

Annexure Four

COVID-19 restrictions and the impact on criminal justice and human rights

South Africa



By

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1. Introduction

This report focuses on the South African government's response to the COVID-19 pandemic. The report reviews the following thematic areas:

- Documenting rights violations linked to the State Disaster
- The impact of COVID-19 on the criminal justice system
- The operation of oversight institutions during COVID-19
- Access to information and public engagement
- Innovative, effective and efficient responses to COVID-19

2. Documenting rights violations linked to the State of Disaster

2.1. South African government COVID-19 measures

On 15 March 2020, the South African government declared a national state of disaster in response to the COVID-19 pandemic.¹ The government also issued COVID-19 measures to control the spread of the virus.² Amongst others, these measures prohibited gatherings, suspended visits to prisons and closed schools.³

On 27 March 2020, the government placed the country on a lockdown due to increasing cases of COVID-19 and introduced stricter 'drastic' measures, initially for a period of 21 days (ending 15 April) but then extended it for another 15 days, effectively ending on 30 April 2020.⁴ In addition to the aforementioned restrictions, additional regulations were issued. Amongst others, this included the prohibition against anyone, except essential workers from leaving their homes; restrictions on movements between districts, metropolitans and provinces; the closure of businesses except for those rendering an essential service; the closure of public places, entertainment, cultural and religious other institutions and the prohibition on the sale of liquor and tobacco, e-cigarettes and related

¹ South African Government, "Disaster Management Act 57 of 2002," accessed April 13, 2022, <https://www.gov.za/documents/disaster-management-act>.

² South African Government, sec. 27(2)(4).

³ "Disaster Management Act Regulations, 2002 Published in GN No. 318 on 18 March 2020." (n.d.).

⁴ Staff, "South Africa's Ramaphosa Extends Lockdown by Two Weeks," *Reuters*, April 9, 2020, sec. Emerging Markets, <https://www.reuters.com/article/us-health-coronavirus-safrica-ramaphosa-idUSKCN21R364>.

products.⁵ The government's COVID-19 response and resultant measures, as gleaned from desktop research, are highlighted in an earlier report.⁶

The lockdown measures imposed by the government severely curtailed citizens' freedoms and fundamental rights with the objective of curbing the spread of the virus.⁷ Although the lockdown measures applied to all, the impact of COVID-19 weighed most heavily on those who can least afford to bear the burden - the poor, marginalised and vulnerable as they also bore the brunt of the enforcement of these measures.

The COVID-19 restrictions have changed over time depending on the infection rate in the country. The South African government adopted a five-level 'COVID-19 Alert System' to manage the gradual easing of the lockdown measures.⁸ The risk-adjusted approach is guided by several criteria, including the level of infections and rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions.⁹ Level five contains the most restrictive measures and level one is least restrictive as most normal activities can resume.¹⁰ The timeline of changes in the level and restrictions imposed in South Africa since the inception of the pandemic can be accessed on the government portal set up to disseminate information to the public.¹¹ A brief description of the changes, during the first year of the pandemic can be found in our previous research report on South Africa. Despite the government's strategy to ease the level of restrictions over time, unfortunately, the impact of COVID-19 will have lasting implications as they recover from the economic turmoil presented by the pandemic.

⁵ "Disaster Management Act Regulations, 2002 Published in GN No. 318 on 18 March 2020, as Amended by GN No. 43148 of 25 March 2020." (n.d.).

⁶ L Muntingh, J Mangwanda, K Petersen & J Redpath, "Criminal Justice, Human Rights and COVID-19 - a Comparative Study of Measures Taken in Five African Countries - Kenya, Malawi, Mozambique, South Africa and Zambia," File (Africa Criminal Justice Reform, October 13, 2021), <https://acjr.org.za/acjr-publications/combined-covid-19-report-13-10-2021-final.pdf/view>.

⁷ "Constitution of the Republic of South Africa, 1996" (n.d.), sec. 9(2), 17,18,21, 22 and 31.

⁸ Department of Health, "Directions Issued in Terms of Regulation 3(3) of the Regulations Made under Section 27(2) of the Disaster Management Act, 2002: Criteria to Guide the Determination of Alert Level," Pub. L. No. GN. 43599 (2020), https://www.gov.za/sites/default/files/gcis_document/202008/43599rg11158gon867_0.pdf.

⁹ "About Alert System," accessed April 13, 2022, <https://www.gov.za/covid-19/about/about-alert-system>.

¹⁰ Section 1, Directions: Criteria to Guide the Determination of Alert Levels.

¹¹ "About Alert System"; South African Government, "Regulations and Guidelines - Coronavirus COVID-19," COVID-19, accessed April 13, 2022, <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19>.

The State of Disaster was lifted on 5 April 2022 but then reinstated again on 18 April 2022 due to severe flooding and devastation in the KwaZulu Natal province.¹²

2.2. Problematic COVID-19 measures

There were a number of measures, particularly at the start of the national lockdown - during levels five and four, that can be viewed as problematic from a rights and enforcement perspective.

Some regulations can be viewed as unreasonable and unnecessary as it serves no rational basis to curbing the spread of COVID-19. For example, the COVID-19 measures noted that individuals could only leave their homes to purchase essential goods or perform an essential service. As a result, there were reported incidences of people's bags being searched in public and them being arrested and fined for buying non-essential items.¹³ Moreover, under level four of the lockdown regulations, which came into effect on 1 May 2020, outdoor exercise was limited to three hours and only between 06h00 and 09h00 and movement was limited to a five-kilometre radius from home. Those breaking the exercise curfew also faced arrest and penalisation. Subsequently, in January 2021, the Supreme Court of Appeal noted the irrationality of this measure and declared it invalid.¹⁴

Minor children whose parents are divorced and share custody, and their parents' rights were negatively impacted by directions issued on 30 March 2020 by the Minister of Social Development prohibiting the movement of children between co-holders of parental responsibilities and rights. This Directive was later amended because of the outcry by the co-holders of parental responsibilities and rights, to ensure that existing parenting plans made by an order of the court and those registered with the Family Advocate's office, are implemented whilst exercising precautionary measures that will

¹² Cooperative Governance & Traditional Affairs, "End of State of Disaster in Sight for South Africa," Cooperative Governance and Traditional Affairs, February 11, 2022, <https://www.cogta.gov.za/index.php/2022/02/11/end-of-state-of-disaster-in-sight-for-south-africa/>.

¹³ Thinus Ferreira, "The Bachelor SA's Marc Buckner Claims He Was Arrested during Lockdown in Instagram Post," *News24*, April 10, 2020, sec. Channel, <https://www.news24.com/channel/TV/News/the-bachelor-sas-marc-buckner-claims-he-was-arrested-during-lockdown-in-instagram-post-20200410>.

¹⁴ "Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021)," accessed April 14, 2022, <http://www.saflii.org.za/za/cases/ZASCA/2021/9.html>. The Court declared it invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometres from a person's residence.

prevent the spread of COVID-19 infection.¹⁵ The Direction as it stood was still highly problematic as children, whose parents share custody under mutual responsibility were left out of the arrangement.

For a brief period from late March 2020 to 2 April 2020, the initial set of regulations excluded street vendors, hawkers, spaza shops and other informal activities and jobs from the list of ‘essential services.’ They were excluded, whilst large commercial enterprises and supermarkets continued to operate. When the lockdown was enforced, street vendors were summarily stopped from trading which led to a loss of income and stock losses of perishable goods. The situation was partly remedied on 2 April 2020 when amendments were made to the regulations which allowed spaza shops and informal traders (excluding those selling cooked food) selling essential goods to operate; provided they secure a permit from their local ward councillor or municipality.¹⁶ Unfortunately, this too resulted in confusion amongst informal traders who were either not aware that they needed to apply for a permit or where bureaucracy prevented them from getting a permit to operate. As a result, many traders were arrested, detained and fined.¹⁷ Similarly, the plight of informal recyclers or ‘wastepickers’ who were overlooked by the regulations sparked an outcry after it was reported in the media in June 2020 that two ‘waste pickers’ were arrested on 14 April 2020 and spent three months in prison because they were trying to collect plastic.¹⁸ They were released on 8 July 2020 after legal intervention. This is an example of the poor being forced to choose between survival and breaching the lockdown regulations. The individuals were detained for minor contraventions of the law during a public health crisis, but consequently exposing them to a heightened risk of infection. This was an unreasonable and counterproductive response to dealing with a public health crisis.

¹⁵ Sharlene Naiker, “Minister Lindiwe Zulu Sends Direction for Amendment of Shared Custody Regulations during Coronavirus COVID-19 Lockdown,” South African Government, April 8, 2020, <https://www.gov.za/speeches/minister-lindiwe-zulu-sends-direction-amendment-shared-custody-regulations-during>.

¹⁶ Mosima Rafapa GroundUp, “Lockdown: Street Vendor Says She Can Now Feed Family of 17 under Relaxed Regulations,” *News24*, April 6, 2020, sec. News24, <https://www.news24.com/news24/SouthAfrica/News/lockdown-street-vendor-says-she-can-now-feed-family-of-17-under-relaxed-regulations-20200406>.

¹⁷ Timeslive, “In Pictures: Street Vendor Arrested for Selling Goods during Lockdown,” *TimesLive*, April 6, 2020, <https://www.timeslive.co.za/news/south-africa/2020-04-06-in-pictures-street-vendor-arrested-for-selling-goods-during-lockdown/>; Naledi Shange, “Help for Woman Arrested Selling Atchaar during Lockdown in Soweto,” *TimesLive*, April 23, 2020, <https://www.timeslive.co.za/news/south-africa/2020-04-23-help-for-woman-arrested-selling-atchaar-during-lockdown-in-soweto/>; GroundUp, “Lockdown”; Peoples Coalition, “Experience of Food Vendors during Lockdown: A Snapshot of the Cape Town, Johannesburg and EThekweni Municipalities,” May 25, 2020, <https://aet.org.za/wp-content/uploads/2020/05/C19Peoples-Coalition-Experience-of-Food-Vendors-during-Lockdown.pdf>; Lucas Nowicki, “Police Arrest Shopkeeper for Trading without a Permit,” *GroundUp News*, March 31, 2020, <http://www.groundup.org.za/article/covid-19-police-arrest-shop-employee-trading-without-permit/>.

¹⁸ Chanel Retief, “Lockdown Detentions: Arrested Waste Pickers Languish in Tshwane Jail,” *Daily Maverick*, June 9, 2020, COVID.

The COVID-19 measures made provision for the creation of temporary shelters for the homeless in order to protect them from the virus. The measures authorised enforcement officers to relocate them in order to preserve their own and others' lives. This created huge challenges in that shelters were not immediately available when the lockdown started and there was an outcry from the media and international organisations regarding the deplorable conditions of temporary shelter sites lacking basic services and amenities, and not enabling social distancing, nor providing medical screening and COVID-19 testing.¹⁹ Furthermore, the interpretation of the rules also created enforcement challenges as it was reported that enforcement officers were 'rounding up' homeless people and placing them in quarantine facilities.²⁰

2.3. Enforcement of COVID-19 measures

The enforcement of measures within the first few days of the lockdown was accompanied by rampant abuse of power and excessive use of force which can be categorised as brutal. Numerous videos emerged depicting police and soldiers kicking, slapping, whipping and shooting alleged lockdown violators.²¹ Furthermore, law enforcement officials were also seen discharging water cannons and rubber bullets, and forcing people into humiliating positions.²² It was reported that by 31 March 2020,

¹⁹ David McKenzie and Brent Swails, "South Africa Gathered Homeless People into a Sports Stadium. Here Too, Coronavirus Divides Rich from Poor," *CNN*, April 2, 2020, <https://www.cnn.com/2020/04/02/africa/homeless-community-south-africa-coronavirus-intl/index.html>; MSF Medical Humanitarian Aid, "South Africa: COVID-19 Pandemic Lockdown Demands Safer Temporary Shelters," COVID-19, April 15, 2020,

<https://www.msf.org.za/news-and-resources/press-release/south-africa-covid-19-pandemic-lockdown-demands-safer-temporary>; Alex Mitchley, "200 Homeless People Escape Tshwane Temporary Lockdown Shelter Due to Bad Conditions," *News24*, April 1, 2020, sec. News24, <https://www.news24.com/news24/SouthAfrica/News/exclusive-200-homeless-people-escape-tshwane-temporary-lockdown-shelter-due-to-bad-conditions-20200401>; Theolin Tembo, "Strandfontein Homeless Shelter Described as a 'Concentration Camp,'" *IOL*, April 9, 2020, <https://www.iol.co.za/news/south-africa/western-cape/watch-strandfontein-homeless-shelter-described-as-a-concentration-camp-46502470>.

