

The Law Of Emergencies and Disasters: Reflecting on the High Court of South Africa's *Freedom Front Plus* Decision

Basutu S Makwaiba* and Valantine Mutatu**

ABSTRACT

*Reacting to the Coronavirus disease (COVID-19), a number of countries globally introduced measures to control the pandemic. This was done through the declaration of states of public emergency, states of disaster and public health emergency. The declaration of states of emergency and disaster saw the enactment of Regulations which limited and derogated a number of constitutionally guaranteed rights. Noting a striking resemblance between a state of emergency and disaster, the article saw the need to have a comprehensive discussion on the law of state of emergency and disaster. For this article, it is important to distinguish between a state of emergency and disaster as their declaration call the executive to exercise its state powers. This article will look at the declaration of state of emergency and disaster in Zimbabwe. In the article, we analyse the scope of the declaration of a constitutional state of emergency and disaster, the conditions that necessitate for their declarations and the constraints of government's powers in such instances. The article discusses why it was ideal for the Zimbabwean government to declare a state of disaster in place of a state of emergency when in it responded to the COVID-19 pandemic. In interrogating these issues, we reflect on the High Court of South Africa's *Freedom Front Plus Decision* where the applicant challenged the constitutionality of the South African Disaster Management Disaster Act and argued that the South African government ought to have declared a state of emergency in-lieu-of a state of disaster. The article will explore the international human rights framework which provides the best standard in the limitation and derogation of human rights.*

1. INTRODUCTION

An emergency is a de-facto situation which calls for the state to temporarily change some state structures so that it can more adequately address a situation at hand.¹ For this article, an emergency is 'a state in which normal procedures are

* LLB (Hons), Midlands State University, LLM, Faculty of Law, University of Zimbabwe, Legal Practitioner, Zimbabwe. Email: basutumakwaiba@gmail.com.

** LLB, University of Zimbabwe, MBA and LLM, Midlands State University, PhD Candidate, University of Witwatersrand, Lecturer and Head of Public Law, Midlands State University. Email: mutatuv@staff.msu.ac.zw

1 Andrej Zwitter "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy" (2012) 98 Archives for Philosophy of Law and Social Philosophy 95-111.

suspended and extra-ordinary measures are taken in order to avert a disaster'.² The word emergency has been used in a number of state Constitutions as well as Acts of Parliament.³ Nations may face natural disasters such as earthquakes, floods, droughts that are considered as exceptional dangers which threaten the security, safety and welfare of their peoples.⁴ These circumstances necessitate a declaration of a state of emergency. A state of emergency is a governmental action taken during an extra- ordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crises.⁵ States of emergencies are provided for by state Constitutions which spell out when they can be declared. Before a nation declares a state of emergency, it must satisfy two fundamental conditions. 'The situation must amount to a public emergency which threatens the life of a nation, and the state party must have officially proclaimed a state of emergency'.⁶ States of emergencies have origins in the French Revolution that gained ground in a number of legal systems by the mid-twentieth century.⁷ They date as far back as Roman times where there was practice of putting forward an absolute ruler in cases of external ambush or internal insurrection.⁸ The modern concept of emergencies began in 1789 decree of the French Constituent Assembly.⁹

The concept of a 'disaster' has brought about much discourse and dissent since its founding in the beginning of the 20th century. Smith defines a disaster as an event concentrated in time and space in which a society undergoes physical harm and social disruption, such that all or some of its essential functions are impaired.¹⁰ The United Nations International Strategy for Disaster Reduction defines disaster as a significant disturbance of the operation of a community or a society resulting in widespread human, material, economic or environmental losses and effects which exceeds the capacity of the affected community or society to subsist using its own resources.¹¹ Types of disasters usually fall into broad categories of natural and man-made.¹² Natural disasters in general are

-
- 2 World Health Organisation and European Hematology Association, *Disasters and Emergencies Definitions Training Package*, Pan African Emergency Training Centre, Addis Ababa updated March 2002 by EHA 10.
 - 3 The Zimbabwean Public Health Act (Chapter 15.17) provides for a Public Health Emergency in s 116 of the Act.
 - 4 Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford Clarendon Press 1992).
 - 5 Grossman Claudio, 'A Framework for the Examination of States of Emergency under the American Convention on Human Rights' (1986) 1 American University International Law Review 36.
 - 6 International Covenant on Civil and Political Rights General Comment No.29, States of Emergency (Art 4). General comment on Art 4 (Adopted at the 1950th meeting, on July 2001).
 - 7 Scott P. Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34 Michigan Journal of International Law 496.
 - 8 Oraa (n 4) 4.
 - 9 Sheeran (n 7) 496.
 - 10 Keith Smith, *Environmental hazards: Assessing Risk and Reducing Disaster* (3rd edn, Routledge 2001).
 - 11 International Strategy for Disaster Reduction, *2009 UNISDR Terminology on Disaster Risk Reduction* (Geneva 2009) 9.
 - 12 Paul N Severin and Philip A Jacobson, 'Types of Disasters' in Catherine J Goodhue and Nancy Blake

associated with weather and geological events, including extreme temperatures, hurricanes, floods, earthquakes, volcanic eruptions, landslides and drought.¹³ Naturally occurring epidemics such as the 2014 Ebola,¹⁴ and the 2019 (COVID-19),¹⁵ outbreaks many at times are included in this category.¹⁶ Another category of disasters are man-made which are usually associated with criminal activities or attacks such as explosive, biological or chemical agents.¹⁷ Responding to the COVID-19 disaster, a number of countries in Southern Africa declared states of disaster in terms of their domestic legislation to prevent and suppress the disease. A state of disaster is often provided for in terms of domestic legislation that enables the state to take extra ordinary measures to tackle an existing or imminent disaster.

Declaration of state of emergencies and disasters call forth the use of emergency powers by governments which can be potentially abused. The measures adopted under the declarations may also open on to derogation and infringement of fundamental human rights. Declaration of states of disasters and emergencies are often accompanied by a serious violation of civil liberties. It should be noted that limitation and derogation of human rights are distinct.¹⁸ Limitation of rights entails their justified infringement.¹⁹ The reasoning for allowing for the limitation of human rights is that rights are not absolute or unconditional.²⁰ Derogation of a right refers to its complete or partial elimination.²¹ Derogation of human rights are only allowed in extra-ordinary situations where states face a danger that puts the life of the nation at risk.²²

(eds) *Nursing Management of Pediatric Disaster* (2020) 89.

