

POLICE AND POWER IN A PANDEMIC: REFLECTIONS ON THE RISE OF POLICE BRUTALITY DURING COVID-19 AND ITS IMPLICATIONS ON SOCIAL JUSTICE IN SOUTH AFRICA

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Abstract

The global COVID-19 pandemic came at a time of already increasing police brutality and has since accelerated this nationwide issue. This increasingly frequent behaviour is due to the calling of a state of disaster, the limiting of fundamental rights by force, and the overlooking of essential methods that help to hold the police accountable. This article will critically reflect on the increase in police brutality in South Africa during the initial lockdown period, highlighting how it affects social justice.

1 Introduction

It has been more than a year since the initial case of the respiratory syndrome coronavirus 2 (SARS-CoV-2) was identified in five patients in Wuhan, China.¹ This was later deemed COVID-19 and labelled a pandemic by the World Health Organization. South Africa's National

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1 J Zamoarini et al 'COVID-19 and the uniqueness of South Africa' (2020) 35 *Southern African Journal of Infectious Diseases* at 1.

Institute of Communicable Diseases confirmed its first case on 5 March 2020.² To this current date (22 June 2021) 58 795 people have reportedly died from COVID-19 in South Africa.³ With numerous restrictions on the rights to freedom of movement and freedom of trade, and the implementation of curfews and a nationwide lockdown, a necessary authority is required to enforce the law. However, the increase in the need for policing and the lack of well-defined parameters of enforcement have opened a large gap for the police to abuse its power and utilise unnecessary force.

The police are, first and foremost, public servants. They are the people who are meant to protect the civilians of society and to assist with the enforcement of fundamental rights in the Bill of Rights. Enshrined in sections 13(3)(a) and 13(3)(b) of the South African Police Service Act,⁴ is the requirement that when a member of the police is executing an official duty, that duty must be done with due regard to his or her powers in a manner that is reasonable, and that should force be used, it ought to be minimum force which is reasonable in the presented circumstances. This has, however, not been the case during the national lockdown.

With the killing of George Floyd in the city of Minneapolis, USA, at the knee of a police officer, the police have become an ironic symbol for violence and crime. The global community has become more politically conscious and aware of injustices perpetrated by those in authority. During the initial outbreak of the pandemic in Kenya, the police killed seven people and caused injuries which led to the hospitalisation of 16 when enforcing a curfew imposed on 27 March 2020.⁵ In Nigeria, 18 people were killed by police during its lockdown.⁶ In response to the surge in violence, people across the globe have retaliated against the police and are now demanding accountability from law enforcement.⁷

South Africa has unfortunately not been immune to events of police brutality. This article will critically reflect on the increase in police brutality in South Africa as a result of the South African government's attempts to manage the pandemic by initially outlining how a state of disaster encourages brutality, followed by how COVID-19 affects the most vulnerable of South African citizens.

2 C Sawnepoel & M Labuschaignen 'Between a rock and a hard place: COVID-19 and South Africa's response' (2020) 7 *Journal of Law and the Biosciences* at 5.

3 COVID-19 Corona Virus South African Resource Portal <https://sacورونا.virus.co.za/> (accessed 22 June 2021).

4 South African Police Service Act 68 of 1995.

5 Amnesty International *COVID-19 crackdowns: Police abuse and the global pandemic* (2020) at 4.

6 Amnesty International (n 5) 15.

7 Staff Writer 'George Floyd Death: Clashes as protests spread across US' *BBC News* 30 May 2020 <https://www.bbc.com/news/world-us-canada-52857334> (accessed 22 June 2021).

Consequently, an in-depth analysis of both the South African Defence Force and the South African Police Service during the first stage of the lockdown will take place.