²⁰ Emile Bosch, "Stories from the Streets: Homelessness during the Time of Covid-19," *TimesLIVE*, April 6, 2020,; David McKenzie, Brent Swails, "Cost of Failing to Respond to Virus Could Be 'Unimaginable,'" *CNN*, April 2, 2020, <https://edition.cnn.com/videos/world/2020/04/01/south-africa-coronavirus-covid-19-pandemic-homeless-quarantine-mckenzie-intl-ldn-vpx.cnn>; "South Africa Gathered Homeless People into a Sports Stadium. Here Too, Coronavirus Divides Rich from Poor"; Nowicki, "Police Arrest Shopkeeper for Trading without a Permit"; Naledi Shange, "Help for Woman Arrested Selling Atchaar during Lockdown in Soweto"; Timeslive, "In Pictures: Street Vendor Arrested for Selling Goods during Lockdown."

²¹ Joseph Cotterill, "South Africa Uses Water Cannon and Rubber Bullets to Enforce Lockdown," *Financial Times*, March 29, 2020, <https://www.ft.com/content/bad47729-32be-4865-b68a-27506158f023>; Andrew Faull Today, "State Abuses Could Match the Threat of Covid-19 Itself," *Daily Maverick*, April 13, 2020, <https://www.dailymaverick.co.za/article/2020-04-02-state-abuses-could-match-the-threat-of-covid-19-itself/>.

²² Joseph Cotterill, "South Africa Uses Water Cannon and Rubber Bullets to Enforce Lockdown."

police had reportedly killed three people.²³ A glean at the annual reports of the Independent Police Investigative Directorate (IPID), the police watchdog tasked with investigating public complaints of police misconduct and holding said officers accountable, shows that the COVID-19 pandemic only accelerated an already rampant epidemic of police brutality.²⁴ Moreover, the IPID data also shows an increase in case intake by IPID and also in assault cases reported against police and municipal law enforcement officials, which increased from 65% in 2017/18 to 69% by 2020/21.²⁵ In April 2020, the United Nations (UN) Human Rights Office raised concerns about the use of excessive force in several countries, including South Africa, as governments enforced lockdowns in a bid to curb the spread of COVID-19.²⁶ It was further reported that the UN received reports of police using rubber bullets, tear gas, water bombs and whips, to enforce social distancing, especially in poor neighbourhoods in South Africa.²⁷

There was an increase in the number of people being arrested by SAPS during the COVID-19 period²⁸ and there is enough evidence reported in the media that the poor and vulnerable such as the homeless, informal traders or workers such as hawkers, waste pickers and so forth were mostly impacted by the enforcement of curfew measures and stay at home orders. Moreover, the 2021 annual report of the National Prosecuting Authority (NPA) also shows that for the month of April 2020 – which is more or less the first month since the onset of the lockdown, failure to confine oneself to

²³ D Knoetze, "Police Kill Three People in Three Days of Lockdown. This Is Normal for South Africa," *GroundUp News*, April 1, 2020, <http://www.groundup.org.za/article/police-kill-three-people-three-days-lockdown-normal-south-africa-data-reveals/>.

²⁴ M Du Plessis, "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," *The Pretoria Student Law Review* 15, no. 1 (November 8, 2021): 44, <https://doi.org/10.29053/pslr.v15i1.3657>.

²⁵ Independent Police Investigating Directorate, "Annual Report 2020/21" (Pretoria: IPID, 2021), 38; Independent Police Investigating Directorate, "Annual Report 2018/19" (Pretoria: IPID, 2019), 38.

²⁶ Al Jazeera, "UN Raises Alarm about Police Brutality in COVID-19 Lockdowns," *Al Jazeera*, April 28, 2020, <https://www.aljazeera.com/news/2020/4/28/un-raises-alarm-about-police-brutality-in-covid-19-lockdowns>; Azarrah Karrim, "Covid-19: UN Human Rights Office Concerned by Excessive Force, Death Reports during SA Lockdown," *News24*, April 28, 2020, sec. News24, <https://www.news24.com/news24/SouthAfrica/News/un-human-rights-office-highlights-toxic-lockdown-culture-in-sa-20200428>.

²⁷ "UN Raises Alarm about Police Brutality in COVID-19 Lockdowns," *Al Jazeera*, April 28, 2020, <https://www.aljazeera.com/news/2020/4/28/un-raises-alarm-about-police-brutality-in-covid-19-lockdowns>; Azarrah Karrim, "Covid-19: UN Human Rights Office Concerned by Excessive Force, Death Reports during SA Lockdown," *News24*, accessed April 19, 2022, <https://www.news24.com/news24/SouthAfrica/News/un-human-rights-office-highlights-toxic-lockdown-culture-in-sa-20200428>.

²⁸ SAPS, "Annual Report 2015/16" (Pretoria: South African Police Service, 2016); SAPS, "Annual Report 2016/17" (Pretoria: South African Police Service, 2017); SAPS, "Annual Report 2017/18" (Pretoria: South African Police Service, 2018); SAPS, "Annual Report 2018/19" (Pretoria: South African Police Service, 2019); SAPS, "Annual Report 2019/20" (Pretoria: South African Police Service, 2020); SAPS, "Annual Report 2020/21" (Pretoria: South African Police Service, 2021).

his or her place of residence, accounts for 56.8% of the total new cases enrolled in district courts.²⁹ Poorer communities in South Africa lack access to basic goods and services such as water, shelter and they rely on their freedom of movement and the informal economy to survive for food security. COVID-19 measures restricting freedom of movement, are more likely to be transgressed by the poor, not out of defiance, but out of necessity to provide for their families. It can therefore be assumed that a greater policing presence would responsively exist in poorer areas in South Africa when compared to more affluent areas, making them more susceptible to police brutality.³⁰

It appears that at the start of the pandemic law enforcement officials were functioning without guidelines to manage the public health crisis. Policing and handling of suspects remained the same and no training was provided. On 15 May 2020, in a case challenging lockdown brutality, the High court ordered the South African security services to develop and publish a Code of Conduct and operational procedures, regulating the conduct of members of the South African security service in giving effect to the declaration of the State of Disaster.³¹ Subsequently after the judgement, the Minister of Police and Defence issued a joint Code of Conduct for enforcement officers during the State of Disaster.³² Amongst dealing with issues such as the respective codes of conduct, it also deals with guidelines on the enforcement of the disaster management regulations and any other regulations issued during the state of disaster, guidelines on arrest of a person and alternative means of securing an arrested person's attendance at trial and guidelines about enforcing social distancing and the restriction of movement and other activities, at each of the different stages of the state of disaster.

2.4. Penalties, sanctions and prosecutions for rights violations

The penalties and or sanctions for any person or business who failed to comply with the COVID-19 measures is a fine or imprisonment for a period not exceeding six months or to both a fine and imprisonment.³³ The extent to which informal penalties 'bribes' took place, is not widely disseminated in the media. Corruption Watch noted that 11% (4,780) of reports it received during the pandemic

²⁹ "National Prosecuting Authority Annual Report 2020/21," n.d., 46, https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202020_2021.pdf.

³⁰ Du Plessis, "POLICE AND POWER IN A PANDEMIC," 44.

³¹ "Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)," para. 146, accessed April 13, 2022, <http://www.saflii.org/za/cases/ZAGPPHC/2020/147.html>.

³² South African Government, "Code of Conduct for Enforcement Officers during the State of Disaster" (2020), https://www.saps.gov.za/newsroom/code_of_conduct_form_enforcement_officers.pdf.

³³ South African Government, "COVID-19: Regulations and Guidelines."

alleged corruption by the South African Police Service (SAPS) and claims of bribery accounted for 27%.³⁴

Whether or not the sanction meted out for a COVID-19 violation is appropriate or proportionate should be seen against the backdrop of poverty, equality and the fact that most of the COVID-19 measures for which people were being punished for was not previously criminalised. Some of these restrictions, such as the curfew and stay at home orders, particularly enforced at the beginning of the pandemic, were most likely to be violated by the poor and marginalised and the consequence of having a criminal record for breaking the rules is highly disproportionate and inappropriate under these circumstances.

There were numerous reported incidents of arbitrary arrests and detention, assaults, excessive use of force, torture and killings by law enforcement officials. These include amongst others, the widely media reported case of Petrus Miggel, Collins Khosa, Ishmael Gama and Adane Emmanuel.³⁵

During a parliamentary briefing on 29 April 2020, the IPID provided a summary of deaths as a result of police action related to COVID 19 operations within the first few weeks of the lockdown.³⁶ One notable case was that of Collins Khosa from Alexandra, who was allegedly beaten to death on 10 April 2020 by members of the military and law enforcement on his own property during the lockdown.³⁷ Law enforcement entered Khosa's residence for a search and seizure of liquor, and Khosa was brutally assaulted and died. The Khosa family approached the High court in a bid to force government to

³⁴ BUSINESSSTECH, *The Most Common Types of Corruption during Lockdown in South Africa*, 2021, <https://businesstech.co.za/news/government/478755/the-most-common-types-of-corruption-during-lockdown-in-south-africa/>.

³⁵ Daneel Knoetze, "Details of Two Additional Alleged Lockdown Killings by Police Revealed," *GroundUp News*, April 30, 2020, <http://www.groundup.org.za/article/details-two-additional-alleged-lockdown-killings-police-revealed/>; Daneel Knoetze, "Gauteng Police Have Killed Hundreds, but SAPS Leaves Brutal Cops Unchecked," *News24*, July 5, 2021, sec. News24, <https://www.news24.com/news24/southafrica/news/gauteng-police-have-killed-hundreds-but-saps-leaves-brutal-cops-unchecked-20210705>; Andisiwe Makinana, "Collins Khosa Murder: Military Ombud Finds That Soldiers Acted Improperly," *Timeslive*, August 19, 2020, <https://www.timeslive.co.za/politics/2020-08-19-collins-khosa-murder-military-ombud-finds-that-soldiers-acted-improperly/>.

³⁶ Independent Police Investigative Directorate, "PowerPoint Presentation on Police Misconduct Cases," <https://pimg.org.za/committee-meeting/30164/>.

³⁷ "Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)," accessed April 13, 2022, <http://www.saflii.org/za/cases/ZAGPPHC/2020/147.html>; Andisiwe Makinana, "Military Ombud Finds That Soldiers Acted Improperly."

intervene in the alleged heavy-handedness.³⁸ The case is notable as it challenged lockdown brutality in court. The applicants asked the Court to confirm existing rights protection available to citizens during a state of disaster and to ensure that government, and by implication the public, are aware of the requirements.³⁹ The court confirmed that all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency: the right to human dignity, the right to life, the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way. The court ordered the South African security services to instruct all its members to act in accordance with the Constitution and the law and to develop and publish a code of conduct and operational procedures, regulating the conduct of members of the South African security service.⁴⁰

With regards to officials being held accountable for rights violations (i.e., internal discipline, charged, prosecuted, convicted, sentenced, and imprisoned), from available annual reports from SAPS, IPID, NPA and the South African Defence force, the data does not disaggregate COVID-19-related employee disciplinary transgressions and sanctions. This is despite the fact that some of these institutions provided statistics to the media and Portfolio Committee on COVID-19.⁴¹ The IPID reported to the Portfolio Committee on Justice and Correctional Services on 8 May 2020 and noted that they received a total of 828 cases against the police between 26 March and 5 May 2020, a spike of 200 cases when compared to the same period in 2019.⁴² Included in the recent statistics were 32 alleged killings by police, 18 reports of deaths in custody, 25 torture cases, eight allegations of rape by police officers and 589 assault cases. Only 379 of the total number related directly to police lockdown operations. To date, it does not appear as if anyone has been held liable for lockdown brutality.