13 Severin and Jacobson (n 12) 89.

14 'The Ebola virus causes an acute, serious illness which is often fatal if untreated. EVD first appeared in 1976 in 2 simultaneous outbreaks, one in what is now Nzara, South Sudan and the other in Yambuku, DRC. The latter occurred in a village near the Ebola River, from which the disease takes its name. The 2014-2016 outbreak in West Africa was first discovered in 1976. The outbreak started in Guinea and then moved across land borders to Sierra Leone and Liberia...' World Health Organisation 'Ebola virus disease' (2020) <<https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease>> accessed 12 August 2022.

15 'Coronavirus disease (COVID-19) is an illness caused by a novel coronavirus now called *severe acute respiratory syndrome coronavirus*. It was first identified amid an outbreak of respiratory illness cases in Wuhan City, Hubei Province, China. Initially, it was reported to the WHO on December 31, 2019. On January 30, 2020, the WHO declared the COVID-19 outbreak a global health emergency. WHO declared COVID-19 a global pandemic on March 11, 2020' See an article by Abebe C Endeshaw, Dejenie A Tadesse etal "The newly emerged COVID-19 disease: A systematic review" (2020) 17:96 <<https://virologyj.biomedcentral.com/articles>> accessed 12 August 2022.

16 Severin and Jacobson (n 12) 89.

17 Ibid.

18 Dominic McGoldrick, "The interface between public emergency powers and International law" (2004) 2 *International Journal of Constitutional Law* 384.

19 Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (6th edn, Juta and Company 2013).

20 Amrei Mulei "Limitations and Derogations from Economic, Social and Cultural Rights" (2009) 4 *Human Rights Law Review* 559.

21 McGoldrick (n 18) 384.

22 Mulei (n 20 above) 564.

International law advocates for the limitation of rights rather than derogation.²³

This article will look at the declaration of a constitutional state of public emergency and state of disaster in Zimbabwe. The article is divided into six parts, the first being this introduction. The second part discusses the *Freedom Front Plus v President of the Republic of South Africa*,²⁴ (*Freedom Front Plus case*) Decision where the applicant challenged the constitutionality of the South African Disaster Management Act.²⁵ The applicant argued that the government of South Africa ought to have declared a state of emergency in place of a state of disaster. In the case, the Court expounded the contrast between a state of emergency and disaster. The Court also explained the limitation and derogation of human rights under a constitutional state of public emergency and disaster. The third part of the article discusses the international law framework on the limitation and derogation of human rights. The fourth part of the article deliberates on the declaration of a constitution state of public emergency in Zimbabwe. In the fifth part, we discuss the declaration of a state of disaster in Zimbabwe. The fourth and the fifth parts will analyse the scope of a declaration of state of emergency and disaster, the circumstances in which they may be invoked as well as the limitations of a government's power in such situations. The parts will make a distinction between a constitutional state of emergency and a state of disaster analysing their potential impact on fundamental human rights. The sixth part is the conclusion of the article.

2. FACTS AND JUDGMENT IN FREEDOM FRONT PLUS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 22939/2020

In the case, the Court was called to rule on the legality of the South African government's response to COVID-19 crisis in declaring a state of national disaster under the Disaster Management Act.²⁶ Freedom Front Plus, a registered political party, and applicant in the case, brought the application in the interest of the public and its members in terms of section 38 of the South African constitution which provides for the enforcement of rights.²⁷ The applicant argued that the President of the Republic of South Africa ought to have declared a state of emergency in terms of section 37 of the South African constitution.²⁸ Section 37 states as follows:

(1) A state of emergency may be declared only in terms of an Act of

²³ McGoldrick (n 18) 384.

²⁴ 22939/2020.

²⁵ South African Disaster Management Act No 57 of 2002 hereafter "Disaster Management Act".

²⁶ *Freedom Front Plus* (n 24) 2 para 1.

²⁷ *Ibid* 3 para 1.

²⁸ The Constitution of the Republic of South Africa, 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

Parliament and only when-

- (a) The life of a nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and
 - (b) The declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any other legislation enacted or other action taken in consequence of that declaration, may be effective only-
- (a) Prospectively, and
 - (b) For no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than 3 months at a time. The first resolution of emergency must be by a resolution adopted with a supporting vote of majority of the members of the Assembly. Any subsequent extension may be by a resolution adopted with a supporting vote of at least 60 percent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.²⁹

The applicant challenged the constitutionality of the Disaster Management Act and stated that it unjustly limited fundamental human rights contained in the Bill of Rights of the South African Constitution. The judgment was delivered by the Judge President of the Gauteng High Court D Mlambo as well as the judges of the same court N Kollapen and R Keightley.

2.1 The facts

In response to the COVID-19 crisis, the South African government declared a state of disaster under the Disaster Management Act.³⁰ Section 27 of the Disaster Management Act provides for the declaration of a state of disaster and state as follows:

- (1) In the event of a national disaster, the Minister may, by notice in the *Gazette* declare a national state of disaster if-
 - (a) Existing legislation and contingency arrangements do not adequately provide for national executive to deal effectively with the disaster, or
 - (b) Other special circumstances warrant the declaration of a national state of disaster.³¹

²⁹ See also Subsections (3) (4) (5) and (6) of s 37 of the South African constitution (n 28) which provides for powers of a competent court to declare the validity and extension of a state of emergency and the limitations of derogation of rights in a state of emergency.

³⁰ *Freedom Front Plus* (n 24) 2 para 1.

³¹ See also Section 27 (2) of the Disaster Management Act (n 25) which provides for the enactment of

Section 26 of the Disaster Management Act provides for the responsibilities in a state of disaster. The provision provides that:

- (1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.
- (2) The national executive must deal with a national disaster-
 - (a) In terms of existing legislation and contingency arrangements, if a national disaster has not been declared in terms of section 27 (1), or
 - (b) In terms of existing legislation and contingency arrangements as augmented by Regulations made or issued in terms of section 27 (2), if a national disaster has been declared.
- (3) ...

