

After the COVID-19 state of disaster in South Africa

To the Editor — Arbitrarily extending a national state of disaster beyond the conditions that necessitate it can create the perception of despotic power. Declaring an emergency or a disaster enables governments to invoke extraordinary measures, usually through the executive, and allows the limitation or derogation of rights as may be necessary to deal with the emergency. To respond to the COVID-19 pandemic, many countries used emergency legislation, through a ‘state of emergency’ or through disaster or other national legislation that provided for responses to emergencies, as exemplified for the Asia-Pacific region¹.

South Africa was the first African country to declare a national state of disaster², only ten days after the detection of its first case of COVID-19 on 5 March 2020. The South African government was faced with two legal options: either declare a state of emergency in terms of section 37 of the Constitution or utilize the Disaster Management Act 57 of 2002. The government chose the latter, which allowed the Minister of Co-operative Governance and Traditional Affairs to declare a national state of disaster, following a disaster classification by the National Disaster Management Centre. A state of disaster is declared for a period of three months, after which it can be extended by the Minister month-by-month. It provides the Minister with wide-ranging powers to introduce regulations to manage the situation. However, the use of emergency powers should be selective and focused on the extraordinary phenomenon. The overstepping of or abuse of such powers is contrary to the intention of emergency or disaster law.

Article 4 of the United Nations’ International Covenant on Civil and Political Rights³ makes provision for member states to take measures that derogate from certain human rights obligations in the case of disasters and emergencies. The United Nations’ Human Rights Commission guidelines for emergency measures during the COVID-19 pandemic⁴ require supervision of the exercise of emergency powers as a pivotal ingredient for democracy and the rule of law. They suggest that emergency measures should be subject to periodic and independent review by the legislature and adequate legislative scrutiny.

However, in the case of South Africa, there is no provision in the Disaster Management Act for parliamentary oversight in respect of either the declaration of a disaster or any subsequent extensions, nor is there any legal duty on the Minister to publish reasons for extensions. As there are no such provisions built into the Act itself, the initiative must be taken by parliament to keep the Minister accountable. This can be contrasted with South Korea⁵, where accountability from all levels of government was directly to the Prime Minister. Greece decided on full transparency as their accountability strategy⁶, while in Turkey the Interior Minister resigned after a poorly timed announcement of a weekend curfew which lead to panic buying and widespread unhappiness in April 2020 (ref. ⁶).

Indeed, in South Africa, it took five months from the call from opposition parties and others requesting a roadmap to its end before the state of disaster was eventually ended on 5 April 2022. By the time the state of disaster was ended, South Africa was just exiting the fourth wave of the pandemic, which started in December 2021. This fourth wave did not challenge the health system to the same extent as the previous waves did. Although the pandemic was ongoing, from October 2021 COVID-19 no longer severely affected the ability of governments to deal with it through ordinary means. It therefore stands to reason that the state of disaster could have been ended in October 2021.

In what alternative ways could similar pandemic situations in South Africa be handled in future? Although many of the current non-pharmaceutical measures have become obsolete, some might remain useful to manage the pandemic going forward and should be retained or implemented, taking into account all available evidence globally and regionally^{7,8}. There needs to be a process to (re-)promulgate those regulations that are still required in terms of other (non-disaster) legislation. For instance, in the case of South Africa, this could be accomplished through the National Health Act 61 of 2003.

Regulations through the National Health Act offer a distinct advantage from the vantage point of values of democracy and consultative decision-making: intended regulations must, as a general rule, first

be published for public comment before being promulgated. For South Africa, this would signal a return to normality in policy-making. New regulations must be evidence-based and internally consistent, and should contain a sunset clause or objective indicators on when they will lapse, to prevent them from becoming permanent.

The lesson to be learned from the extension and the delayed transition to normal legislation is that governments should not be perceived as artificially extending states of disaster beyond what is perceived as an actual disaster. This can easily be seen as government over-reach and reluctance to surrender special disaster powers⁹. □

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Competing interests

The authors declare no competing interests.