³⁸ Azarrah Karrim, "South Africa: UN Human Rights Office Highlights 'Toxic Lockdown Culture' in Nation," *News24Wire*, April 28, 2020, sec. News, <https://allafrica.com/stories/202004280220.html>; "Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)."

³⁹ "Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)."

⁴⁰ "Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)," para. 146.

⁴¹ Andisiwe Makinana, "IPID Investigating More than 700 Cases of Police Misconduct since Lockdown," *TimesLive*, October 12, 2020, <https://www.timeslive.co.za/news/south-africa/2020-10-12-ipid-investigating-more-than-700-cases-of-police-misconduct-since-lockdown/>.

⁴² PMG, "Police Misconduct in COVID-19 Lockdown with Minister & IPID," § Police Portfolio Committee (2020), <https://pmg.org.za/committee-meeting/30164/>.

3. The impact of COVID-19 on the criminal justice system

The pandemic and accompanying COVID-19 measures had a notable impact on the criminal justice system and affected the due process rights of arrested persons and detainees in South Africa.

3.1. Detainees' rights and amenities

The State of Disaster declared on 15 March 2020 resulted in the closure of all prisons to civilian visits.⁴³ Not only were visits by friends and families to prisoners stopped, but so were the visits by Independent Correctional Centre Visitors (ICCV) mandated under the Correctional Services Act. Only telephonic communications in urgent matters, via the Head of Centre, were allowed between inmates and the legal representatives in this phase.⁴⁴ This had obvious implications for the right to legal representation. This also prevented visits under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), to which South Africa is a party, since the Judicial Inspectorate for Correctional Services (JICS) forms part of the National Preventive Mechanism (NPM) under the South African Human Rights Commission (SAHRC), as designated by South Africa in June 2019. Although restrictions have been somewhat eased, families are still allowed only two non-contact visits per month (April 2022) under level 1.⁴⁵

3.2. Due process

The steady increasing numbers in remand, (data available only for the Western Cape) suggests a general slowdown of the system.⁴⁶ This increasing number in the initial early lockdown period suggests that trials were delayed or that bail applications were either unsuccessful or delayed, although there were mitigating measures attempting to prevent this, including bail via video remand (see further on mitigating measures below).

⁴³ L Muntingh, "Africa, Prisons and COVID-19," *Journal for Human Rights Practice* 12, no. 2 (August 31, 2020): 284–92.

⁴⁴ *Regulation 4(2) GN 460 Government Gazette N. 43225, 2020*

⁴⁵ Correctional Services, "Directions: Measures to Prevent the Spread of COVID-19 in All Correctional Centres and Remand Facilities in South Africa" (2021), sec. 5(3), https://www.gov.za/sites/default/files/gcis_document/202107/44883gon647.pdf.

⁴⁶ Jean Redpath, "OP-ED: Number of Awaiting-Trial Prisoners Increases under Lockdown," *Daily Maverick*, July 27, 2020, <https://www.dailymaverick.co.za/article/2020-07-27-number-of-awaiting-trial-prisoners-increases-under-lockdown/>.

Courts were only open for urgent matters during level 5 (“hard” lockdown).⁴⁷ Urgency was not defined, which left this open to the court to decide. If an accused person qualified for police or prosecutorial bail, bail was to be determined and issued by a police officer or prosecutor; an accused person arrested for a petty offence must be released and warned to appear in court on a future date, while an accused person who does not qualify for police or prosecutorial bail nor to be released on warning, was remanded to court during the lock-down period to apply for court bail.⁴⁸

The Minister of Justice and Correctional Services issued Directions on the functioning of courts (‘Court Directions’) to provide guidelines of the cases courts will deal with during level 4.⁴⁹ In level 4, bail applications were heard at courts subject to the following qualifications:

- An audio-visual link could be used for unopposed bail applications for a charge listed in Schedule 1, 5 or 6 of the Criminal Procedure Act.
- An accused person arrested for a petty offence do not need to apply for bail as they will be released and warned to appear in court on a future date.

Opposed cases in less serious matters were to be postponed. Only the following were to be heard under level 4:

- first court appearances;
- guilty pleas;
- trials, involving
 - corruption, sexual offences, gender-based violence and femicide;
 - serious violent crimes, robbery, murder;
 - violation of COVID-19 regulations;
 - cases where accused persons are in detention;
 - finalization of partly heard matters, which can be completed;
- proceedings under section 63A of the Criminal Procedure Act (bail due to overcrowding);
- all matters where children are detained in Child and Youth Care Centres and Correctional Centres must be brought before court for consideration of continued detention, and
- applications for leave to appeal, appeals and reviews.⁵⁰

All other criminal trials enrolled during level 4 had to be postponed, except trials where special arrangements have been made with the judicial officer hearing the matter.

⁴⁷ Africa Criminal Justice Reform, “The Operation of Courts, Police and Correctional Services during COVID19 Lock-down (Updated)” (ACJR, April 14, 2020), <https://acjr.org.za/resource-centre/acjr-infosheet-1-covid-cjs.pdf>.

⁴⁸ ACJR, “The Operation of Courts, Police and Correctional Services during COVID-19 Lock-Down,” April 14, 2020, <https://acjr.org.za/resource-centre/acjr-infosheet-1-covid-cjs.pdf>.

⁴⁹ ACJR, “COVID-19 ALERT LEVEL 4: The Operation of Courts, Police & Correctional Services,” May 15, 2020, <https://acjr.org.za/resource-centre/acjr-infosheet-1-update-15-5-2020-1.pdf>.

⁵⁰ ACJR.

Ongoing provisions, such as restrictions on public access to the courts, differing by court, continued to apply after the move to level 3 and down to level 1.

3.3. Efforts to reduce overcrowding

South African prisons are routinely overcrowded. The World Prison Brief recorded 154 437 inmates in 2020 in South Africa against an official capacity of 110 000.⁵¹

The Correctional Services Act makes provision for the earlier release of sentenced prisoners and mandates the President to authorise the early release of any sentenced prisoner subject to the conditions laid down by the Correctional Supervision and Parole Board, or Minister, in the case of persons sentenced to life imprisonment.⁵² Such a remission of sentence was announced by the President some three months prior to the COVID-19 lockdown on 16 December 2019 resulting in the release of 15 911 low-risk sentenced prisoners.⁵³ The following prisoners were excluded from the December 2019 remission and the same criteria were applied when the planned release of some 19 000 prisoners was announced in early May 2020 as a result of COVID-19:

- prisoners serving sentences for sexual offences, child abuse, violations under the Domestic Violence Act, murder, attempted murder, armed robbery, sedition, high treason, sabotage and terrorism;
- offenders declared as dangerous by a court;
- offenders sentenced to life imprisonment;
- any escaped/absconded inmate who evaded the justice system after being released on bail pending appearance and was still at large on 16 December 2019, and
- those certified as mentally ill and detained accordingly.

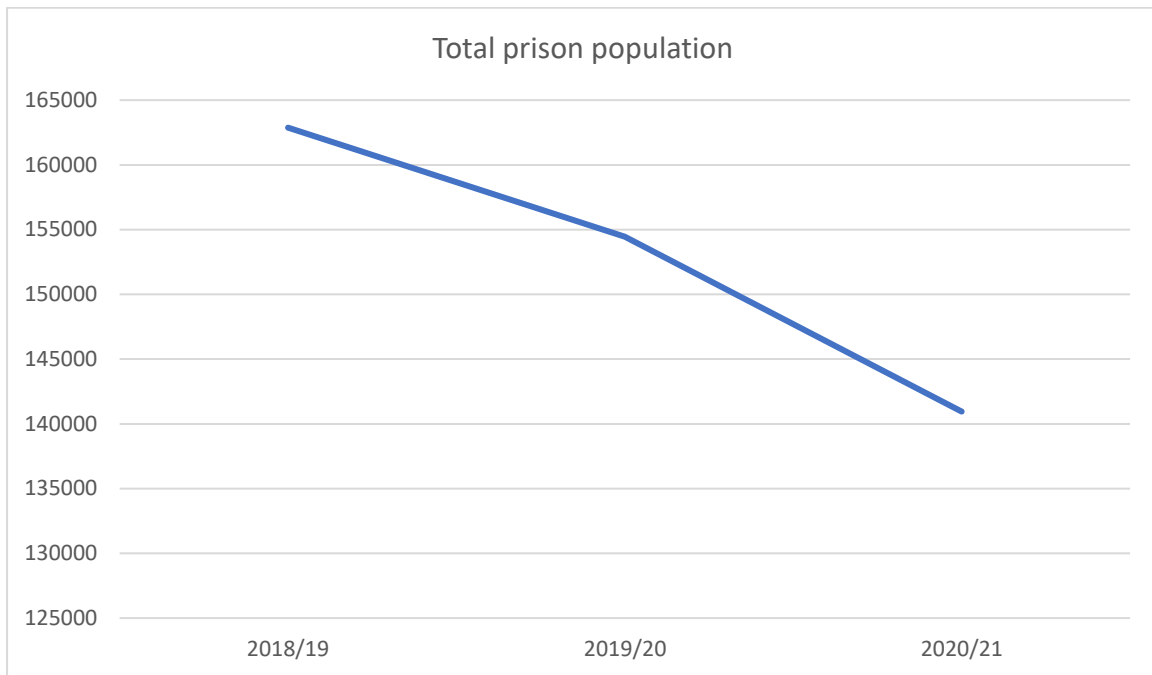
In terms of the May 2020 remission, the President authorised the consideration of parole for selected low-risk qualifying sentenced offenders who had or will have reached their minimum non-parole period (generally half of the sentence imposed) within five years. The overall result from both remissions, as well as other factors that could impact on criminal justice process was a significant decline in the total prison population, as shown in Figure 1 below.

⁵¹ 'World Prison Brief, South Africa' <<https://www.prisonstudies.org/country/south-africa>> [accessed 20 April 2021]

⁵² Constitution of the Republic of South Africa, 1996, sec. 9(2), 17,18,21, 22 and 31; "Correctional Services Act 111 of 1998" (n.d.), sec. 82(1).

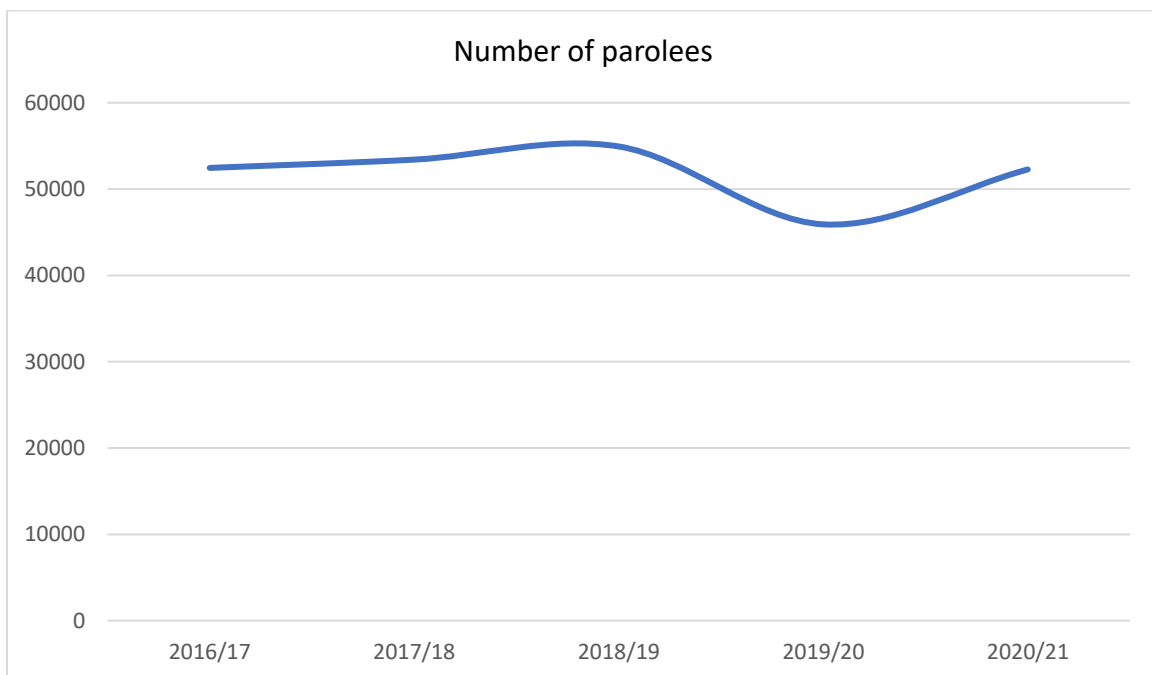
⁵³ Department of Correctional Services, "Annual Report 2019/20" (Pretoria: Department of Correctional Services, 2020), 13; R Lamola, "Press Statement: Minister Ronald Lamola: Special Coronavirus COVID-19 Parole Dispensation Statement," May 8, 2020, <https://www.gov.za/speeches/minister-ronald-lamola-special-covid19-parole-dispensation-statement-8-may-2020-0000>.

