[114] The court's view of the relationship between public health and human

[109] Ibid at para 85.

[110] *British American Tobacco South Africa (Pty) Ltd & Others v Minister of Co-operative Governance and Traditional Affairs & Others* [2020] ZAWCHC 180, 2021 (7) BCLR 735 (WCC) at para 212.

[111] *One South Africa Movement & Another v President of the Republic of South Africa & Others* [2020] ZAGPPHC 249, 2020 (5) 576 (GP).

[112] Ibid at para 131.

[113] Ibid at para 2.

[114] Ibid at para 98.

rights generally saw the pandemic, and consequently public health measures, of less urgent importance than the competing economic interests and other civil and political rights such as—

> the right to reasonable access to health care services for all the population, and not only for COVID-19 patients; the right to freedom of movement; the right to dignity which attaches to the ability to earn a living and feed one's family; the right to free choice of one's trade, profession and occupation; and the right to property. Moreover, the measures that the state adopts must also not hinder its ability to meet its constitutional obligations progressively to provide access to housing, social-welfare, health care and education. The health of the economy and fiscus are central to its ability to do so.[115]

The court clearly viewed the right to education and the right to food as standing in conflict with the right to health and the right to life and accordingly approached the section 36 limitation test as follows:

> [I]n our view it must follow that in the balancing exercise between the competing rights, the balance was appropriately struck between the right to life and other implicated rights, such as the right to education, and the right to food.[116]

This approach should be contrasted with the *Equal Education* case as discussed below, where the rights to health, food and education were aligned with the public health COVID-19 restrictions.

In *Esau*, the Supreme Court of Appeal had to decide on the constitutionality of the state of disaster regulations that applied on level 4.[117] Specifically, the court had to consider whether the limitations on the rights to dignity, freedom of movement and trade could justifiably be limited to prevent COVID-19. The Minister argued that the COVID-19 regulations worked to promote the rights to life, freedom and security of person and access to healthcare system – not of a particular person but of broader South African society.[118] The court accepted the argument that these nonpharmaceutical interventions served to protect societal rights, specifically the right to life, stating:

> At its most basic, the purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that has cost thousands of lives and has infected hundreds of thousands of people. In a sense, there has been something akin to a trade-off: the rights to freedom of movement, to dignity and to pursue a livelihood were limited to prevent the spread of COVID-19 and that, in turn, protected the right to life of many thousands of people, who would have died had the disease had the opportunity to run unchecked through the country.[119]

However, this recognition also placed public health objectives at odds with other fundamental rights and framed the goals of public health as diametrically opposed to the protection of other

[115] Ibid at para 90.

[116] Ibid at para 165.

[117] *Esau & Others v Minister of Co-Operative Governance and Traditional Affairs & Others* [2021] ZASCA 9, 2021 (3) SA 593 (SCA).

[118] Ibid at para 121 which reads: 'The COGTA Minister's starting point in justifying the regulations under attack was that the State was under an obligation to respect, protect, promote and fulfil the fundamental rights of everyone to life, to freedom and security of the person and to access to health care services. These rights were threatened by the pandemic. In order to arrest the spread of COVID-19, it was necessary to compel people to remain at home. The logic is clear: "Uninfected persons who stay at home minimize their contact with infected persons and infected surfaces. Infected persons who stay at home reduce the occasions upon which they may infect others or public surfaces."'

[119] Ibid at para 132.

civil and political rights, with the realisation of one being mutually exclusive to the realisation of the other.

> At the same time, an easing of those strict restrictions was envisaged as and when appropriate. But that easing came at a cost. Even though the COGTA Minister described level 4 as being 'largely a success', she said that it 'resulted in the increased spread of the virus, albeit within acceptable parameters'. By way of example, she said that an increase in the doubling rate of the disease was noted, from 15 days under level 5 to 12 days under level 4. By ameliorating the harshness of the lockdown and moving to level 4, the COGTA Minister sought to strike a balance 'between saving lives and saving livelihoods'. For the most part, I am satisfied that the means chosen – and the limitation of rights that those choices brought about – were objectively rational. They were also proportional in the sense that, in the circumstances, those means were necessary to deal with the exigencies faced by the country, struck appropriate balances between the adverse and beneficial effects of the response to the pandemic and were suitable for their intended purpose.[120]