The applicant argued that a declaration of a state of emergency in terms of the Constitution provides safeguards to the exercise of executive power compared to the declaration of a disaster in terms of the Disaster Management Act.³² The applicant stated that under the Disaster Management Act, the Minister for Co-operative Governance and Traditional Affairs (second respondent) could extend a state of disaster unilaterally whereas a state of emergency could only be extended after a debate in the national assembly.³³ Freedom Front Plus further argued that a competent court could decide on the validity of a state of emergency and argued that there was no further similar provision in relation to the declaration of a state of disaster.³⁴ The applicant also averred that the powers of the Minister for Co-operative Governance and Traditional Affairs were extreme and unadulterated and they overpowered the powers of a President under a state of emergency.³⁵ In opposing the application, the respondents stated that the applicant's assumption that, 'the same derogation of rights may occur under a state of disaster as under a state of emergency' was a misconception.³⁶

2.2 The Relief Sought

Applicant sought the following relief from the Court:

1. An order declaring that sections 23 (8), 26 (2) and section 27 of the Disaster Management Act were inconsistent with the Constitution and invalid in so far as these sections did not provide for various safeguards that were found in section 37 of the Constitution which dealt with states of emergency.

regulations or issues for a state of disaster.

32 *Freedom Front Plus* (n 24) 9 para 3.

33 *Ibid* 19.

34 *Ibid* 19.

35 *Ibid* 19 and 20.

36 *Ibid* 20.

2. That the same sections be declared unconstitutional and invalid ‘in so far as national disaster such as COVID-19 pandemic was declared and managed in terms of the Disaster Management Act, imposing a national lockdown and consequent restrictions...’³⁷

2.3 Decision by the Court

On the question of whether to invoke a state of emergency or disaster when exercising powers to limit or derogate fundamental human rights during a national crisis, the Court reiterated that a state of emergency can only be declared when the ‘life of a nation’ is at risk or to ‘restore peace and order’.³⁸ The Court stated that that a disaster does not presuppose a danger to the life of a nation and does not disrupt its peace and structure.³⁹ It was the Court’s reasoning that a declaration of a state of emergency is, ‘undoubtedly an extra-ordinary constitutional measure, and not one that is intended to be used lightly’ as it results in the suspension or derogation of fundamental freedoms.⁴⁰ The Court held that section 37 of the South African Constitution only provides safeguards in so far as the departure from the usual constitutional order is permitted by the section.⁴¹ It emphasised that the Disaster Management Act does not allow the departure from an ordinary constitutional arrangement.⁴² It only allows the state to pass Regulations and directions for a state of disaster.⁴³ The Regulations have the potential to limit fundamental human rights but the limitation should be measured against section 36,⁴⁴ of the Constitution which provides for the limitations of rights.

The Court held that there was no need for the Disaster Management Act to include a direct provision on the competence of the court on the justifiability of the Regulations.⁴⁵ On the applicant’s argument of lack of parliamentary oversight in state of disasters, the Court held that it is as a result of the constitutional departures that are allowed under a state of emergency that parliamentary oversight is explicitly included in section 37 of the South African Constitution.⁴⁶ The Court stated that where no deflections are sanctioned,

37 *Freedom Front Plus* (n 24) 6 and 7.

38 *Ibid* 21.

39 *Ibid* 21 para 2.

40 *Ibid* 21.

41 *Ibid* 22.

42 *Ibid* 22 para 3.

43 *Ibid* 22 para 3.

44 See s 36 of the South African constitution (n 28) which provides for the limitations of rights.

45 The Court further remarked that, ‘The courts may review a declaration of state of disaster, any extension of a state of disaster, and any Regulations enacted under a state of disaster under their ordinary powers to review the exercise of any public power. This power may be exercised under the principle of rule of law entrenched in s 1 (c) of the Constitution and all the provisions of the Bill of Rights... The courts’ powers of review accordingly remain entirely unimpaired under a state of disaster’.

46 *Freedom Front Plus* (n 24) 23.

parliamentary oversight is not imperative.⁴⁷ The applicant's case was dismissed.

The case put forward the differences between a state of emergency and disaster and when the two can be invoked by the executive. The Court in the *Freedom Front Plus* case also explained the limitation and derogation of rights under a state of emergency and state of disaster and whether or not parliamentary oversight is necessary in the declaration of states of disaster. It was the reasoning of the Court that there were no constitutional deviations in the declaration of state of disaster that necessitated the provision of Parliamentary oversight and competence of the courts in the Disaster Management Act. The decision is important for this article as the authors are discussing the declaration of a constitutional state of public emergency and state of disaster. The next part of the article discusses the international law on limitation and derogation of human rights.

3. INTERNATIONAL LAW, LIMITATION AND DEROGATION OF HUMAN RIGHTS

The regional and international human rights framework is the admirable standard for the safeguard and limitation of rights.⁴⁸ The Universal Declaration of Human Rights⁴⁹ states for the limitation of rights in Article 29 (2).⁵⁰ The Declaration affirms that rights and freedoms may be limited in instances of morality, public order and the welfare of a democratic society.⁵¹ The International Covenant on Civil Political Rights⁵² in Article 19 (3) states that rights may be limited as provided for by the law as well as for protection of national security, public order, morals, public health and the rights of others. The International Covenant on Economic, Social and Cultural Rights⁵³ provides for the limitation of rights in Articles 4 and Article 5. The limitation of the rights should be determined by law and should entirely be for promoting the general welfare in a democratic society. The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,⁵⁴ state that public

⁴⁷ Ibid.

⁴⁸ Basutu S Makwaiba "Tension between the individual's fundamental human rights and the protection of the public from infectious and epidemic diseases" (2021) 21 African Human Rights Law Journal 315.

⁴⁹ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

⁵⁰ Art 29 (2) provides that, 'In the exercise of his rights and freedoms, everyone shall be subject to only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the requirements of morality, public order and the general welfare of a democratic society'.

⁵¹ Makwaiba (n 48) 318.