Figure 1: Total prison population



Even though there is some uncertainty as to exactly how many prisoners were released, there was some effect seen in the number of people placed on parole and the data from 2020/21 show a notable increase from the previous year indicating that the remissions had some impact (see Figure 2).

Figure 2: Number of parolees



A number of pre-existing factors enabled the releases following the remission announcements:

- remissions are provided for in law and there is ample precedent.
- there is a well-established parole system with clear guidelines in law, regulations and standings orders.
- the entities making the decisions for release are clearly mandated and understand their roles.
- the categories identified (i.e., non-violent offences) were broadly acceptable to the public thus avoiding a backlash.

The enforcement of lockdown provisions increased the number of remand detainees initially.⁵⁴ By March 2021 the total number of prisoners had dropped to 140 948, of which 34% were remand detainees.⁵⁵ That reduction suggests that admissions and releases since 2020 have favoured releases. For sentenced offenders, releases may be the result of parole. A possible interpretation is a reduction in the extent to which serious crime is being addressed by the criminal justice system, as more serious offences have stricter bail requirements and longer sentences.

4. Socio-economic impact of COVID-19 restrictions

The pandemic measures had severe socio-economic consequences for citizens. Amongst others, it impacted job security, employment, crime, social development, access to health care and education.

4.1. Impact on employment

The Quarterly Labour Force Survey (QLFS), published by Statistics South Africa (SSA), is a household-based sample survey on the labour market activities of individuals aged 15–64 years.

The QLFS for the third quarter of 2020 shows that from March 2020 to June 2020, the number of employed people dropped from 16.4 million to 14.1 million – a drop of 2.2 million jobs. Almost 14 percent or more than one in seven jobs were lost in only three months.⁵⁶

⁵⁴ Redpath, “OP-ED.”

⁵⁵ ‘World Prison Brief, South Africa’ <<https://www.prisonstudies.org/country/south-africa>> [accessed 20 April 2021]

⁵⁶ “Statistics South Africa - Quarterly Labour Force Survey Quarter 4,” 2021, <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2021.pdf..>

Jobs increased slightly by 543 000 as restrictions eased from June to September 2020. However, year-on-year there were 1.684 million fewer jobs comparing September 2019 to September 2020. At the same time, the population aged 15-64 increased by 585 000.

Consequently, by September 2020 it can be calculated from these figures that the proportion of the population aged 15-64 years in employment was only 37.5 percent, compared to 42.4 percent in September 2019. This is known as the absorption rate. In September 2020 the absorption rate was at only 37.5 percent. This means only 37.5 percent of the population aged 15-64 was working. This includes informal work.

Unfortunately, government continued to impose restrictions on economic activity, particularly over the summer tourist seasons of 2020 and 2021, resulting in further job losses. By the end of 2021, the absorption rate had reduced further to 36.5 percent, with only 14.5 million people employed out of a population 15-64 of 39.9 million.⁵⁷

This compares to the 16.4 million who were employed immediately prior to the March 2020 lockdown. Put differently, after almost two years of varying restrictions, some 25.3 million people of working age are not working, whether formal, informal or agricultural, compared to 22.5 million immediately prior to the imposition of restrictions.

Table 1: Working age population employment, March 2020 and December 2021

Population	March 2020	December 2021
Population 15-64	38 874 000	39 888 000
Employed	16 383 000	14 544 000
Not employed	22 491 000	25 344 000

SSA also publishes Quarterly Employment Statistics (QES), based on an enterprise-based sample survey drawn from private non-agricultural businesses such as factories, firms, offices, and stores, as well as from national, provincial and local government entities. The QES only provides information about formal non-agricultural employment, while the QFS tells us about the labour market more generally.

⁵⁷ "Statistics South Africa - Quarterly Labour Force Survey Quarter 4."

The QES for the third quarter of 2020 showed that jobs in the non-agricultural formal sector dropped from 10.2 million in March 2020 to 9.5 million in June 2020.⁵⁸ In other words, some 700 000 formal jobs were lost from March to June 2020. Year-on-year, every occupation type, save for “Professionals”, recorded a significant drop in employment. Year-on-year, total gross earnings in relation to these jobs decreased by R43.8 billion or (-6,1%) between September 2019 and September 2020.

The QLFS reports that professionals were also the most likely to be able to work from home during both quarters affected by lockdown, with some 45 percent able to do so during hard lockdown in March-April 2020.⁵⁹ Consequently, non-professionals were hardest hit across South Africa – in other words, blue collar and informal workers, and those without jobs.

4.2. Impact on crime

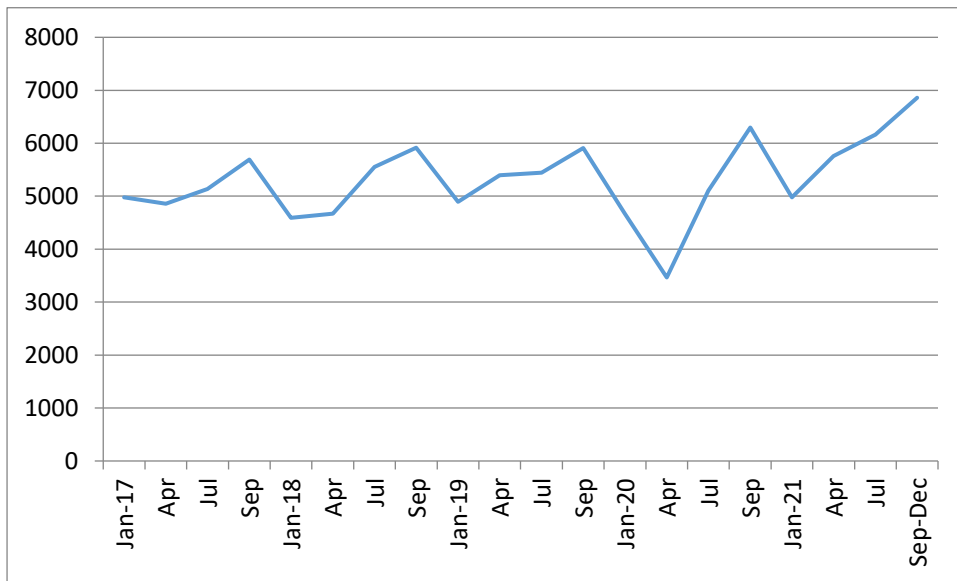
The initial 5-week lockdown was associated with a decrease in recorded crime and violent crime, including murder, resulting from the lack of movement, curfews, and alcohol bans. However, subsequent to that, the resultant economic conditions coupled with the loss of trust in policing resulted in a steady rise in the best indicator of serious violent crime - the number of murders. While in the pre-pandemic era the quarterly number of murders recorded never breached 6000 per quarter, by the final quarter of 2021 the number almost breached 7000 (see Figure 3 below).⁶⁰ This is a large increase which cannot be attributed to population growth. Citizens are accordingly much less safe than they were before the imposition of the restrictions and the use of the police in enforcing them.

⁵⁸ “Statistics South Africa - Quarterly Employment Statistics (QES),” September 2020, <https://www.statssa.gov.za/publications/P0277/P0277September2020.pdf>.

⁵⁹ “Statistics South Africa - Quarterly Employment Statistics (QES).”

⁶⁰ ‘South African Police Services - Crimestats’ <<https://www.saps.gov.za/services/crimestats.php>> [accessed 2 April 2022]

Figure 3: Murders recorded per quarter, South Africa⁶¹



4.3. Access to health care

According to official data, approximately 100 000 people died of COVID-19 known to the health care system.⁶² However, some 300 000 excess deaths were recorded.⁶³ This suggests some 200 000 people sick enough to die could not or did not access health care. This suggests the right of access to health care was not sufficiently realized in South Africa.

4.4. Government support

Lockdown restrictions, which initially only allowed “essential work”, were clearly likely to affect the ability of citizens to work and earn a living. While government did take measures to mitigate these effects, these were inadequate to the scale of the economic impact. In particular, the Social Relief or Distress grant was only implemented in May 2020, some weeks after the restrictions were

⁶¹ “South African Police Services - Crimestats,” accessed April 2, 2022, <https://www.saps.gov.za/services/crimestats.php>.

⁶² “COVID-19 Statistics Is South Africa,” accessed April 8, 2022, <https://sacoronavirus.co.za/2022/04/07/update-on-covid-19-thursday-07th-april-2022/>.

⁶³ “South African Medical Research Council - Report on Weekly Deaths in South Africa,” accessed April 5, 2022, <https://www.samrc.ac.za/reports/report-weekly-deaths-south-africa>.

introduced.⁶⁴ A range of measures were announced at the commencement of the lockdown. The interventions have been summarized by the International Monetary Fund (IMF) as follows:

- Companies and workers facing distress were assisted through the Unemployment Insurance Fund (UIF) and special programs from the Industrial Development Corporation;
- Workers with an income below a certain threshold received a small tax subsidy for four months;
- Vulnerable families received temporarily higher social grant amounts until end-October 2020
- A new temporary COVID-19 grant, the Social Relief of Distress grant, created to cover unemployed workers that do not receive grants or UIF benefits, continues to be paid. Its value per month is currently R350 (US\$ 24);
- Food parcels for distribution were increased;
- Funds were made available to assist SMEs under stress, mainly in the tourism and hospitality sectors, and small-scale farmers operating in the poultry, livestock, and vegetables sectors
- An official loan guarantee scheme was introduced to provide bank loans;
- Allocations were made to a solidarity fund to help combat the spread of the virus, with assistance of private contributions, and support municipal provision of emergency water supply, increased sanitation in public transport, and food and shelter for the homeless;
- The revenue administration accelerated reimbursements and tax credits, allowing SMEs to defer certain tax liabilities, and issued a list of essential goods for a full rebate of customs duty and import VAT exemption;
- A 4-month skills development levy tax holiday was also implemented.⁶⁵

Controversially, some financial relief qualification requirements required compliance with Black Economic Empowerment policies.⁶⁶ This was overturned in the Supreme Court of Appeal.⁶⁷ The amount of the Social Relief of Distress grant (R350 per month) falls well below the food poverty line in South Africa, which was R585 per month in August 2020.⁶⁸

Widespread and wide-scale fraud was evident in the distribution of the relief, with much of the relief not reaching the intended beneficiaries.⁶⁹

⁶⁴ Department of Social Development, "Minister Lindiwe Zulu: Launch of The Rapid Assessment of the Implementation and Utilisation of the Special Coronavirus Covid-19 Social Relief of Distress Grant Report," Speeches, October 21, 2021, <https://www.gov.za/speeches/keynote-address-minister-social-development-ms-lindiwe-zulu-mp%C2%A0-occasion-launch-rapid>.

⁶⁵ "International Monetary Fund," accessed April 3, 2022, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#S>.

⁶⁶ "Coronavirus: South Africa's Race-Based Relief Fund Faces Court Challenge," *The Irish Times*, May 6, 2020, <https://www.irishtimes.com/news/world/africa/coronavirus-south-africa-s-race-based-relief-fund-faces-court-challenge-1.4246741>.