2 How a state of disaster encourages brutality

Prior to analysing the increase in police brutality in South Africa, one must understand the legislation behind the master plan for addressing COVID-19. Dr Nkosazana Dlamini-Zuma (the Minister of Cooperative Governance and Traditional Affairs) declared a national state of disaster under section 27(1) of the Disaster Management Act.⁸ A national state of disaster entails the implementation of regulations that restrict the rights of people in a state, such as the right of movement or congregation, in order to mitigate the damage produced by an external natural disaster such as an earthquake, hurricane, or in the case of COVID-19, a pandemic.⁹ Despite the number of confirmed cases only topping 61 with zero deaths at the time, a national state of disaster was declared on 5 March 2020 and right-limiting legislation ensued.¹⁰ The Constitution provides regulations that address emergencies such as wars or natural disasters, however, with regard to public health crises' and especially one of this magnitude, there are instances where it falls short. Despite the implemented regulations being considered necessary by officials in the efforts to slow the spread of the virus, they are regarded amongst the strictest worldwide.¹¹

On 10 April 2020, Collins Khosa was brutally killed by blunt force trauma to the head when the South African National Defence Force (SANDF) confronted him and his brother-in-law after finding a bottle of alcohol in his yard during the national ban on alcohol sales. Not only did the SANDF have no reason to enter the premises, it also denied having abused Khosa despite eight eye witnesses attesting that the soldiers poured beer on Khosa and his brother-in-law, strangled Khosa, and hit him with the butt of a rifle to reportedly 'prove a point'.¹² Once this matter was brought to the Gauteng High Court, it was stated in the Founding Affidavit that had the commanding officers responded promptly and effectively to the incidents of lockdown brutality by developing a proper Code of Conduct or by reminding

8 Disaster Management Act 57 of 2002.

9 Disaster Management Act (n 8) sec 27(1).

10 eNCA 'Coronavirus cases in SA rise to 61' 15 March 2020 <https://youtu.be/ErUeNJ2utVQ> (accessed 19 February 2021).

11 P Whittle *The Implementation of the Disaster Management Act Regulations for COVID-19 and the Justice and Security Sector: A Provincial Overview* (2020) at 2.

12 G Nicolson 'Eight Witnesses saw soldiers assault Collins Khosa' *Daily Maverick* (Johannesburg) 10 June 2020 <https://www.dailymaverick.co.za/article/2020-06-10-eight-witnesses-saw-soldiers-assault-collins-khosa-ipid-report/> (accessed 19 February 2021).

security forces of their legal obligation, then Collins Khosa may have not been killed at the hands of the SANDF.¹³ The Court further held that Use of Force Guidelines must be developed and publicised.¹⁴ Prior to the judgment of *Khosa*, no formal guidelines for policing conduct during a state of disaster such as COVID-19 had been published.

In terms of a state of disaster, it rests on section 36 of the Constitution to limit certain rights.¹⁵ Pertaining COVID-19 in South Africa, limitations have taken the mode of national regulations proposed by Ministers. These range from, but are not limited to, the Minister of Cooperative Governance and Traditional Affairs to the Minister of Transport.¹⁶ These regulations lack involvement or oversight from Parliament, which is standard practice for a state of emergency. A state of emergency that is utilised for instances of state security entails that fundamental rights can be suspended temporarily for no more than three months at a time, whereas under a state of disaster, said period of right limitation can be extended with ease by notice in the Gazette.¹⁷ This can be seen by the extension of the regulations throughout 2020 and even into 2021. One can then argue that the duration and prolonging of said regulations have encouraged an environment wherein the police are ever-present. It is further argued that cases of police brutality are more likely to rise as these regulations persist.

Regulations imposed under the state of disaster have been critically analysed and many of these regulations have been brought to court. For example, the case of *De Beer v Minister of Cooperative Governance and Traditional Affairs* was brought before the North Gauteng High Court where various regulations promulgated under section 27 of the Disaster Management Act were invalidated.¹⁸ It was revealed that the Court ignored the threshold test for the limitation of rights as well as the rationality test (the word ‘rationality’ was used as a synonym for ‘constitutionality’) with regards to newly implemented regulations to mitigate the spread of COVID-19. Thus, regulations that were implemented seemingly lacked the necessary parliamentary oversight, therefore contributing to a lack of concise

13 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* 2020 (3) ALL SA 190 (GP) (*Khosa*) para 35.

