

Constitutional implications of COVID-19

*Parliament: oversight, law-making
and public participation in lockdown*

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This new contribution seeks to provide a weekly analysis of constitutional issues arising from COVID-19 and the responses to it. In this instalment, I consider the role of Parliament during COVID-19.

Parliament has three main constitutional functions – to make laws, to provide a national forum for public consideration of issues, and to provide oversight over the executive (s 42(3) of the Constitution). When making laws, Parliament is *obliged* to facilitate public participation in the process (s 59(1)(a)). During the lockdown, Parliament ceased to perform these functions as soon as it was suspended. Rather, as I described last week, several ministers promulgated a raft of new regulations in an emergency, executive-driven response to Covid-19.

In my first contribution last week, I commented on the suspension of Parliament and the announcement that measures were being taken to enable the resumption of some parliamentary functions. Those efforts have gathered pace – on 17 April 2020, Parliament's Presiding Officers announced the resumption of Parliamentary business.

Parliament has already set up virtual committee meetings, prioritising government departments driving the COVID-19 response. These include the committees on defence, social development and social services, and co-operative governance and traditional affairs. The Chief Whips have agreed to draft guidelines and rules on the functioning of committees. On the legislative process, the Presiding Officers have framed new rules on the sitting of the two Houses of Parliament. In addition, they are also exploring how questions and oral replies with the Leader of Government Business may work in this new format, and have highlighted the budget as a key area that may require revision in Parliament.

The Constitutional Court has previously considered some of the questions relating to the powers of the government to make laws and implement emergency plans in crisis situations. In one of its earliest decisions in 1995, Executive Council of the Western Cape Legislature, upholding a challenge to legislation purporting to delegate substantial law-making powers to President Mandela, the Court contemplated that situations might arise that require departures from how laws are ordinarily to be made (at para 62):

'It is possible that circumstances short of war or states of emergency will exist from which a necessary implication can arise that Parliament may authorize urgent action to be taken out of necessity. A national disaster such as a result of floods or other forces of nature may call for urgent action to be taken inconsistent with existing laws such as environmental laws. And there may well be other situations of urgency in which this type of action will be necessary.'

In its later decision in 2001 in *Kyalami Ridge Association*, the Constitutional Court had to consider whether government had acted lawfully in setting up an emergency transit camp on the Leeuwkop prison farm to accommodate flood-victims in Alexandra township. The Court held that government had a constitutional duty to provide relief to people in crisis because of natural disasters. The Court further held that government had an obligation to consult the nearby residents, who might be affected by its emergency action.

Read together, these decisions confirm that the Constitution confers reasonably broad powers on the executive to make laws and implement emergency plans in the face of a crisis like COVID-19. But there are still significant limits, including (1) the general obligation to consult those affected by the measures, and (2) the undesirability of leaving the executive to craft and implement the response unchecked by Parliament indefinitely.

The restarting of parliamentary activity from mid-April is to be welcomed. The shift towards executive regulation-making as the primary law-making mechanism may have been necessary in the immediate wake of the crisis, but it threatened to over-reach. There are some matters, such as the national budget, that may certainly not be dealt with through regulations alone. The resumption of parliamentary committees will also provide crucial oversight over the executive's various measures.

However, Parliament's resumption also brings with it serious challenges. The Constitution places great emphasis on public participation in law-making. The Constitutional Court in *Doctors for Life International* held that legislation may even be struck down if public

participation is rushed or inadequate. The Presiding Officers, in light of this, promised that Parliament will share details of opportunities for public participation in parliamentary affairs in these strange times.

Let's be realistic: public participation during conditions of lockdown will obviously be extremely challenging. Ordinarily, it involves several opportunities for participation through public hearings and written submissions. In practice, communities and sectors organise before engaging with Parliament. There is real cause for concern that the public will struggle to engage in the law-making process at present due to the fragmentation of society caused by the lockdown and importantly, due to lack of access. That may well be the price of parliamentary activity on COVID-19-related matters, but it should provide pause before Parliament moves to pass other important legislation. For example, public participation on the constitutional amendment to section 25 of the Constitution and the National Health Insurance Bill was drawing to a close shortly before COVID-19 struck. In relation to major legislation of this sort, Parliament will need to make a careful assessment to ensure that adequate opportunities for public participation were provided before it is passed. As with so much else, this is uncharted territory for our legislatures.

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