⁶⁷ "Use of BEE Criteria for Govt's R200m Covid-19 Tourism Relief Is Unlawful, SCA Finds," *Fin24*, September 22, 2021, <https://www.news24.com/fin24/companies/use-of-bee-criteria-for-govts-r200m-covid-19-tourism-relief-is-unlawful-sca-finds-20210922>.

⁶⁸ "Statistics South Africa - National Poverty Lines," 2020, <http://www.statssa.gov.za/publications/P03101/P031012020.pdf>.

⁶⁹ "S.Africa's \$30 Bln COVID-19 Relief Package Exposed to Fraud - Auditor General," *Reuters*, September 2, 2020, <https://www.reuters.com/article/healthcoronavirus-safrica-corruption-idINL8N2FZ2GF>.

5. Access to information and public engagement

The dissemination of COVID-19 information is important to ensure that the public is educated about the virus and are aware of their duties in response to measures. The first case of the virus was reported on 5 March 2020 by the Minister of Health as confirmed by the National Institute for Communicable Diseases.⁷⁰ Ever since President Ramaphosa's declaration of a State of Disaster on 15 March 2020,⁷¹ the country was informed about the spread of COVID-19 and government's response to the pandemic through presidential addresses followed by the gazetting of regulations and regular media briefings by key government officials via mainstream media (newspaper, radio and television), social media as well as information published on the country's coronavirus website.⁷² The expected response of citizens was also communicated through these means. The presidential addresses were always accompanied by sign language interpreters ensuring that persons hard of hearing were considered in the method of conveyance; and COVID-19 educational booklets were made available in e-braille and audio formats for persons living with blindness.⁷³

The Constitution of South Africa expresses great importance for public participation and states that 'the *facilitation of public participation and involvement in the legislative and other processes of the legislature and its committees are to be adhered to.*'⁷⁴ During the process of deciding what lockdown measures to put in place, it was a constitutional requirement that the legislature include public participation. However, in the week preceding the announcement of the lockdown on 27 March 2020, very limited stakeholder consultation occurred between the government and other sectors. The President held a series of meetings with the National Coronavirus Command Council on COVID-19 as well as leaders of all the political parties which have parliamentary representation to discuss the implications of COVID-19 on the population. In addition, meetings were also held with religious groups and trade union representatives and leaders of the business sector in an effort to obtain their support devised plans to address the COVID-19 outbreak.⁷⁵ Save for media briefings, the content of these

⁷⁰ 'First Case of COVID-19 Coronavirus Reported in SA', *National Institute For Communicable Diseases*, 5 March 2020 <<https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/>.

⁷¹ "President of South Africa, Mr. C. Ramaphosa, Statement on Measures to Combat Covid-19 Epidemic, Union Buildings, Tshwane," March 15, 2020, <http://www.dirco.gov.za/docs/speeches/2020/cram0315.pdf>.

⁷² South African Government, "South Africa Coronavirus," 2022, <https://sacoronavirus.co.za/>.

⁷³ "Free Covid-19 Educational Booklet Available in e-Braille and Audio Formats," *Blind South Africa*, August 26, 2020, <https://blindsa.org.za/2020/08/26/free-covid19-educational-booklet-available-in-e-braille-and-audio-formats/>.

⁷⁴ Constitution of the Republic of South Africa, 1996.

⁷⁵ N Sobikwa and M Phooko, "An Assessment of the Constitutionality of the COVID-19 Regulations against the Requirement to Facilitate Public Participation in the Law-Making and/or Administrative Processes in South Africa," *Law Democracy and Development* 25 (2021): 309–44.

meetings were neither broadcasted nor publicized in a manner that would have enabled the public to participate by way of public information.⁷⁶

A month after the announcement of the State of Disaster, a process of engaging the public in the regulatory process of the lockdown regulations took place through a call for comments on the “draft framework for sectors” drafted by the Department of Cooperative Governance and Traditional Affairs (COGTA).⁷⁷ The call for comments sought to obtain the opinion and views of the public on the proposed list of activities set to be permitted during ‘level 4’ of the lockdown. Three main criticisms arose regarding this call. Firstly, the fact that the government only sought the opinion of the public with regards to ‘lockdown level 4’, yet no call for public comment was made during the promulgation of the rules for the harsh ‘level 5 lockdown’ which the country had undergone for at least 5 weeks.⁷⁸

The second concern was the fact that the timeframe for sending submissions was only two days (from 25 April 2020 to 27 April 2020), yet approximately 70 000 submissions were received. The large number of submissions indicates the strong public interest in engaging with the government concerning the socio-economic impact of the lockdown. However, the extremely limited timeframe prevented any large scale and extensive public consultation. The third concern was that submissions could only be made via email which largely excluded vulnerable and marginalised groups who, amongst other basic resources, do not have access to the internet.

The lack of public consultations was raised in a case brought before the Western Cape High court attacking the constitutionality of the state of disaster and ensuing regulations.⁷⁹ One of the issues raised by the applicants was that it was impossible for the Minister of CoGTA to have considered the 70 000 submissions in the 48-hour time span before the regulations of 29 April 2020 were published. The High court held that the fact that the number of public comments were 70 000 does not detract from the allegation that they were indeed considered.⁸⁰ Moreover, the court dismissed the applicants' case and ruled that the Disaster Management Act does not provide for a public participation process

⁷⁶ Sobikwa and Phooko.

⁷⁷ “Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021).”

⁷⁸ Government Notices, “COVID-19 Regulations of 18 March 2020: Regulations Issued in Terms of Section 27(2) of the Disaster Management Act,” March 18, 2020, https://www.gov.za/sites/default/files/gcis_document/202003/43107gon318.pdf; Government Notices, “COVID-19 Amendment Regulations of 25 March 2020,” March 25, 2020, https://www.gov.za/sites/default/files/gcis_document/202003/4314725-3cogta.pdf.

⁷⁹ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020), para 129.

⁸⁰ *Esau and Others v Minister of COGTA and Others* (5807/2020) (2020).

before making disaster management regulations, but only requires that the Minister should consult relevant Cabinet members.⁸¹ The court held that even if the Minister did make regulations without public participation, ‘the exigencies of the crisis that she sought to regulate is of such a nature, that where the Disaster Management Act does not prescribe public participation, the public’s check and balance on abuse of power still resides with Parliament to which the Minister is accountable for the exercise of delegated powers to make subordinate law.’⁸²

Between mid-2020 and 2021, the extent of stakeholder engagements became more apparent as details pertaining to engagements with the South African Human Rights Commission, religious bodies, academic bodies, civil society organisations on COVID-19 rules were publicized.⁸³ There has been within the two years a steady relaxation of rules and re-opening of various sectors of the economy and cultural activities. As of October 2021, South Africa was on alert ‘level 1’ of the lockdown and in January 2022 calls by opposition parties for the end of the State of Disaster became rampant.⁸⁴

On 30 March 2022, the Minister of COGTA gazetted the draft post-national state of disaster regulations pertaining to the management of the COVID-19 pandemic.⁸⁵ The draft was opened to public comment for a period of 48 hours ending Friday, 1 April 2022. The reason provided for the limited comment period was to ensure that government can end the State of Disaster as soon as possible, while responsibly putting in place regulations relating to post-disaster recovery and rehabilitation.⁸⁶ It was further noted that the Minister would leave in place minimal and confined

⁸¹ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 160-161.

⁸² *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 164.

⁸³ T Mahlakoana, “Govt Promises to Consider Input as It Seeks Comment on Lockdown Regulations,” *Eyewitness News*, July 14, 2020, <https://ewn.co.za/2020/07/14/govt-promises-to-consider-input-as-it-seeks-comment-on-lockdown-regulations>; L Tandwa, “Ramaphosa Seeks Buy-in from Religious Leaders for Covid-19 Vaccine Roll Out,” *News 24*, January 11, 2021, <https://www.news24.com/news24/southafrica/news/ramaphosa-seeks-buy-in-from-religious-leaders-for-covid-19-vaccine-roll-out-20210111>; V Banton, “Ramaphosa Meets with Church Leaders as Country Prepares to Move to Level 3 of Lockdown,” *News 24*, May 19, 2020, <https://www.news24.com/news24/southafrica/news/ramaphosa-meets-with-church-leaders-as-country-prepares-to-move-to-level-3-of-lockdown-20200519>; “Minister Nkosazana Dlamini Zuma Convenes a Special MINMEC on COVID-19,” *Department of Cooperative Governance and Traditional Affairs*, March 19, 2020, <https://www.cogta.gov.za/index.php/2020/03/19/minister-nkosazana-dlamini-zuma-convenes-a-special-minmec-on-covid-19/>; “CoGTA Minister and SAHRC to Cooperate in Furthering Human Rights,” *Department of Cooperative Governance and Traditional Affairs*, July 14, 2020, <https://www.cogta.gov.za/index.php/2020/07/14/cogta-minister-and-sahrc-to-cooperate-in-furthering-human-rights/>.

⁸⁴ F Venter et al., “Experts: End South Africa’s National State of Disaster,” *Daily Maverick*, January 23, 2022, <https://www.dailymaverick.co.za/article/2022-01-23-experts-end-south-africas-national-state-of-disaster/>.

⁸⁵ South African Government, “Minister Nkosazana Dlamini Zuma Gazettes Draft COVID-19 Post National State of Disaster Regulations for Public Comment,” March 30, 2022, <https://www.gov.za/speeches/minister-dlamini-zuma-gazettes-draft-covid-19-post-national-state-disaster-regulations>.

⁸⁶ South African Government.

regulations dealing with post-disaster recovery and rehabilitation as defined in the National Disaster Management Act, whilst the remaining regulations would be repealed. Following an assessment of the public comments, on 5 April 2022 the National State of Disaster which had lasted 750 days was lifted.⁸⁷ However, on 18 April 2022 another national state of disaster was declared, following massive devastation caused by rainfall flooding in the KwaZulu-Natal and Eastern Cape provinces.⁸⁸

In April 2022, the Minister of Health also opened a call for comments on amendments to the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions.⁸⁹ The regulations deal with propositions on vaccinations, the need to make face masks and social distancing mandatory in public spaces, shops, certain workplaces and in public transit as part of the general measures instituted to contain the spread of notifiable medical conditions that can spread through droplets or aerosol.⁹⁰ The call for comments was extended until 24 April 2022.

6. The operation of oversight institutions during COVID-19

The Constitution makes provision, in Chapter 9, for a number of institutions to support constitutional democracy being, amongst others, the South African Human Rights Commission (SAHRC).⁹¹ For the purposes of the discussion here the emphasis will be placed on the SAHRC as it is also the appointed holding structure for the National Preventive Mechanism (NPM) under the OPCAT, which South Africa ratified in 2019.⁹² The other constituent components of the NPM are the Judicial Inspectorate for

⁸⁷ "SA's State of Disaster Has Been Lifted, Interim Measures Announced by Ramaphosa," *Eyewitness News*, April 4, 2022, <https://ewn.co.za/2022/04/04/sa-s-state-of-disaster-has-been-lifted-interim-measures-announced-by-ramaphosa>; G Nicolson, "National State of Disaster Ends after 750 Days, but Some Regulations Remain," *Daily Maverick*, April 4, 2022, <https://www.dailymaverick.co.za/article/2022-04-04-national-state-of-disaster-ends-after-750-days-but-some-regulations-remain/>.

⁸⁸ "Ramaphosa Declares National State of Disaster," *ENCA*, April 18, 2022, <https://www.enca.com/news/ramaphosa-declares-national-state-disaster>.

⁸⁹ South African Government, "National Health Act: Regulations: Surveillance and Control of Notifiable Medical Conditions: Amendment: Comments Invited," April 2022, <https://www.gov.za/documents/national-health-act-regulations-surveillance-and-control-notifiable-medical-conditions>.

⁹⁰ "The Odd One out: Impacts of the Draft Regulations Regarding the Surveillance of Notifiable Medical Conditions," *Cliffe Dekker Hofmeyr*, March 24, 2022, <https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-law-alert-24-march-2022-the-odd-one-out-impacts-of-the-draft-regulations-regarding-the-surveillance-of-notifiable-medical-conditions-.html>.

⁹¹ Constitution of the Republic of South Africa, 1996, chap. 9.