14 *Khosa* (n 13) para 44.

15 Constitution of the Republic of South Africa, 1996 (Constitution) sec 36.

16 J Brickhill ‘Constitutional Implication of COVID-19: The Striking Down of Lockdown Regulations’ 07 June 2020 <https://juta.co.za/press-room/2020/06/07/constitutional-implications-covid-19-striking-down-lockdown-regulations-issue-14/> (accessed 19 February 2021).

17 L le Roux ‘Human Rights during a state of Emergency’ April 2020 <https://www.lexisnexis.co.za/lexis-digest/resources/covid-19-resource-centre/practice-areas/public-law/human-rights-during-a-state-of-emergency> (accessed 14 April 2021).

18 2020 11 BCLR 1349 (GP).

governing legislation. Parliament overlooked the procedure of limiting rights under the Constitution whilst enacting regulations. This enabled the police to do the same when enforcing these regulations. It was further emphasised that any action taken under the National Disaster Management Act must comply with all constitutional provisions relating to the limitation of rights subject to parliamentary and judicial control.¹⁹ It can be argued that the lack of stringent oversight with the implementation of a state of disaster has resulted in policing methods and conduct being overlooked where penalties for the breaking of regulations are present, but the methods and manners of enforcement have been left to be fulfilled 'off the cuff'.

The limitation of rights has led to provisions such as section 49(1)(b) of the Criminal Procedure Act,²⁰ which determines the amount of force allowed when apprehending resisting offenders, being strategically ignored thus furthering police brutality. An example of a regulation that encourages such brutality is Regulation 11E of the Disaster Management Act which provides that 'no person is entitled to compensation for any loss or damage arising out of any act or omission by the enforcement officer under these Regulations'.²¹ Such a regulation suggests a way out for policing misconduct and enables law enforcement to evade accountability. In conjunction with the aforementioned writing, it can be determined that official oversight mechanisms have malfunctioned at a crucial time as foundational codes of conduct for exercising power during a state of disaster have not been formulated.²²

In addition to a lack of policing guidelines being implemented, there already exists a culture within law enforcement of flouting the rule of law, and the state of disaster has seemingly made an excuse for excessive force.²³ Rhetoric that encourages abuse of power disguised under the veil of 'necessary force' has been damaging to the country during lockdown. As discussed in *Khosa*, the speech of several high-ranking law enforcement members has seemingly encouraged police abuse. On 7 April 2020 in a national address by the Minister of Police, the police force was encouraged to 'push South Africans back to their homes if they refuse' and it was further stated that 'it is our duty, if you want to protect yourself and the rest of us, we must start by protecting you ... so we need to push a little bit'.²⁴ These

19 IM Rautenbach 'Unruly Rationality, Two High Court Judgments on the Validity of the COVID-19 Lockdown Regulations' 2020 (4) *Tydskrif vir die Suid-Afrikaanse Reg* at 830.

20 Criminal Procedure Act 51 of 1977.

21 *Khosa* (n 13) para 43.

22 J Brickhill (n 16).

23 Parliament of the Republic of South Africa 'IPID Investigations of Public Complaints of Police Misconduct During the Lockdown Period' 27 April 2020 https://static.pmg.org.za/200429IPID_Investigations_during_Lockdown.pdf (IPID) at 5.

24 *Khosa* (n 13) para 39.

statements took place after previous mentions of the fact that the people were not listening to the police. Although subliminal, one could argue that said speech was aggressive in nature.