In *Democratic Alliance,* the high court had to consider the constitutionality of the Disaster Management Act and whether there was sufficient parliamentary oversight of the COGTA powers exercised under the COVID-19 pandemic. [121] In this case the court specifically acknowledged the need to ensure the protection of rights within the Bill of Rights, even during a pandemic, and that limitations of these rights ought to be justified in terms of section 36 of the Constitution. It held:

> We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.[122]

D Public health and human rights and complimentarity

Despite the initial approach of the judiciary in exercising a high level of deference to the government's response to the COVID-19 pandemic, the courts began to hand down judgments that melded human rights with public health.

One of the most significant judgments concerning the COVID-19 response was *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*[123] which marked a significant turning point in the judiciary's willingness to scrutinise state responses to the pandemic. The applicants approached the high court, amongst others, to restate the entitlement of all persons to enjoy rights in the context of the state of disaster. The *Khosa* case

[120] Ibid at para 142.

[121] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs & Others* [2021] ZAGPPHC 168.

[122] Ibid at para 75.

[123] *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others* [2020] ZAGPPHC 147, 2020 (5) SA 490 (GP).

was centrally about incidences of torture and brutality perpetrated by members of the South African security forces against citizens in the course of the state's response to Covid19.[124]

The court also ordered the creation of a mechanism for citizens to report allegations of torture or cruel, inhumane, or degrading treatment or punishment committed during the state of disaster; and, more specifically, to Mr Khosa: the court required investigations to be completed and the results provided to the court. The *Khosa* judgment outlines the tension between human rights and public health objectives that is the centre point of South Africa's COVID-19 response succinctly:

> I must emphasize that all counsel were in agreement that a lock-down was necessary, and I must add that I am of the same view less there be any doubt about that. The public is however entitled to be treated with dignity and respect whether rich or poor. Section 7 of the Bill of Rights makes this abundantly clear and there is no doubt about that.[125]

However, it is also worth noting that the precise dichotomy between rights and public health objectives that was exposed in *Khosa* is distinct from many other instances of conflict between human rights and public health. The brutality at the centre of the *Khosa* case serves no public health goal and can be categorized without doubt as an abuse of power. Fabricius J, recognised the importance of protecting human rights in the context of the pandemic response, stating:

> [I]f the Government is held to these Constitutional obligations and the citizens trust is restored, and lawful rational Regulations are obeyed, the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found. The fact of the matter is thus simply the following: Communality or failure.[126]

Some of the other cases that attempted to adopt a complimentary approach to public health and human rights focussed specifically on whether different groups of people could be excluded from accessing COVID-19 social safety nets. The broader objective of addressing poverty and historical inequities highlighted in *TAC* was reiterated in the *Solidarity* case.[127] Here, the applicants sought an order to review and set aside a decision by the Minister of Tourism to introduce race-based criteria to emergency assistance given due to COVID-19. The high court commented that pursuing equality goals should not be seen as contrary to effectively providing a COVID-19 response, but that it is important to understand that COVID-19 impacts the poor and disadvantaged to the greatest extent, and that government calibrating its response to factor in historical disadvantage 'is not only permissible at the level of principle but warranted and necessary.' The court also heeded that 'in a time of crisis when people are at their most vulnerable context matters perhaps even more so than in a time of normality and the policy response must factor that into its dynamics.' In addition, poorer individuals were more affected by the lockdown and suspension of economic activity than middle- and upper-class individuals who were able to continue work remotely. In this sense, the judgment's prioritisation of historically disadvantaged groups supported efforts that worked to assist groups most affected by the pandemic.

The case of *Scalabrini Centre of Cape Town v Minister of Social Development*[128] was concerned with whether asylum seekers and social permit holders could be lawfully excluded

[124] Ibid at para 24.

[125] Ibid at para 19.

[126] Ibid at para 9.