⁹² "International Torture Prevention," South Africa's National Preventive Mechanism, accessed April 21, 2022, <https://sahrc.org.za/npm/>.

Correctional Services (JICS),⁹³ the Military Ombudsman⁹⁴ and the Health Ombudsman.⁹⁵ While the need for police detention monitoring and oversight has been widely recommended and even acknowledged in the provincial legislation of the Western Cape province,⁹⁶ such a system has as yet not been established. The Independent Police Investigative Directorate (IPID) is mandated to investigate serious complaints (e.g., murder, rape and torture) against the South African Police Service (SAPS) and metro-police, where the latter exists. IPID is therefore a reactive entity with a relatively narrow focus. Members of Parliament, judges and magistrates are also mandated to visit prisons announced and unannounced.⁹⁷ There is also a range of other places where people are deprived of their liberty which are at present not subject to designated and independent monitoring and oversight, such as psychiatric hospitals, Child and Youth Care Centres, drug treatment centres, and TB hospitals.⁹⁸ Even though this lacuna was identified more than a decade ago, it has not been addressed.

6.1. JICS

The SoD regulations and directives excluded JICS, and its Independent Correctional Centre Visitors (ICCV), from the definition of essential services from late March 2020 to early September 2020.⁹⁹ Visits by ICCVs to prisons is the main means of conducting interviews and collecting complaints from prisoners. When comparing the 2020/21 data on the number of complaints handled by ICCVs with that of the previous year, there is a notable decline. However, if the 2018/19 data are included, the decline is more marked from prior to the pandemic. Figure 4 shows that there has been a steady decline in the number of complaints handled by the ICCV over the preceding three years.¹⁰⁰

⁹³ Correctional Services Act 111 of 1998, chaps. 9–10.

⁹⁴ “Military Ombud Act,” Act 4 § (2012).

⁹⁵ “National Health Amendment,” Act 12 § (2013).

⁹⁶ “Western Cape Community Safety Act,” 3 § (2013), sec. 4(1)(c)(v).

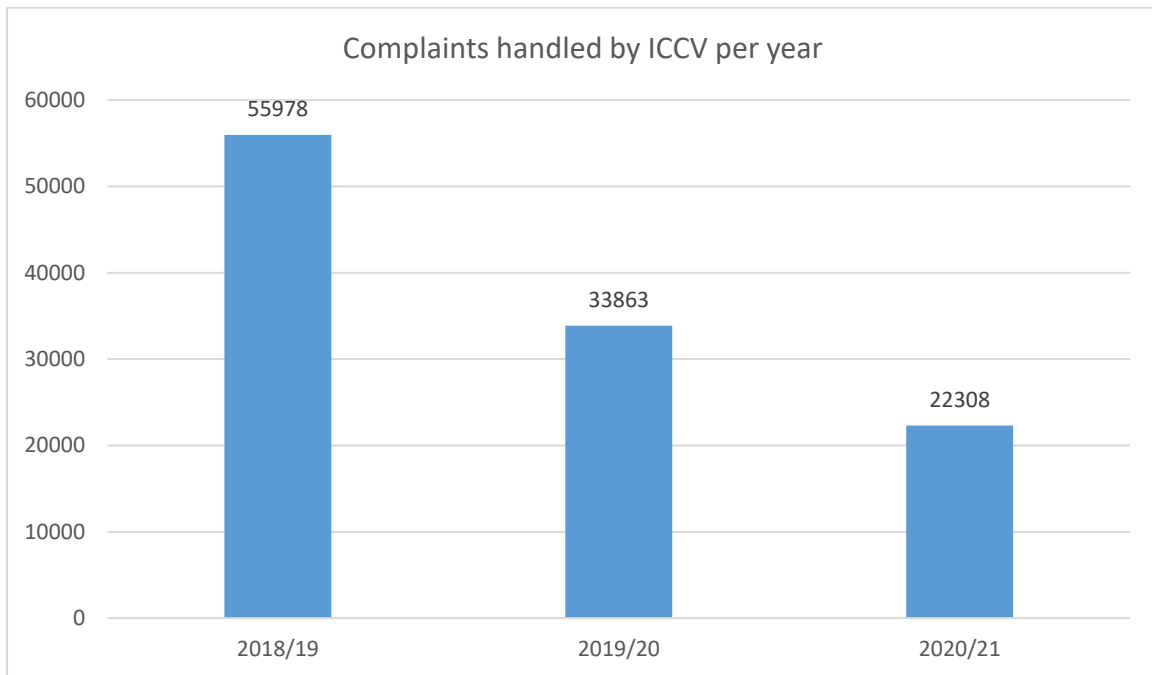
⁹⁷ Correctional Services Act 111 of 1998, sec. 99 (1–3).

⁹⁸ L Muntingh and L Fernandez, “A Review of Measures in Place to Effect the Prevention and Combating of Torture with Specific Reference to Places of Detention in South Africa,” *SA Journal of Human Rights* 24, no. 1 (2008): 123–43.

⁹⁹ “Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002,” Pub. L. No. Government Gazette, No. 43148 (2020), pt. Annexure B, Section B, paras 16 and 18.

¹⁰⁰ Judicial Inspectorate for Correctional Services, “Annual Report 2018/19” (Pretoria: Office of the Inspecting Judge for Correctional Services, 2019), 64; Judicial Inspectorate for Correctional Services, “Annual Report 2019/20” (Pretoria: Office of the Inspecting Judge for Correctional Services, 2020), 58; Judicial Inspectorate for Correctional Services, “Annual Report 2020/21” (Pretoria: Office of the Inspecting Judge for Correctional Services, 2021), 78.

Figure 4: Complaints by ICCV



The April 2020 Correctional Services Directives contained a number of restrictions that also impacted on informal mechanisms of oversight:

- Visits by members of the public, including legal representatives, to all places of detention were suspended.
- Prisoners were allowed to consult with their attorneys telephonically with the permission of the Head of Centre. Telephonic consultations were only allowed for urgent matters, resources permitting.

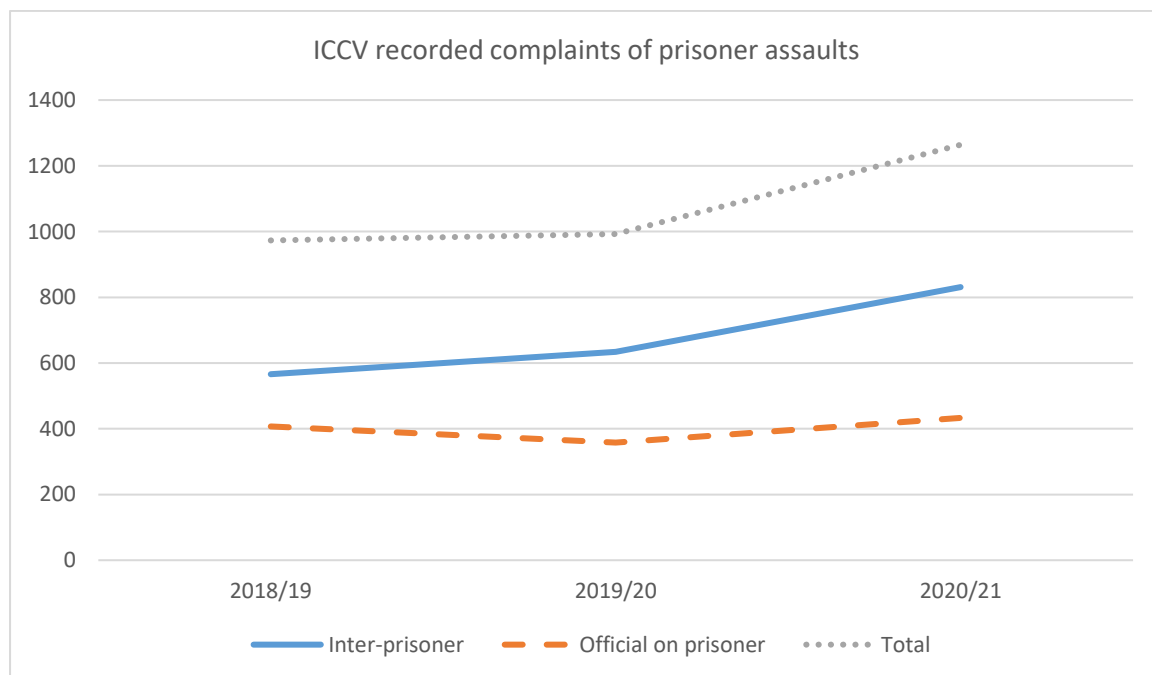
On 4 September 2020, the restrictions were relaxed:

- prisoners could now receive one non-contact visit per month; non-contact consultations with legal practitioners; the transfer of inmates between facilities was permitted; inmates could be referred to external health care service providers;
- parolees and probationers at community corrections offices could be released and community services programmes resumed;
- visits to correctional centres from: essential service providers, and external non-essential health care providers, and judicial statutory oversight inspections could resume.¹⁰¹

¹⁰¹ "Directions for Alert Level 2, Issued in Terms of Regulation 4(2), Read with Regulation 58(a) and (b) of the Regulations Made under the Disaster Management Act, 2002: Measures to Address, Prevent and Combat the Spread of COVID-19 in All Correctional Centres and Remand Detention Facilities in the Republic of South Africa.," Government Gazette No. 43688 Government Notice No. 967 § (2020).

It can thus be concluded that from end of March 2020 to beginning of September 2020 a set of restrictions were in place that effectively prevented formal and informal monitoring and oversight of prisons. Despite a decline in the prison population due to remissions and the lockdown, the number of complaints recorded by ICCV alleging assault for both inter-prisoner assaults and official-on-prisoner assaults, increased from 2018/19 to 2020/21 as shown in Fig 5 below. Even though the total number of complaints recorded by ICCV declined by more than half from 2018/19 to 2020/21, the number of complaints alleging assault, increased. One explanation is that the abnormal circumstances of 2020 increased frustration levels and thus increased the potential for violent confrontations between prisoners as well as between officials and prisoners. The restriction in visits by family members may also have removed an important management tool from management as access to visits is an important incentive to encourage good behaviour. Research from elsewhere does indicate, broadly, that regular prison visits by family members have a positive impact on prisoner behaviour.¹⁰² Data from DCS does indicate increases, from 2019/20 to 2020/21 in the number of prisoners injured as a result of assaults as well as the number of escapes. The increase in injuries due to assaults was modest, from 37 per 1000 to 40 per thousand but still below the 2018/19 level of 41 per 1000. There was a sharp rise in escape following a mass escape at Malmesbury (Remand); from 2.2 per 10 000 to 8.5 per 10 000.

Figure 5: Complaints of assault



¹⁰² K. De Claire and L. Dixon, "The Effects of Prison Visits From Family Members on Prisoners' Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research Since 1991," *Trauma, Violence and Abuse* 18, no. 2 (2015 2017): 185–99, <https://doi.org/10.1177/1524838015603209>.

While JICS were active during the entire period, their access to prisons were suspended from end March 2020 to beginning September 2020, a period of some five months.

6.2. SAHRC and NPM

During levels 3 to 5 of the lockdown, a consortium of civil society organisations under the banner of the Detention Justice Forum (DJF) developed a monitoring tool and collected data based on the UN Sub-committee for the Prevention of Torture (SPT) public advice¹⁰³ and submitted their findings on prisons and other places of detention to the NPM on three occasions, but no reply was ever received. A main concern of the DJF was the lack of information about what was happening inside prisons and places of detention, and what steps were being taken by the NPM to continue monitoring.

The 2020/21 annual report of the SAHRC provides a fairly detailed account of the activities related to the NPM and it seems that the Commission's attention was focussed on setting up the NPM and developing its working procedures.¹⁰⁴ Consequently, there appears to have been limited activity related to active monitoring, although the NPM has a web page on the website of the SAHRC which contains a map of places of detention visited.¹⁰⁵ However, it is not clear over what period it was done and how recently. There are also a number of generic advisories that were issued to certain government department regarding people deprived of their liberty.