Following the words of the Minister of Police, the now suspended executive member of the Matjhabeng Local Municipality endorsed police brutality by instructing the SADF to ‘not hesitate to *skop* and *donder*’ citizens when enforcing the state of disaster lockdown.²⁵ It can be understood that a fine line between the constitutionality and efficiency of force must be balanced, however, it must be reinforced that the South African Police Service Act²⁶ must continue to be complied with especially in terms of section 13 which outlines that the exercising of power and functions are always subject to the Constitution with due regard to the fundamental rights of every person.²⁷

3 The effects of COVID-19 on vulnerable citizens in South Africa

COVID-19 has already widened the divide between wealth and poverty with upper-end wage earners having the freedom to work remotely and maintain a ‘semi-stable’ income during a pandemic, whilst the poorer majority of South African citizens have been financially compromised immensely as the majority of the lower-paying jobs require in-person interactions.²⁸ This financial impact is illustrated by the increase of unemployment by 2.2 million people in the third quarter of 2020 alone.²⁹

In a climate where millions of South Africans are already infected with tuberculosis, HIV, or both, and where only 16 percent of the population has access to medical aid, COVID-19 is affecting the vulnerable far more than those with financial and social security.³⁰ It is now even more imperative that the government manages the pandemic in a way that promotes the upliftment of society, rather than the degradation thereof. The COVID-19 regulations have negatively affected the informal sector and poorer communities of South Africa which lack food security and access to water.³¹ This has

25 *Khosa* (n 13) para 37.

26 South African Police Service Act 68 of 1995.

27 *Khosa* (n 13) para 58.

28 CDH ‘The COVID-19 effect: Its impact on industries and how to reduce insolvency risks’ 5 May 2020 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/business-rescue-newsletter-5-may-the-covid-19-effect-its-impact-on-industries-and-how-to-reduce-insolvency-risks> (accessed 20 June 2021).

29 Stats SA ‘Quarterly Labour Force Survey’ 12 November 2020 <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2020.pdf> (accessed 14 April 2021).

30 Swanepoel & Labuschaignen (n 2) comment 2.

31 Swanepoel & Labuschaignen (n 2) 3.

resulted in more cases of lockdown infringements arising in poorer, more vulnerable areas out of mere necessity.³² People who leave their houses for water or food due to a lack of access to basic sanitation and food security run the risk of violating lockdown restrictions. With more restrictions presumably taking place in poorer communities, a greater policing presence would responsively exist in poorer areas in South Africa when compared to their wealthier counterparts.³³ This therefore means that the poor and most vulnerable become most susceptible to police brutality.

4 Abuse by the SAPS and SANDF resulting in the infringement of fundamental rights

Police brutality and the violent abuse of power are systematic and deeply set in the foundations of modern South Africa as the echoes of the apartheid-era law enforcement ring to this day. The disadvantaged black citizens who felt the harsh hand of the apartheid police force form part of the same group that remains vulnerable to abuse by the South African Police Service.³⁴ The COVID-19 pandemic has only accelerated an already rampant epidemic of police brutality.³⁵

The Independent Police Investigative Directorate (IPID) is the arm of government tasked with investigating public complaints of police misconduct and holding said officers accountable. The IPID provided a summary of investigations of police misconduct during the initial lockdown period of 26 March to 17 April 2020.³⁶ Its total intake of cases during COVID-19 operations amounted to 403 cases of misconduct.³⁷ Within the context of excessive force, 152 cases of assault by police officers arose between 26 March and 17 April 2020.³⁸ The IPID further recorded that there were five deaths due to excessive use of force and 37 discharges of official firearms.³⁹ The most poignant fact is that in total, the COVID-19 cases account for 49.4% of all cases investigated by the IPID for the previously mentioned period.⁴⁰ Despite President Cyril Ramaphosa's call for respect,

32 Swanepoel & Labuschaignen (n 2) 4.

33 Andrew Harding 'Coronavirus in South Africa: Unravelling the mystery' *BBC News* 19 December 2020 <https://www.bbc.com/news/world-africa-55333126> (accessed 24 June 2021).