⁵² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966. Entry into force 23 March 1976.

⁵³ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976.

⁵⁴ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on

health may be invoked for limitation of certain rights. Section 25 states that, 'Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population'. The aim of the measures should be the prevention and suppression of the disease.

At international law, a state is allowed to take measures derogating from its obligations under international law when it is faced with a situation which threatens the life of a nation.⁵⁵ The situation must be one that affects the whole of the population or part of the territory. If a state party wants to derogate human rights because of public emergency, it has to give a written notice to the treaty which is responsible for monitoring compliance of state parties.⁵⁶ The measures taken by the state to deal with the public emergency must be 'strictly required by the exigencies of the situation'.⁵⁷ In terms of the International Covenant on Civil and Political Rights (ICCPR) derogation of rights during a state of public emergency is only permissible if it meets the requirements set out in Article 4.⁵⁸ A state of public emergency must be introduced by an official proclamation.⁵⁹

General Comment No. 29 of the UN Human Rights Committee,⁶⁰ on Article 4 of the International Civil and Political Rights also gives guidance on the application of emergency powers. The International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights have no derogation provisions meaning that rights provided therein technically cannot be derogated.⁶¹ A state that has declared a state of public emergency

Civil and Political Rights (1984).

55 Art 4(1) of the International Covenant on Civil and Political Rights (ICCPR); Para 39 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984); See also Art 15(1) of the European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

56 ICCPR (n 55). Art 4(3).

57 Art 15(1) of the European Convention (n 55). See also *Lawless v Ireland* (No.3) Judgment paragraph 22. At para 37, the European Court of Human Rights held that detention without trial in the circumstances was a strictly required measure by the exigencies of the situation.

58 Art 4 of the ICCPR (n 55) provides as follows:

1. In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

59 Para 42 of the Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, 1984.

60 General Comment on Art 4 (adopted at the 1950th meeting, on 24 July 2001).

61 McGoldrick (n 18) 385.

must notify the necessary treaty body of the proclamation. During a state of public emergency, a state may suspend its obligations under international law which may lead to derogations and limitations of fundamental human rights. It is important to emphasise that derogations of human rights and freedoms during states of public emergencies must not be arbitrary. Laws governing states of public emergency must be clear and precise.⁶² The manner in which a state respond to a public emergency is “an acid test of its commitment to the effective implementation of human rights.”⁶³

4. CONSTITUTIONAL STATE OF PUBLIC EMERGENCY IN ZIMBABWE

The Constitution anticipates that a state of public emergency is an inevitable thing and as such it provides for what should happen before and during a state of public emergency.⁶⁴ The declaration of a state of emergency is the preserve of the President.⁶⁵ Declaration of states of emergency do not apply retrospectively. Whilst the Constitution of Zimbabwe⁶⁶ does not state under what circumstances a state of emergency may be declared, it is now clear for this article that a state of emergency can be declared when there is a situation threatening the life of the nation. Reference to a situation ‘threatening the life of the nation’ or a similar phrase is not found in the Constitution. Guidance is however sought from international law to determine circumstances that justify a declaration of public emergency. A state of public emergency can only be declared where the threat to the life of the nation is actual or imminent; its effects must involve the whole nation; the continuance of the organised life of the nation must be threatened; the situation must be exceptional, in that the normal measures or restrictions permitted under international law for the maintenance of public safety, health and order are plainly inadequate.⁶⁷ According to Principle 39 of the ‘Siracusa Principles’ a ‘threat to the life of the nation’ is the one that:

- (a) Affects the whole of the population and either the whole or part of the territory of the State, and
- (b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and project the rights recognised in the Covenant.⁶⁸

62 Ibid 387.

63 McGoldrick (n 18) 388.

64 Laurence R Helfer et al “Emergency and Escape: Explaining Derogations from Human Rights Treaties” (2011) 4 International Organisation 674.

65 Constitution of the Republic of Zimbabwe, 2013 hereafter “Constitution”.

66 Constitution (n 65).

67 Greek Case, Year XII of the European Convention on Human Rights (1969) 72.

68 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (n 54).

The threat to the life of the nation can be caused by natural disasters, war, general insurrection, invasion and disorder. It is important to note that some of the state of emergencies that were declared in Zimbabwe did not meet the 'threat to the life of the nation' threshold.⁶⁹ A state of emergency can only be employed as a last resort since it includes derogation of human rights and freedoms.⁷⁰ The state is expected to take temporary measures that can include the suspension of civil and political liberties to deal with a situation threatening the life of the nation.⁷¹ The measures taken by the state must be suitable to reduce the threat to the nation and must be used only as long as they are necessary.⁷²

Zimbabwe has had considerable experience of state of emergencies, which were declared on several times before and after the independence. A state of public emergency can be declared in the whole or part of Zimbabwe.⁷³ This therefore leaves it to the discretion of the President and maybe exploited by the executive for political motives.⁷⁴ This has always been the case before and soon after Zimbabwe obtained its independence in 1980.⁷⁵ Since Zimbabwe is a party to the ICCPR,⁷⁶ it is obliged to inform the United Nations General Secretary of the rights and freedoms suspended, the reasons for the suspension, and the date when emergency measures will end.⁷⁷

The Constitution however provides for some checks and balances. The Constitution gives Parliament an important function of overseeing the conduct of the state of emergency. The declaration of state of public emergency will cease to have effect after fourteen days calculated from the day of publication of the proclamation in the Gazette, if it has not been approved by at least two-thirds of the total membership of Parliament at a joint sitting of the Senate and the National Assembly.⁷⁸ Anticipating the possibility of the Parliament being dissolved during the fourteen days period, the Constitution provides that in that event the Parliament is dissolved during the period of fourteen days after a state of emergency has been declared, the declaration of a state of public emergency will cease to have effect after twenty-one days, calculated from the day the

69 Greg Linington, *Constitutional law of Zimbabwe* (Legal Resources Foundation 2001). State of public emergencies has been declared as a result of economic and industrial reasons.

70 See Lawless case ECHR Series A Vol. 3 (1961) 28; Greek Case, Year XII of the European Convention on Human Rights (1969) 72.