Between June 2019 and December 2020, the NPM, through the Human Rights Officers (HRO) of the SAHRC, visited some 105 police stations across South Africa.¹⁰⁶ The intention was to test the feasibility and methodology of such data collection and use this as a basis for the development of a lay visitor scheme. All indications are that this was the first survey of this kind by the SAHRC. Despite methodological and resource constraints, the report makes a number of valuable observations and to some extent confirm worse than expected fears. The detention conditions, the treatment of

¹⁰³ United Nations Subcommittee on Prevention of Torture and Other Cruel, “Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms Relating to the Coronavirus Pandemic” (2020), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

¹⁰⁴ South African Human Rights Commission, “Annual Performance Report, 31 March 2021.” (South African Human Rights Commission, n.d.), <https://www.sahrc.org.za/home/21/files/Final%20SAHRC%20Annual%20Report%202020-21.pdf>.

¹⁰⁵ South African Human Rights Commission, “Places Visited,” South Africa’s National Preventive Mechanism, accessed June 10, 2022, <https://sahrc.org.za/npm/index.php/places-visited>.

¹⁰⁶ SA Human Rights Commission, ‘The Conditions and Treatment of People in Police Custody in South Africa - Report on Visits to Police Stations by Independent Custody Visitors 2019-2020’ (Johannesburg: SA Human Rights Commission, 2021).

detainees, level of health care and infrastructure fall in many regards far short of what are regarded as the minimum standards of humane detention. For example, of the 105 stations, 79 (or 75%) experienced problems with access to clean running water and clean toilets; see Table 3 below.¹⁰⁷

Table 2

Observation	N	%
Few or no people in custody have access to running water or water provided by other means	9	11.4
Few or no people in custody have access to hot running water or hot water provided by other means	28	35.4
Few or no people in custody have access to flushing toilets and non- flushing toilets	10	12.7
Few toilets or no toilets are clean and usable	32	40.5
Total	79	

The report itself does not make any substantial recommendations on addressing the problems and that was perhaps not its intention. Nonetheless, the expectation remains that these valuable observations will be taken forward by the NPM and that the attention of the Portfolio Committee on Police will be drawn to it. The NPM does, however, not seem to have used these findings as a springboard for further action.

6.3. IPID

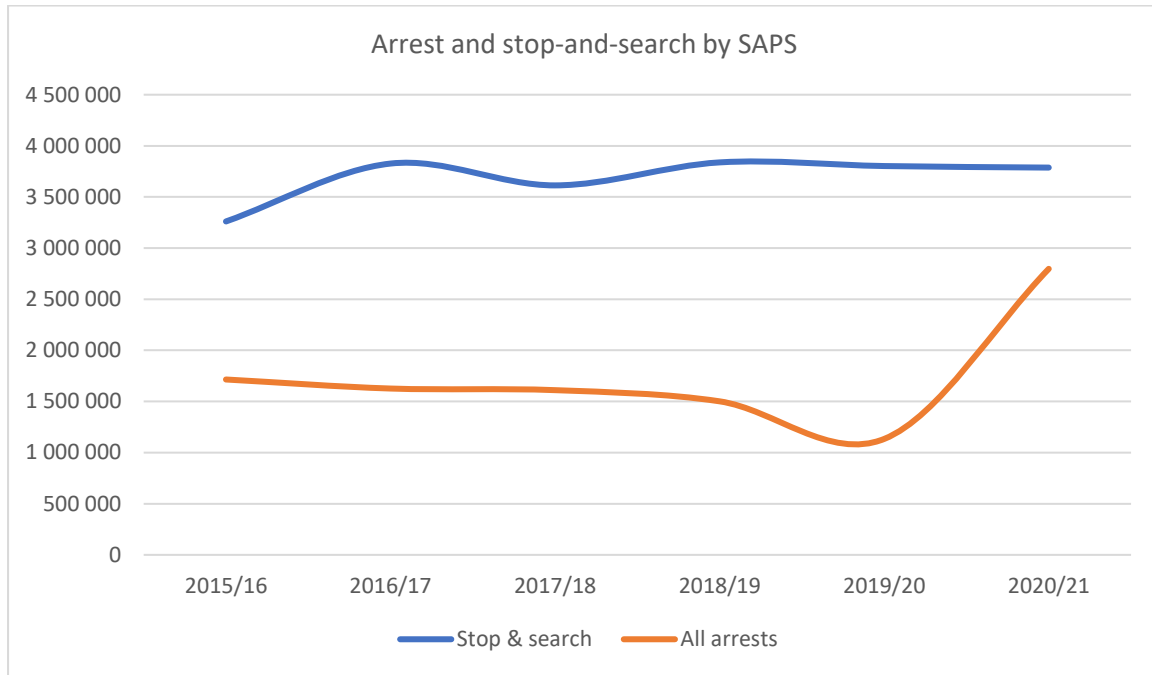
During the period 2018/19 to 2020/21 there was a substantial increase in the number of people being arrested by SAPS as shown in Figure 6; nearly 2.8 million arrests during 2020/21.¹⁰⁸ This was, however, not accompanied by matching stop-and-search numbers as in previous years, which raises question about the accuracy of the data. Nonetheless, it remains the situation that it is predominantly low-

¹⁰⁷ SA Human Rights Commission, 18.

¹⁰⁸ SAPS, "Annual Report 2015/16"; SAPS, "Annual Report 2016/17"; SAPS, "Annual Report 2017/18"; SAPS, "Annual Report 2018/19"; SAPS, "Annual Report 2019/20"; SAPS, "Annual Report 2020/21."

income adult men that carry the arrest burden.¹⁰⁹ The arrest numbers therefore reflect in real terms the reliance of the government on the criminal justice system to respond to COVID-19 and enforce restrictions.

Figure 6: Stop and search by SAPS

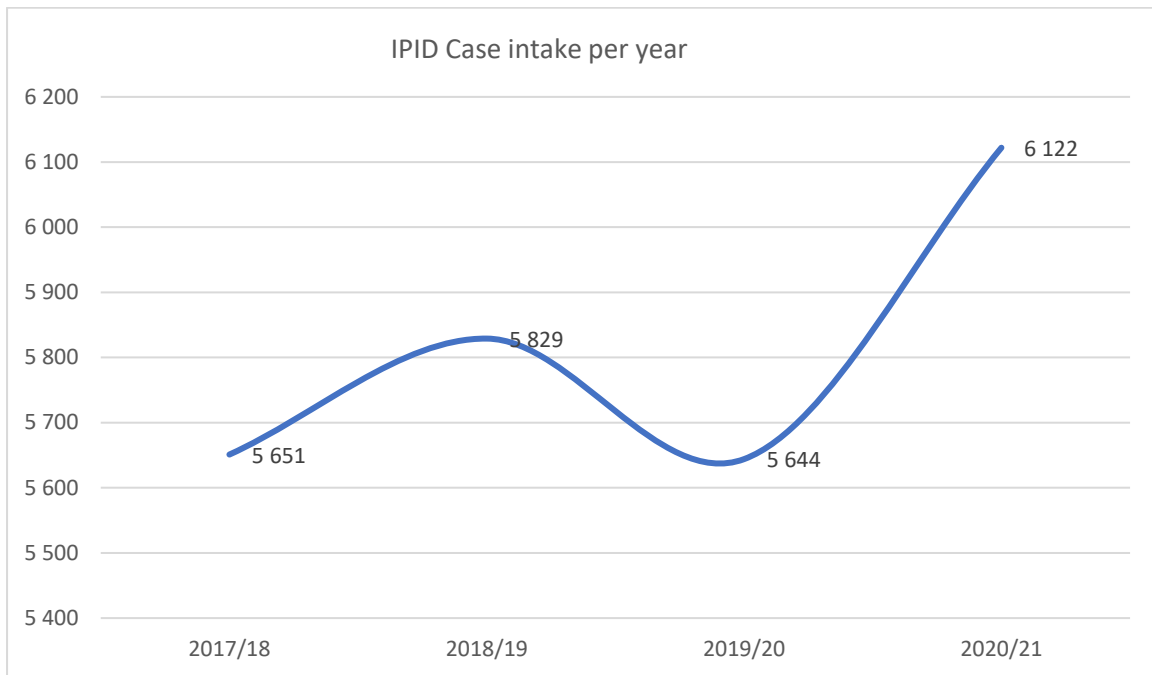


The increase in arrests is also, to some extent, reflected in the case intake figures from IPID, as shown in Figure 7. From 2019/20 to 2020/21 the case intake increased by some 8.5%, or from 5 644 to 6 122 – the highest increase in recent years.¹¹⁰

¹⁰⁹ L Muntingh, “Race, Gender and Socio- Economic Status in Law Enforcement in South Africa – Are There Worrying Signs?” (Bellville: Community Law Centre, 2013), <https://admin.acjr.org.za/resource-centre/Inequality%20paper.pdf>.

¹¹⁰ Independent Police Investigating Directorate, “Annual Report 2018/19,” 38; Independent Police Investigating Directorate, “Annual Report 2020/21,” 38.

Figure 7: IPID intake



It is not within the scope of this report to deal with progress on investigations, but the data show some measure of consistency in that there was a rapid increase in the number of people arrested and that this increase was modestly reflected in the number of cases reported to IPID. A closer examination of the IPID data also shows a steady increase in the proportion of assault cases of the total intake, which increased from 65% in 2017/18 to 69% by 2020/21.¹¹¹

6.4. What was their role in ensuring that the rights of citizens and inmates are protected?

At the outset it should be noted that accountability for rights violations rests with the National Prosecuting Authority (NPA). Oversight and monitoring agencies can record and report alleged violations, but criminal prosecutions are the exclusive mandate of the NPA.¹¹² That prosecutions of state officials for rights violations are indeed rare is well-documented in the literature¹¹³ and the absence of such prosecutions represent a material failing in protecting people's rights.

¹¹¹ Independent Police Investigating Directorate, "Annual Report 2020/21," 38; Independent Police Investigating Directorate, "Annual Report 2018/19," 38.

¹¹² Constitution of the Republic of South Africa, 1996, sec. 179.

¹¹³ L Muntingh, "Key Issues in the NPA - In Search of Strategy" (Bellville: ACJR - DOI-UWC, 2022); L Muntingh and G Dereymaeker, "Understanding Impunity in the South African Law Enforcement Agencies," ACJR

As already mentioned above, in April 2020 the case of Collins Khosa was reported after he was reportedly killed by SANDF soldiers for alleging violating the curfew (he and a friend were consuming alcohol in the yard of his house in Alexandra (Johannesburg)).¹¹⁴ Despite a finding from the Military Ombudsman that the soldiers implicated exceeded their powers,¹¹⁵ the case seem to have fizzled out and the family of Khosa has now instituted a civil claim against the state.¹¹⁶ The Collins Khosa case reflects in many ways the manner in which rights violations are dealt with by the state, even when there are more than credible grounds for believing that state officials exceeded their powers.

On its own assessment, the SAHRC achieved just below two thirds of its performance targets in the 2020/21 financial year.¹¹⁷ The same annual report makes one brief mention of police brutality despite ample reporting over many years on the issue.¹¹⁸ Data from the SAHRC for 2020/21 on complaints resolution and securing redress is not disaggregated and there is not a description of the redress secured, but merely whether certain activities were completed and targets met.¹¹⁹ The SAHRC annual report for 2020/21 does provide a series of observations and recommendations from the NPM, but these are well known and none focussed specifically on the enforcement of COVID-19 lockdown restrictions and the impact thereof on vulnerable groups. There is notably no reflection on the public advice issued by the SPT to all National Preventive Mechanisms.¹²⁰

South Africa faced, and continues to do so, a number of profound human rights challenges relating to safety, corruption, access to healthcare, socio-economic status, and children's rights, to name a few. Given the calamitous nature of the current situation, it may indeed be beyond the scope of oversight and monitoring agencies to deal with the prevailing challenges. The inability of state to effectively deal with serious structural threats to the constitutional order are apparent, and this leaves the individual, especially those already vulnerable, in an extremely precarious position where the Bill of Rights has little meaning. It is therefore not surprising that a recent *AfroBarometer* survey found that two thirds

Research Report (Bellville: Dullah Omar Institute, 2013); L Muntingh and J Redpath, "Recommendations for Reform of the NPA," ACJR Research Report (Bellville: Dullah Omar Institute, 2020).