34 IPID (n 23) 5.

35 As above.

36 IPID (n 23) 5.

37 IPID (n 23) 6.

38 As above.

39 IPID (n 23) 6.

40 As above.

humility, and compassion at the SAPS training academy prior to the 21-day lockdown, these abhorrent instances still ensued.⁴¹

The words ‘underfunding’ and ‘underspending’ are synonymous to the IPID. The IPID does not have the necessary revenue to take on its vast case load. In terms of the IPID’s overall expenditure and performance, the department’s Administration Programme reportedly declined from its 86% performance target in the 2018/19 financial year to 33% in the 2019/20 financial year.⁴² Voids exist in the number of reports due to reporting being more difficult during the pandemic. If one wants to lodge a complaint, one must open a case at one’s nearest police station and only report to the IPID office if the police fail to or is unable to assist.⁴³

This is inherently biased against civilians who are assaulted by police officers as they may encounter the same police officers at the station. A victim of rape who was raped by a police officer, for example, has to face the possibility of encountering the person who raped them when reporting the crime. Furthermore, the requirement to be physically present to report is inefficient as people may fear contracting COVID-19 at such places. Other issues, such as not being able to afford the airtime or travel fees to report an act of abuse by a police officer, need to be considered. A new problem emerging from this requirement is that in the context of COVID-19 where masks are mandatory for both police officials and civilians, identification of perpetrators faces are obscured thus making it harder to identify the police official who is abusing their position.⁴⁴

Independent and journalistic reporting has been fundamental in highlighting the use of excessive force by the government. Social media has been able to give every person a voice and has exposed activity by the police that would otherwise have been easily hidden. Not only does it bring former issues to light, but it is also far more wide-reaching than traditional media.

41 D Knoetze ‘Police kill three people three days lockdown normal South Africa date reveals’ 1 April 2020 <https://www.groundup.org.za/article/police-kill-three-people-three-days-lockdown-normal-south-africa-data-reveals/> (accessed 16 February 2021).

42 Parliamentary Monitoring Group ‘Budget Review and Recommendation Report of the Portfolio Committee on Police on the Independent Police Investigative Directorate (IPID) performance for the 2019/2020 financial year dated 25 November 2020’ (2020) at 1.

43 South African Government ‘Lodge a Complaint About Police Misconduct’ <https://www.gov.za/services/victim-empowerment/lodge-complaint-about-police-misconduct?gclid> (accessed 19 February 2020).

44 A Faul ‘State abuses could match threat COVID-19’ *Reliefweb* 2 April 2020 <https://reliefweb.int/report/south-africa/state-abuses-could-match-threat-covid-19-itself> (accessed 16 February 2021).

On the first day of the national lockdown, the police deployed 24 000 officers who were armed with guns and sjamboks instead of sanitisers and thermometers.⁴⁵ On the streets of Hillbrow in Johannesburg, rubber bullets were used to enforce lockdown restrictions.⁴⁶ The South African Human Rights Watch argued that it is imperative that the police engage with the public to gain their trust and enhance their protection.⁴⁷ It is of primary concern that the fundamental human rights of everyone in South Africa, such as freedom and security of the person and the right to life, remain intact.⁴⁸

On Sunday 29 March 2020, a 41-year-old man named Sibusiso Amos, was shot by lockdown enforcement officers while he was under his home's veranda. During the incident, children aged 5, 6, and 11 were also injured.⁴⁹ Many SAPS and SANDF officials have taken it upon themselves to use their own methods of 'discipline and punishment'. Controversial videos had surfaced on social media of officials pushing Soweto residents, who were not obeying lockdown laws, to do push-ups and perform squats in the streets.⁵⁰ Despite this not being physically violent, these sorts of measures are a blatant abuse of power. CBS Evening News compiled various videos of security forces firing rubber bullets at people contravening lockdown laws and similar cases of police officers making people hold a squat and kicking them back into position where they were unable to do so.⁵¹ Many videos also show such disciplinary actions taking place with police officers without the required personal protective equipment (PPE) such as masks.⁵²

5 Recommendations

For police brutality to be curbed, the reformation of the police as a whole is required. In the American context of 2020, a viral theory of

45 AllAfrica 'South Africans Accuse Police, Soldiers of Heavy-Handedness During COVID-19 Lockdown' 30 March 2020 <https://www.youtube.com/watch?v=adNAF6Sph4I> (accessed 23 March 2021).