71 Helfer (n 64).

72 John Hatchard, "Emergency Powers in Zimbabwe: An Overview of Post-Independence Developments" (1986) *Zambia Law Journal* 35.

73 S 113(1) of the Constitution (n 65); see also Second Schedule para 2(2) of the Constitution (n 65).

74 For instance, emergency powers were used to detain acquitted persons, see *Dabengwa and Another v Minister of Home Affairs* 1982 (1) ZLR 233 (H). In this case the applicants were acquitted of treason at their trial and released. After their release, they were re-arrested.

75 Hatchard (n 72) 3. The author argues that the declaration of public emergency that was declared on 5 November 1965 was renewed several times and in January 1986 it was renewed for the 40th time. Between 1980 and 1985, 103 Emergency Powers Regulations and orders were made.

76 Zimbabwe acceded to the Convention on 13 May 1991.

77 See Article 4(3) of the ICCPR (n 55).

78 Section 113(2) of the Constitution (n 65)

proclamation was published in the Gazette.⁷⁹ In the event that the declaration of state of public emergency has not been approved by the Parliament or for any other reason has not been considered by the Parliament within the prescribed time, the President has no option but to revoke the declaration by proclamation in the Gazette within seven days of the lapse of the prescribed time.⁸⁰ It should however be noted that if the President's declaration has not been approved by the Parliament within the prescribed time limit, the President can make a fresh declaration since there is no bar to a fresh declaration.⁸¹

A declaration of a state of public emergency which has been approved by the Parliament has a life span of three months.⁸² If the situation that has necessitated the declaration of a state of public emergency is still tormenting the nation, Parliament can resolve to extend the life span of the declaration but not with more than three months.⁸³ The Parliament can also resolve that the declaration be revoked from its application to some parts of the country and apply to a smaller part.⁸⁴ International law requires that a state of public emergency exist for a short time as much as practicable⁸⁵ since there will be derogations of human rights during that period.⁸⁶ The Constitution is however silent on the number of times the declaration can be renewed,⁸⁷ and this can therefore give a government with parliamentary majority a lee way to use it to advance their political interests.

The validity of the declaration of a state of public of emergency or its extension can only be challenged in the Constitutional Court.⁸⁸ However, any legislation that is passed, any action taken pursuant to a declaration of a state of public emergency, can be challenged in any court.⁸⁹ This empowers the courts to control state of emergencies and guarantee that the constitutional essentials are met. Hafner-Burton et al argue that judicial attitudes shift markedly once a state of public emergency is declared and the courts are more willing to uphold restrictions than during periods of normalcy.⁹⁰ They further argue that if the public emergency is prolonged, the attitude of the courts usually change and they start to hold accountable government for infringing rights.⁹¹

79 Section 113(3) of the Constitution (n 65).

80 Section 113(5) of the Constitution (n 65).

81 Hatchard (n 72) 36.

82 Section 113 (4) of the Constitution (n 65). It should be noted that the current Constitution reduced the life span of the state of public emergency. In terms of section 68(3) of the Lancaster House Constitution of 1980, the life span of a State of Public emergency was six months.

83 Section 113 (6) (a) of the Constitution (n 65).

84 Section 113 (6) (b) of the Constitution (n 65).

85 See *Brannigan and McBride v United Kingdom*, 17 ECHR 539, para 576.

86 See Jean J Rousseau, *The Social Contract and Discourses* (Everyman Paperback Re-Issue edn 1993).

87 Hatchard (n 72) 36.

88 S 113(7) of the Constitution (n 65).

89 S 113(8) of the Constitution (n 65).

90 Helfer (n 64) 681.

91 *Ibid.*

Whilst the Constitution provides that all the rights provided in the Bill of Rights can be limited during a state of public emergency except those listed in section 86(3)⁹² of the Constitution,⁹³ a close look at the Second Schedule would tell that personal liberty,⁹⁴ and freedom of movement,⁹⁵ are the most targeted. The majority part of the Second Schedule is dedicated to detainees.⁹⁶ Paragraph 3 provides for the establishment of the Detainees Review Tribunal which is responsible for reviewing cases of persons who would have been detained during a state of public emergency.⁹⁷ Paragraph 4 is concerned with the basic rights of detained persons.⁹⁸ Paragraph 5 provides for duty of the Detainees Review Tribunal. After reviewing detainees' cases, the Review Tribunal must make written recommendations to the authority that ordered the detention as to whether or not the detainee should continue to be detained.⁹⁹ The responsible authority has no discretion but to act in accordance with the Review Tribunal's recommendations.¹⁰⁰ Paragraph 7 provides that persons who would have been released pursuant to the recommendations of the Review Tribunal on the basis that there is no sufficient cause for the detention cannot be detained again on substantially the same grounds as those on which he or she was originally detained.¹⁰¹ In including this provision, the drafters of the Constitution were mindful of the fact that in the previous state of emergencies, it was not uncommon for persons who would have been released to be re-arrested for the same grounds. Paragraph 8 provides for the right of detainees to challenge the lawfulness of their detention before a court of law even where the case is already before the Review Tribunal.

The checks and balances provided in the Constitution are to keep the powers of the executive in check and guard against their abuse during a state of an emergency. Hatchard warned that if the power of the executive is not checked

92 S 86(3) of the Constitution provides that:

No law may limit the following rights enshrined in this Chapter, and no person may violate-

- (a) the right to life, except to the extent specified in section 48;
- (b) the right to human dignity;
- (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- (d) the right not to be placed in slavery or servitude;
- (e) the right to a fair trial; and
- (f) the right to obtain an order of habeas corpus as provided in section 50(7) (a).

93 Section 87(4) (b) of the Constitution (n 65).

94 Section 49 of the Constitution (n 65).

95 Section 66 of the Constitution (n 65).

96 Para 1 of the Second Schedule of the Constitution defines a detainee as 'a person who is detained under an emergency law that provides for preventive detention'. An emergency is defined as 'a written law that provides for action to be taken to deal with any situation arising during a period of public emergency'.

97 Para 5 of the Second Schedule of the Constitution (n 65).

98 Detainees have rights to be informed as soon as reasonably practicable of the reasons of their detention; right to legal representation, which they must also be informed of in a language they understand; right to be treated humanely and with respect for their inherent dignity as human beings.