[127] *Solidarity obo Members v Minister of Small Business Development & Others; Afriforum v Minister of Tourism & Others* [2020] ZAGPPHC 519.

[128] *Scalabrini Centre of Cape Town v Minister of Social Development* [2020] ZAGPPHC 308; 2021 (1) 553 (GP).

from receiving the COVID-19 distress grant. The court considered that these persons were 'locked-in' by the pandemic and that the lockdown impacted their ability to secure food and basic necessities. The court found that a person's immigration status is an irrational and unreasonable ground for exclusion. The court held that the interrelatedness of their rights to equality, dignity and access to social assistance could not be overemphasised, and that '[w]hilst it cannot be disputed that the COVID-19 pandemic must be fought by all means necessary, it must be constantly borne in mind that the Constitution and the Bill of Rights in particular, ought to be the touchstone against which the formulation and implementation of regulations is measured.'[129]

The complementary approach can also be observed in the case of *South African Human Rights Commission and Others v City of Cape Town and Others*,[130] which concerned the right to housing and the suspension of evictions during COVID-19. The South African Human Rights Commission was able to successfully interdict the City of Cape Town from evicting persons or demolishing informal housing structures. The high court condemned the City's conduct as 'inhumane, heartless and done with scant regard to safety, security and health particularly in the light of the COVID-19 pandemic' and, importantly, recognised that vulnerability is exacerbated during the pandemic. The court reiterated that the purpose of judicial oversight over evictions and demolitions of homes is to protect the right to dignity, housing, safety and security of the person and life which are interrelated.[131]

In *CD and Another v Department of Social Development*[132] the applicants approached the high court for an order to enable them to travel from Cape Town to Bloemfontein and back to fetch their children aged 7 and 10 from their grandparents home. The court took an approach which not only considered the best interests of the child but the children's well-being and physical health during the pandemic, stating:

> The well-being and physical health of the children in these turbulent times are being placed at risk. The situation is clearly an urgent and troubling one, and the issues raised by the Respondent pertaining to the failure to move the children before the lockdown or the fact that the application was brought on 6 April, does not detract from the urgency. The best interests of the children would undoubtedly be served if permission were to be granted for them to be fetched to travel from Bloemfontein to Cape Town.[133]

In *Equal Education v Minister of Basic Education*[134] the suspension of the National Schools Nutrition Programme (NSNP) during lockdown was challenged. The high court went to great lengths to explain the interrelationship and interdependence of the rights to education, nutrition and health.[135] The court noted that in government policies on the NSNP, the link between the rights to education, health and food are made clear, with the stated purposes of the NSNP being 'to contribute to the improvement of education quality by enhancing … learning capacity, school attendance and punctuality… [and] general health development by alleviating

[129] Ibid at para 41.
[130] *South African Human Rights Commission & Others v City of Cape Town & Others* [2020] ZAWCHC 84, 2021 (2) SA 565 (WCC).
[131] Ibid at para 47.
[132] *C D & Another v Department of Social Development* [2020] ZAWCHC 25.
[133] Ibid at para 13.
[134] *Equal Education & Others v Minister of Basic Education & Others* [2020] ZAGPPHC 306, 2021 (1) SA 198 (GP).
[135] Ibid at paras 34–41.

hunger.' [136] The court also highlighted the role of food insecurity and hunger in contributing to adverse health conditions, including obesity and micronutrient deficiencies, something which the NSNP assisted in ameliorating.[137] The court went on to find that the NSNP was part of the state's constitutional obligations under the children's right to basic nutrition.[138]

E The approach of COVID-19 jurisprudence

The above cases illustrate a highly variable and at times inconsistent jurisprudence on COVID-19. More interestingly, despite the richness of decades of development in the relationship between public health and human rights, as well as South Africa's own section 36 jurisprudence, one can see the historical phases of this history woven in throughout these cases as though the jurisprudence began afresh in the pandemic.