46 Knoetze (n 41).

47 Human Rights Watch 'South Africa: Set Rights-Centered COVID-19 Measures' 7 April 2020 <https://www.hrw.org/news/2020/04/07/south-africa-set-rights-centered-covid-19-measures> (accessed 20 February 2021).

48 SA Human Rights Commission 'Media statement SAHRC continues to monitor human rights observance and calls for calm' 31 March 2020 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2298-media-statement-sahrc-continues-to-monitor-human-rights-observance-and-calls-for-calm> (accessed 19 February 2021).

49 Human Rights Watch (n 47).

50 C Cilliers 'Watch police and SANDF force Soweto residents to do hard exercise as punishment' The Citizen 30 March 2020 <https://citizen.co.za/news/covid-19/2262188/watch-police-and-sandf-force-soweto-residents-to-do-hard-exercise-as-punishment/> (accessed 18 February 2021).

51 IPID (n 23).

52 AllAfrica (n 45).

defunding the police emerged and sparked a new conversation.⁵³ However, I would argue that overfunding is not the issue in South Africa. Rather, it is the misplacement and mismanagement of allocated funds. Revenue should be placed in institutions such as the IPID, and training and teaching methods of de-escalation should be encouraged instead of fuelling an already tense situation. If SAPS is to attempt to redeem its reputation, it would be in its own interests to purposefully repress the reports that display acts of unlawfulness. Collusion between SAPS and the IPID (which encourages the suppression of accounts of police brutality) may arise due to the economic and governmental power SAPS currently holds over the IPID. Independence between the SAPS and the IPID is therefore essential. The police should be legally held accountable with punishments equal to those of civilians for the same action. The dismissal or suspension of violent police officers is not an adequate solution.

Enforcement agencies must avoid arresting and detaining individuals for merely breaching lockdown regulations as this only increases the risk of contagion and might further the spread of COVID-19.⁵⁴ The exercise of police power must always follow the principles of necessity and proportionality.⁵⁵ The COVID-19 pandemic must be treated, first and foremost, as a public health crisis that requires evidence-based public health measures steeped in respect for human rights. It is further required that new legislation that is accurate, decisive, and that respects fundamental human rights is created and old legislation is amended to align itself with the aforementioned principles. The education of members of the public on their fundamental rights and the ability that they have to report and pursue civil litigation for damages in such instances, would ensure that their suffering is not overlooked by the state.⁵⁶

6 Conclusion

The severe increase in police brutality during the COVID-19 pandemic has only accelerated an already prominent trend of abuse of power and violence. This has also led to a deterioration of the relationship between law enforcement and the public with the deterioration making it difficult to enforce beneficial laws due to the already

53 UCLA Criminal Justice Program 'What happens after we defund the police? A brief exploration of alternatives to law enforcement' (2020) at 1.

54 Amanda Khoza 'How South African prisons are managing COVID-19' *New Frame* 16 September 2020 <https://www.newframe.com/how-south-african-prisons-are-managing-covid-19/> (accessed 23 June 2021).

55 Amnesty International (n 5) 5.

56 Saferspaces 'Police Brutality in South Africa' 31 August 2011 <https://www.saferspaces.org.za/understand/entry/police-brutality-in-south-africa> (accessed 20 February 2021).

existing distrust prior to the pandemic.⁵⁷ Furthermore, in uncertain times with rampant misinformation being spread, people are bound to question COVID-19 regulations. Therefore police must, at all costs, be held accountable for its undue violence in order for this devastating addiction to be curbed.

57 J Modise et al 'Service delivery, law enforcement and trust: A South African Police Service Perspective' (2020) 32 *Alternation* at 227.