99 Para 6 of the Second Schedule.

100 Para 6 of the Second Schedule.

101 Para 7(1) of the Second Schedule of the Constitution (n 65).

‘the temptation to “rule by regulation” becomes very strong and may lead to an abuse of power and unnecessary prolonging of the state of emergency’.¹⁰² The history of state of emergencies in Zimbabwe has shown that the right to personal liberty,¹⁰³ right to legal representation, right to protection of the law (access to the courts) are the rights that are usually trumped upon during a state of public emergency. States of public emergencies are usually characterised by detentions without trials.¹⁰⁴ The challenge which has existed for a long time which was not addressed by the current Constitution is the secrecy surrounding detentions.¹⁰⁵ The Constitution has no provision requiring the publication of detention orders. This therefore may lead to people being detained for quite a long time before their detention is known.¹⁰⁶

History has shown that during states of public emergency access to legal process,¹⁰⁷ and legal representation is usually hindered. The Constitution provides for the right to legal representation and protection of the law. Regulations were often made that restricted access to courts in certain circumstances.¹⁰⁸ In *Austin v Chairman, Detainees’ Review Tribunal*,¹⁰⁹ Dumbutshena CJ, (as he then was) noted that the right to legal representation should not be derogated during public emergency.

It is important to note that derogations of rights during a state of public emergency are a necessary evil.¹¹⁰ However, the extent of such derogation is what needs to be checked. The measures taken by the government to deal with a situation threatening the life of the nation should not exceed what ‘could reasonably have been thought to be required for the purpose of dealing with the situation prevailing.’¹¹¹ Currie and de Waal argue that ‘by providing clear rules as to when they may be declared, and by laying down what may be done during their duration and how abuse of power will be prevented, states of public emergency can be made compatible with the protection of human rights and

102 Hatchard (n 72) 35.

103 Hatchard (n 72) 43.

104 This can be traced as far back to 1959 when the Preventive Detention (Temporary Provisions) Act was passed. In 1965 the (Maintenance of Law and Order) Regulations were made which empowered the Minister to order the indefinite detention of any person where it appeared to him that this was ‘expedient in the public interest’. See also *State v Slatter* HH 313-83; *Haruperi v Minister of Home Affairs...*; in 1984 at least twelve African nations practiced detention without trial.

105 Hatchard (n 72) 45.

106 Hatchard (n 72) 45, See also the *Slatter* case where the accused was constantly moved from one place to another without being afforded legal representation.

107 It was a common feature during apartheid states of emergency in South Africa that the court’s jurisdiction was ousted to determine the validity of legislative and executive measures.

108 In the case of *Granger v Minister of State* SC-83-84, the plaintiff sought damages following his arrest by members of the Central Intelligence Organisation. There were Regulations that purported to exclude any liability for damages attaching to the CIO members. The Supreme Court ruled that that provision was inconsistent with the Constitution and therefore void. See also Emergency Powers (Family Planning) Regulations 1981, SI643/81.

109 1988 (1) ZLR 21 (SC).

110 Hatchard (n 72) 58. See also the case of *Austin* (n 109) 28.

111 *Austin* (n 109) 29.

judicial review.’¹¹²

A declaration of a state of emergency in Zimbabwe brings into action the Emergency Powers Act.¹¹³ The preamble of the Act reads that it is an Act to make exceptional provision for the protection of the community in cases where a declaration of state of emergency has been declared.¹¹⁴ The preamble refers to the declaration of a state of emergency in terms of section 31 J of the old Constitution¹¹⁵ which provided for public emergencies. Section 3¹¹⁶ of the Act states that where a state of emergency has been declared and is in force, it shall be lawful for the President to make such Regulations that are necessary for the public safety, the maintenance of public order, the maintenance of any essential service, the preservation of peace and making adequate provision for terminating the state of emergency. The Appellate Division decision in *S v Hove*¹¹⁷ explained that the purpose of the Act is ‘...to prevent a state of emergency degenerating into a state of anarchy by conferring extra-ordinary powers on the President to deal with it’.

5. DECLARATION OF STATE OF DISASTER IN ZIMBABWE

Section 27 of the Zimbabwean Civil Protection Act,¹¹⁸ provides for the declaration of a state of disaster in Zimbabwe. The section states that:

- (1) If at any time it appears to the President that any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected by the disaster in any area within Zimbabwe, or that circumstances are likely to arise making such measures necessary, the President may in such manner as he deems fit declare that, with effect from a date specified by him in the declaration, a state of disaster exists within the area defined by him in the declaration.

Provided that where such declaration has been made in a manner other than by Statutory Instrument, the President shall, as soon as possible after making it, cause it to be published in a Statutory Instrument.

- (2) The declaration of a state of disaster in terms of subsection (1) shall

112 Currie and De Waal (n 19) 691.

113 Emergency Powers Act (Chapter 11.04).

114 See the Preamble of the Emergency Powers Act (n 113).

115 Constitution of Zimbabwe, as amended on the 14th of September, 2005 (up to and including Amendment No.17).

116 Sec 3 (1) (a)-(f) of the Emergency Powers Act (n 113).

117 *S v Hove* 1976 RLR 127.

118 Zimbabwean Civil Protection Act (Chapter 10.06) hereafter the “Civil Protection Act”. See s 2 of the Act which defines a disaster as a, ‘(a) natural disaster, major accident or other event howsoever caused, or (b) destruction, pollution or scarcity of essential supplies, or (c) disruption of essential services, or (d) influx of refugees, or (e) plague or epidemic of disease’.

remain in force for a period of three months from the date that is specified in the declaration as the commencement of the state of disaster, unless the President in a Statutory Instrument, withdraws such declaration before the expiry of such period.