The answer to how the courts should manage their role, and the role of human rights during a pandemic, is perhaps best expressed by the Supreme Court of Appeal in *Esau* when it posed the question 'what is the role of the courts in circumstances such as these' and answered powerfully by referring to the 1879 case of *In re Willem Kok and Nathanial Balie*, 'in times of national disaster… "the laws are not silent". "(T)hey speak the same language in war as in peace".'[139] Continuing on, the court noted 'that even in times of upheaval, the courts' first and most sacred duty is to administer justice to those who seek it'.

This judgment, laden with the jurisprudence dating more than 140 years prior to the COVID-19 pandemic, resoundingly emphasized that the duty of the courts in times of crisis is the same as its duty in times of normality. Against this backdrop, the cases which adopted a non-interventionist approach became even more divorced from the chain of jurisprudence that underpins our legal system. These cases, subsumed with the severity of the COVID-19 pandemic, saw courts essentially abrogate their duties to safeguard and promote the realisation of human rights during the earlier phases of the pandemic. Though these cases upheld strong public health responses, they did not adequately consider the reasonableness and justifiability of the resulting human rights limitations. Whilst the COVID-19 pandemic was novel, there was clear direction from previous cases, such as the *TAC* case, which would have compelled courts to intervene when the public health response interfered with human rights. Again, *Esau* offers guidance to the judiciary over the duty it bears in a times of crisis such as COVID-19, viz, the duty of oversight and guidance to other branches of government.

> In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of our Constitution, applies in times of crisis as much as it does in more stable times.[140]

But this duty is not unlimited, it requires a balancing between allowing the executive the flexibility and freedom to respond to the crisis while still maintaining and upholding the

[136] Ibid at para 36 referring to White Paper on Reconstruction and Development (1994).

[137] Ibid at para 30 which reads: "The severity of high levels of unemployment leads to poverty and consequently to food insecurity. Even when employed, the income is not adequate with the informal sector employment totaling 5 million, who in turn supports 16 million people. The parents can accordingly not provide sufficient food and nutrition to their children. Children who suffer from hunger are at risk of various forms of malnutrition which include wasting, stunting, obesity and micronutrient deficiencies."

[138] Ibid at para 42.

[139] *Esau* (note 117 above) at para 4.

[140] Ibid at para 5.

rule of law.[141] While the conflict approach to human rights and public health is not the most desirable in Mann's framework, it is not an inherently flawed approach to the need to assess public health measures in the context of a constitutional democracy, particularly one such as ours where section 36 remains a touchstone to any limitation of rights.

Whilst the complementary approach is a desirable one, there will undoubtedly be instances in which public health efforts do act to limit human rights. However, in such instances, it is imperative that the courts follow an approach of balancing competing rights and justifying limitations of these rights. Of concern in the conflict phase of the COVID-19 jurisprudence is the lack of recognition of many socio-economic rights, such as the right to health, as competing rights and values to be balanced against the civil and political rights infringed by the lockdown regulations and broader public health measures. In particular, the *De Beer* case signalled a troubling lack of regard for the competing rights to health and life against the rights to freedom of movement and autonomy discussed so extensively.

The careful balancing between public health and other rights was perhaps most clearly outlined in *One South Africa* which was one of the few cases that engaged with section 36 in detail and offers a clear pathway to consider how best to balance rights in a pandemic situation. In fact, *One South Africa* offers a counter-point to Mann's approach of reading the rights to health as complementary to other rights as, within the context of COVID-19, there were instances in which socio-economic rights were competing with the rights to health and life.[142] At the outset, the court recognised that there is no hierarchy of rights within the Bill of Rights and there can be no hierarchy applied when undertaking a section 36 analysis.

> In exercising this power, the executive must obviously respect, protect, promote and fulfil all fundamental rights implicated. But even this involves a range of choices as to how best to do it. Therefore, it is not useful, and may indeed be misleading, to appeal to the logicality of a decision of this nature in challenging its constitutional validity. Instead, this Court must look to the relevant principles of law that apply. In the first place, it is well settled in our law that there is no hierarchy of rights under the Bill of Rights, and that different rights may compete against each other.[143]

Importantly, the court recognized that rights may not be complementary in some situations and that these competing goals must be balanced in terms of section 36. In addition, measures that protect other rights ought to be upheld and even within the context of the COVID-19 pandemic there may be other rights which require protection, albeit not to the exclusion of public health objectives:

> In this case, the constitutional issue implicates a range of fundamental rights, which pull in different directions. The measures the state adopts to deal with the threat posed to the right to life must in turn safeguard and protect other constitutional rights which are also affected by the COVID-19 crisis. Section 7(2) expressly requires this of the state. These include, for example, the right to reasonable access to health care services for all the population, and not only for COVID-19 patients; the right to freedom of movement; the right to dignity which attaches to the ability to earn a living and feed one's family; the right to free choice of one's trade, profession and

[141] Ibid at para 6. 'That is not to say that the courts have untrammelled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law. Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based, and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and the judiciary.'

[142] *One South Africa Movement* (note 111 above) at 86–87.

[143] Ibid at para 88.

> occupation; and the right to property. Moreover, the measures that the state adopts must also not hinder its ability to meet its constitutional obligations progressively to provide access to housing, social-welfare, health care and education. The health of the economy and fiscus are central to its ability to do so.[144]

Despite the value of the 'conflicting' phase of the case law and the importance of engaging with section 36 of the Constitution, the complementary cases represent a robust approach to human rights within the context of a pandemic. Framing the goals of public health as mutually reinforcing for the promotion of certain rights has enabled the courts to comprehensively weigh and balance competing interests as required by section 36. It is interesting to note that the first non-interventionist case was the *Khosa* case where, undoubtedly, the public health objectives were not compromised but rather enhanced by the protection of individual liberties and rights. The *Equal Education* case also contained a richness from its holistic reading of rights and broader public health imperatives that allowed the court to make an order that not only upheld other rights but was ultimately beneficial to the health of children – a health and human rights issue that was not erased but rather made all the more important by the pandemic. Importantly, these complementary cases were also most responsive to historical fault lines of inequality based on, among others, race and gender and realities of poverty that vulnerable and marginalised groups contend with, and which were exacerbated by the pandemic.

The COVID-19 case law and the shortcomings of its efforts to protect constitutional rights during a public health crisis has exposed a broader issue within the response, viz, lack of guidance from the Constitutional Court. The inconsistency in the approach of the judiciary was, in part, driven by the lack of guidance from the Constitutional Court which, on several occasions declined to entertain matters central to the question of how constitutional rights should be handled in a state of disaster. This has led to, among others, conflicting decisions from high courts that have yet to be resolved and a lack of clarity about the jurisprudential approach to be taken in times of public health crises. However, the inconsistency we observed in the case law is also indicative of broader shortcomings in all branches of the state. The non-recognition of human rights and lack of observance of both constitutional rights and the Siracusa principles prompts, in the first place, challenges to the regulations and government action. For example, the high court's ability to interfere with the regulations in the *Van Heerden* case was, to some extent, due to the formulation of the regulations which made no allowance for exceptions. There is also a deeper and underlying concern with the executive's use of the Disaster Management Act – interpreted to give the executive extremely broad and wide-ranging powers with little or no oversight by the legislature. The judiciary was often at the forefront of addressing tensions between constitutional rights and public health due to the executive's disregard for the fact that constitutional rights had *not* been suspended during the state of disaster and correspondingly, parliament's abdication of its oversight responsibilities. A great deal of resources and time were spent challenging the validity, scope and execution of the national state of disaster, and particularly the lockdown.

VI CONCLUSION

Though the non-recognition cases prioritised public health, the complementary cases demonstrate how rights and public health objectives are interlinked and may be framed as

[144] Ibid at para 91.

mutually supportive. The complementary approach described by Mann et al aligns with our modern understanding of human rights and our Constitution's conceptualisation of the socio-economic rights, such as the right to health as well as the interdependent and interrelated nature of constitutional rights. By adopting a complementary lens, courts are better placed to adequately weight public health benefits against potentially conflicting rights and the conceptualisation of health and public health as a component of human rights enriches the balancing exercise undertaken when rights are implicated by a public health response. Most importantly, in times of crisis, framing public health as a human rights imperative enables courts to intervene more strongly in public health emergencies and substantively assess the human rights implications of a state's response.