The Zimbabwean government declared a national state of disaster on the 23rd of March 2020 in respect of the COVID-19 formidable infectious disease. The declaration was made in terms of Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 (published as Statutory Instrument 76 of 2020).¹¹⁹ Section 3 of the Statutory Instrument declared a state of disaster by stating that as a result of the COVID-19 pandemic, a state of disaster existed in all rural and urban areas in Zimbabwe with effect from the proclamation of the notice. Since there is not much provided in terms of the Civil Protection Act as to what the President has to do after making a declaration of State of disaster, the President resorted to the Public Health Act.¹²⁰ The declaration of state of disaster was made pursuant to the declaration of the COVID-19 pandemic as a formidable epidemic disease in terms of section 64(1) (a) of the Zimbabwean Public Health Act. Once a disease is declared as a formidable epidemic disease, the Minister of Health and Child Welfare is obliged to make Regulations to contain the spread of the disease.¹²¹ Section 68 of the Act entitles the Minister of Health and Child Welfare to make Regulations in the case of the occurrence or threatened outbreak of any formidable epidemic disease.¹²²

Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 which were published as (Statutory Instrument 77 of 2020),¹²³ were enacted by the Minister of Health and Child care in terms of the Zimbabwean Health Act.¹²⁴ The Statutory Instrument declared COVID-19 as a formidable epidemic disease until January 2021. Statutory Instrument 77 of 2020 introduced the prohibition of gatherings, compulsory testing and detention to contain COVID-19. Numerous Regulations were passed which had their basis on Statutory Instrument 77 of 2020 which limited and infringed fundamental human rights. The major was the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Consolidation and Amendment) Order, 2020 (published as Statutory Instrument 200 of

119 Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) COVID-19 Notice 2020, Statutory Instrument 76 of 2020.

120 Veritas, 'Bill Watch 14/2020-COVID-19 and the Law' <<https://www.veritaszim.net/node/4074>> accessed 12 August 2022.

121 S 68 (1) of the Public Health Act (n 3).

122 The Minister through the Regulations can order quarantines, the isolation, detention of patients, closure of schools and churches, restrict gatherings in places of of entertainment, order medical examinations, establish isolation hospitals, order the evacuation of persons and the destruction of buildings.

123 Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020, Statutory Instrument 77 of 2020.

124 Public Health Act (n 3).

2020).¹²⁵ The Statutory Instrument introduced a national lockdown, prohibition of gatherings, curfew and limitation of business hours and other measures which severely limited fundamental human rights.

The Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020, No 59 (published in Statutory Instrument 314 of 2020),¹²⁶ were enacted which amended section 3 of the Regulations published in Statutory Instrument 77 of 2020. The effect of the amendment was that, 'the declaration of COVID-19 as a formidable epidemic disease has effect until such a time as Minister may by General notice in the Gazette terminate the declaration'.¹²⁷ On the 2nd of January 2021, the Minister of Health and Child Care responding to rise of COVID-19 cases enacted the Public Health (COVID-19) Prevention, Containment and Treatment) (National Lockdown) (No.2) (Amendment) Order, 2021 (No.9), (published as Statutory Instrument 10 of 2021),¹²⁸ which amended the Regulations published as Statutory Instrument 200 of 2020. The result was to impose level four national lockdown for 30 days from the 3rd of January 2021, prohibit gatherings, enforce a curfew and place limitations on the operations of businesses. The Regulations infringed a number of freedoms in the Bill of Rights including the right to equality and non-discrimination,¹²⁹ freedom of assembly and association,¹³⁰ freedom of conscience,¹³¹ freedom of profession, trade and occupation,¹³² freedom of movement and residence.¹³³

Lawfulness of the Quarantine powers

The question on why it was ideal that the government of Zimbabwe declare a state of disaster instead of emergency was answered in the *Freedom Front* case earlier. A state of emergency can only be declared when the life of a nation is in danger. The question that this part of this article seeks to answer is whether not the declaration of state of disaster in Zimbabwe justifiably limited fundamental human rights? Were the Statutory Instruments passed after the declaration of the state of disaster constitutional? Section 134 of the constitution provides for subsidiary legislation. The section states as follows:

Parliament may, in an Act of Parliament, delegate power to make Statutory Instruments within the scope of and for the purposes laid out

125 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Consolidation and Amendment) Order, 2020, Statutory Instrument 200 of 2020.

126 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020, No 5 published in Statutory Instrument 314 of 2020.

127 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020, No 5 published in Statutory Instrument 314 of 2020. See s 2 (2).

128 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (No.2) (Amendment) Order, 2021 (No.9), published in Statutory Instrument 10 of 2021.

129 S 56 of the Constitution (n 65).

130 S 58 of the Constitution (n 65).

131 S 60 of the Constitution (n 65).

132 S 64 of the Constitution (n 65).

133 S 66 of the Constitution (n 65).

in the Act, but-

- (a) Parliament's primary law-making power must not be delegated,
- (b) Statutory Instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights.¹³⁴
- (c) ...
- (d) ...
- (e) ...
- (f) Statutory Instruments must be laid down before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny.

Chiweshe JP (as he then was) commented on section 134 of the Constitution in the case of *Democratic Assembly for Restoration and Empowerment (Dare) v Newbert Saunyama No*,¹³⁵ as follows:

It has also been argued that in publishing the notices temporarily banning demonstrations, the 1st respondent acted without legal basis and contrary to the provisions of section 134 of the Constitution and in particular subsections (b) and (f). These read:

- b) Statutory Instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights,
- f) Statutory Instruments must be laid down before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny.

I am satisfied that there is no merit levelled against the 1st respondent in this regard. Firstly, the import of section 134 cannot be anything more than this, that a Statutory Instrument that is inconsistent with the provisions of the Constitution or the Act of Parliament under which it is made, is ultra vires and therefore null and void. I do not read section 134 of the constitution to mean that a Statutory Instrument properly made in terms of a valid Act of Parliament may be struck off on account of provisions of section 134 (b). If POSA is constitutionally valid, why would a Statutory Instrument made in terms of its provisions, which is intra vires the parent Act, be deemed invalid? In any event how would a regulating authority communicate to the public his decision lawfully made in terms of section 27 (1) of POSA save by publication of the relevant notice?

The Court endorsed the position that Statutory Instruments properly passed in terms of their parent Acts cannot be invalidated by the provisions of section

¹³⁴ Malawian Constitution of 1994 with amendments through 2017. S 46 (1) states that, 'Save in so far as it may be authorised to do so by this Constitution, the National Assembly or any other subordinate legislative authority shall not make any law, and the executive and agencies of government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention be invalid'.

¹³⁵ HH 589-16.

134 (b) of the Constitution. The Court reinforced the position that Statutory Instruments can be struck out as invalid in terms of section 134 (b) of the constitution if they are ultra vires their parent Acts or the Constitution. The article is of the view that the Statutory Instruments were not passed improperly in terms of the Civil Protection Act.

In the case of *Dongwe v Minister of Health and Child Care*,¹³⁶ the applicant sought an order setting aside the Regulations published as Statutory Instrument 10 of 2021 discussed above. Among other issues, the applicant argued that the Regulations were enacted without parliamentary scrutiny and that the Regulations were passed without the declaration of a state of disaster nor a state of emergency. The applicant argued that the declaration of state of disaster only lasted until May 2020 and was not extended by the government of Zimbabwe. The Court discussed the role of the executive in emergency situations and emphasised that the role is applicable whether a state of emergency has been declared or not.

The Court held that the executive powers in this case were not abused, as it was the government that had the necessary COVID-19 information and the capacity to deal with it. The remarks by the court raise a concern in light of the principle of the rule of law. Zimbabwe is founded on the value and principle of the rule of law.¹³⁷ The most famous exposition of the rule of law came from A.V Dicey who associated the principle with a right based liberalism and judicial review of governmental action.¹³⁸ Others have tracked down the modern ideal to Aristotle, who equated the rule of law with rule of reason¹³⁹ while some have associated the rule of law with respect for human rights.¹⁴⁰ Fuller affirmed that the rule of law commands publicly promulgated rules laid down, in advance, and adherence to natural law values.¹⁴¹ Rule of law should not be taken lightly since it forms one of the foundational values and constitutional principles since 2013. Law of states of disaster and emergencies exist in the Zimbabwean legislation, and the state ought to have invoked them in this instance to limit fundamental human rights. The judgment by the court has potential of being abused by the executive in cases of disasters and emergencies in limiting and derogating fundamental human rights.

Constitutional limitation of fundamental human rights

Constitutionality in terms of the Constitution can be achieved by putting the Statutory Instruments to the section 86,¹⁴² test. Delegated legislation in the

136 HH 38-21.

137 S 3 (1) (a) of the Constitution (n 65).

138 Albert V Dicey, *Introduction to the study of the Law of the Constitution* (1959) 181-205.

139 Judith N Shklar, "Political Theory and the Rule of Law" in Allan Hutchison and Patrick J Monahan (eds) *The Rule of Law: Ideal or Ideology* (1987) 1-16.

140 John Finnis, *Natural law and natural rights* (Oxford University Press 1980) 272.

141 Lon L Fuller, *The morality of the law* (Yale University Press 1964) 42-44.

142 See s 86 of the constitution (n 65) which provides for the limitation of rights and freedoms. S 86 (2) provides as follows:

form of statutory instruments qualifies to be a law of general application. This was explained in the South African case of *Larbi-Odam v MEC for Education (North West Province)*,¹⁴³ where the Constitutional Court held that delegated legislation in the form of Regulation 2 (2) of the ‘Regulations regarding the terms and conditions of employment education’¹⁴⁴ which generally applied to all educators in South Africa was a law of general application. The article submits that the Regulations that were passed in terms of the Civil Protection Act are a law of general application in terms of section 86 of the constitution.

In the case of *Re-Munhumeso*,¹⁴⁵ the Court held that section 20 (2) (a) and 21 (3) of the old constitution,¹⁴⁶ which is similar to section 86 of the constitution, permitted the enactment of laws which infringed the right to freedom and assembly in the interests of public safety and public order to an extent which was justifiable in a democratic society. It is in the interest of the public health and safety that the Regulations in question were enacted. The Regulations were an attempt to prevent and suppress the COVID-19 pandemic. The article concludes that the Regulations are not unreasonable in a democratic society,¹⁴⁷ nor there any less restrictive means of achieving the purpose of limitation.

6. CONCLUSION

The article was set out to analyse the law of emergencies and disasters. Noting an evident likeliness between a state of emergency and disaster, the authors saw it key to have a discussion on the law of emergencies and disasters. The article was divided into six parts. The first part was the introduction which introduced and defined the terms emergency and disaster. The introduction noted that the declaration of states of emergencies and disasters conjure-up the use of emergency powers which can likely be abused. It distinguished between

The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent to which the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, taking into account all relevant factors, including:

- (a) The nature of the right concerned;
- (b) The purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
- (c) The nature and extent of the limitation;
- (d) The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights of others;
- (e) The relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose, and
- (f) Whether there are any less restrictive means of achieving the purpose of the limitation.

143 CCT 2/97.

144 ‘Regulations regarding the terms and conditions of employment education’ (sic) Contained in government gazette 16814 GN R 1743 of 13 November 1995 (‘the Regulations’).

145 1994 (1) ZLR 49 (S).

146 Constitution of Zimbabwe (n 115).

147 See the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786.

the limitation and derogation of human rights. The introduction established that the limitation of human rights entails a legitimate violation of human rights while derogation means the absolute or partial eradication of the freedoms. In the second part we discussed the facts and judgment in the *Freedom Front Plus* case. In the case, the applicant argued that the President of South Africa ought to have declared a state of emergency in-lieu of a state of disaster. The Court held that a state of emergency can only be declared when there is a danger to the life of a nation. The Court explained the distinction between a state of emergency and disaster. The third part of the article discussed the international law on the limitation and derogation of human rights. The part established that under international law, a state is allowed to take measures which have an effect on limiting and derogating human rights during extra-ordinary situations. The part entrenched that the limitation and derogation of human rights should be in terms of the law and should foster the welfare of the society. The measures taken by the executive should not exceed what is reasonable in dealing with the situation. The fourth and the fifth parts discussed the declaration of a constitutional state of public emergency and disaster in Zimbabwe. The parts discussed the law governing their declarations and the circumstances which necessitate their pronouncement. The main argument of this article is that while the declaration of emergency is necessary, it should be done within the confines of the constitution.