¹¹⁴ Piet Rampedi Manyane Karabo Ngoepe And Manyane, "SA Lockdown: Soldiers Accused of Beating Alexandra Man to Death with Sjambok," *IOL*, April 12, 2020, <https://www.iol.co.za/news/south-africa/gauteng/sa-lockdown-soldiers-accused-of-beating-alexandra-man-to-death-with-sjambok-46619454>.

¹¹⁵ Craig Bailie, "Slain by Soldiers: Collins Khosa's Death and the Failure of the SANDF to Embrace Cultural Evolution," *Daily Maverick*, April 8, 2021, <https://www.dailymaverick.co.za/article/2021-04-08-slain-by-soldiers-collins-khosas-death-and-the-failure-of-the-sandf-to-embrace-cultural-evolution/>.

¹¹⁶ SABC, "Collins Khosa's Family Suing State for R10 Mln," *SABC News*, August 21, 2020, sec. South Africa, <https://www.sabcnews.com/sabcnews/collins-khosas-family-suing-state-for-r10-mln/>.

¹¹⁷ SA Human Rights Commission, "Annual Report 2020/21" (Pretoria: SA Human Rights Commission, 2021), 18.

¹¹⁸ SA Human Rights Commission, 38.

¹¹⁹ SA Human Rights Commission, 49.

¹²⁰ United Nations Subcommittee on Prevention of Torture and Other Cruel, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic.

of South Africans are willing to accept an unelected government if such a government can provide security, housing and jobs.¹²¹

Some of the more acute symptoms of the current situation are:

- The impact of the COVID-19 restrictions played out in very stark terms in food security according to a recent report from Statistics South Africa which found that the proportion of the population struggling with 'severe' food insecurity doubled from 7% in 2019 to 14.9%.¹²²
- In 2015 there were 15 554 murders reported, but by 2020 this had increased by 37% to 21 325, or 36 per 100 000.¹²³ South Africa is part of a relatively small group of countries with murder rates above 30 per 100 000.¹²⁴ It ought to be emphasised that the murder rate is a proxy for other crime and in particular violent crime, and that other crimes are most likely to be under-reported. It can thus safely be concluded that crime and safety had deteriorated.
- To the increasing murder rate should be added the declining trust in the police (see Fig 4), which has by 2021 reached an all-time low with only 27% of respondents stating that they trust/strongly trust the police, compared to a high of 47% in 1999.¹²⁵
- Corruption perceptions remained at the same level for the past three years with a score of 44 out of 100.¹²⁶ A country's score is the perceived level of public sector corruption on a scale of 0-100, where 0 means highly corrupt and 100 means very clean. The sudden need for PPE to prevent the transmission was quickly seized upon by corrupt officials and private sector individuals. In response, the President mandated the SIU to investigate and it found that 62 % of more than 5 400 contracts were awarded irregularly.¹²⁷
- In March 2022 it was reported that the formal unemployment rate has increased to its highest level since the quarterly labour force survey started in 2008. It increased from 34,9% in the third quarter of 2021 to 35,3% in the fourth quarter of 2021.¹²⁸ Job losses were significant and South Africa lost 742 000 jobs during the first three quarters of 2021.¹²⁹ Job losses should be seen in the context of multiple dependents on one employed person.

¹²¹ M. Moosa and J. Hofmeyr, "South Africans' Trust in Institutions and Representatives Reach New Low," *Afrobarometer Dispatch*, August 2021, 2.

¹²² Statistics South Africa, "Measuring Food Security in South Africa: Applying the Food Insecurity Experience Scale" (Pretoria: StatsSA, 2022), <http://www.statssa.gov.za/publications/Report-03-00-19/Report-03-00-192020.pdf>; E Ellis, "Are Children Dying of Hunger and Malnutrition Viewed as Less 'Deserving' of Help?," *Daily Maverick*, April 5, 2022, <https://www.dailymaverick.co.za/article/2022-04-05-are-children-dying-of-hunger-and-malnutrition-viewed-as-less-deserving-of-help/>.

¹²³ Institute for Security Studies, "ISS Crime Hub - National Crime," 2020, <https://issafrica.org/crimehub/facts-and-figures/national-crime>.

¹²⁴ M Roser and H Ritchie, "Homicides," *Our World in Data*, July 6, 2013, <https://ourworldindata.org/homicides>.

¹²⁵ B Roberts and S Gordon, "Feeling Blue: Changing Patterns of Trust in the Police in South Africa" (HSRC, 2022), <http://www.hsrc.ac.za/en/media-briefs/dces/changing-patterns-of-trust-in-sa-police>.

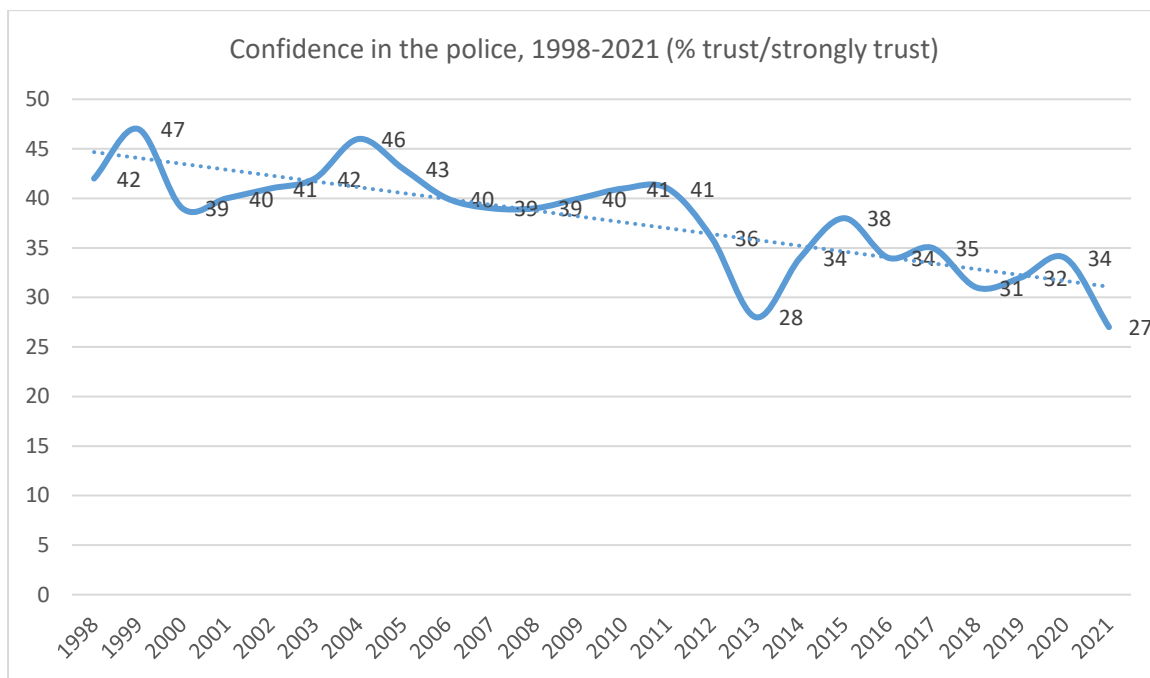
¹²⁶ Transparency International, "2021 Corruption Perceptions Index - Explore South Africa's Results," [Transparency.org](https://www.transparency.org/en/cpi/2021), accessed April 6, 2022, <https://www.transparency.org/en/cpi/2021>.

¹²⁷ "President Cyril Ramaphosa Releases Report on Investigation of Special Investigating Unit into COVID-19-Related Procurement by State Institutions | South African Government," accessed April 6, 2022, <https://www.gov.za/speeches/president-cyril-ramaphosa-releases-report-investigation-special-investigating-unit-covid-19>.

¹²⁸ Statistics South Africa, "Quarterly Labour Force Survey Quarter 4: 2021" (Pretoria: StatsSA, 2022), <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2021.pdf>.

¹²⁹ "The Businesses Hit Hardest by Liquidations in South Africa Right Now – with Jobs Not Coming Back," *BusinessTech*, January 25, 2022, sec. Business, <https://businesstech.co.za/news/business/553046/the-businesses-hit-hardest-by-liquidations-in-south-africa-right-now-with-jobs-not-coming-back/>.

Figure 8: Trust in police



7. Innovative, effective and efficient responses to COVID-19

A multi-agency approach including government, civil society organisations, medical bodies, as well as the academic sector is beneficial in dealing with a pandemic rather than leaving it to the criminal justice sector to handle. During the period between March 2020 and March 2022, some innovative, effective and efficient initiatives were undertaken by civil society organisations and aid agencies to ameliorate the negative impact caused by restrictions. These measures should continue in the future and include the following:

7.1. Social Relief Distress grant

In light of the severe restrictions imposed as a result of levels 4 and 5 of the lockdown, the economic impact on poor people soon became evident. In response, a special monthly COVID-19 Social Relief

Distress (SRD) grant of R 350, was introduced in May 2020.¹³⁰ It was subsequently extended and the latest extension will remain in force until March 2023.¹³¹ Between May and September 2020 some 9.5 million applications for the distress grant was received of which 6.4 million were approved. The purpose of the grant is described as a ‘temporary provision of assistance intended for persons in such a dire material need that they are unable to meet their families’ most basic needs.’¹³² While questions may be raised on the possible impact of such a small amount (i.e. R350 or roughly US\$ 23.00), research on the impact found that roughly 80% of respondents confirmed that the grant made a positive difference in their lives and their households.¹³³

While the SRD grant is most likely not a sustainable option in the medium term, it did provide support to those with low or no income, and who are experiencing multiple household stressors. Moreover, if 6.4 million applications were approved, one could infer that the effect was felt, even if small, by three to four times that number of people.

7.2. Public Transport Industry

The public transport industry was severely impacted by the movement restrictions during levels 4 and 5 of the lockdown. At the onset of the pandemic, taxis were only allowed to carry 50% of their licensed vehicle capacity; and this was later increased to 70% when the restrictions were slightly eased. Moreover, due to sanitization requirements, taxi drivers were faced with increased costs of procuring cleaning materials both for the cleaning of vehicles, and for commuters. This resulted in increased costs but decreased revenues for drivers. The Department of Transport sought to mitigate the effect of COVID-19 by securing once off *ex gratia* relief funds to the tune of R1,135 billion to assist operators.¹³⁴ It was reported that the delays in the distribution of the relief was due to differences with the industry on the conditions and the manner with which the funds were to be disbursed. The application process for operators to access the fund was only launched in January 2022, almost two

¹³⁰ Department of Social Development, “The Rapid Assessment of the Implementation and Utilisation of the Special Covid-19 Social Relief of Distress Grant” (Pretoria: DSD, 2021), <https://www.dsd.gov.za/index.php/component/jdownloads/?task=download.send&id=316:the-rapid-assessment-of-the-implementation-and-utilisation-of-the-special-covid-19-srd-grant&catid=7&m=0&Itemid=101>.

¹³¹ A Khoza, “Relief as R350 Covid-19 Distress Grant Extended for Another Year,” TimesLIVE, February 10, 2022, <https://www.timeslive.co.za/politics/2022-02-10-relief-as-r350-covid-19-distress-grant-extended-for-another-year/>.

¹³² Government of South Africa, “Social Relief of Distress,” South African Government, 2020, <https://www.gov.za/services/social-benefits/social-relief-distress>.

¹³³ Department of Social Development, “The Rapid Assessment of the Implementation and Utilisation of the Special Covid-19 Social Relief of Distress Grant,” iii.

¹³⁴ “Transport on COVID-19 Taxi Relief Support Fund,” *South African Government*, December 20, 2021, <https://www.gov.za/speeches/transport-covid-19-taxi-relief-support-fund-20-dec-2021-0000>.

years since the outbreak of the pandemic. The relief fund provides eligible taxi operators a once off payment of R 5000. The government set strict conditions, which taxi operators must comply with in order to access the funds. These include that they must be South African citizens or permanent residents, be in possession of a valid operating licence and be registered as a taxpayer with the South African Revenue Services.¹³⁵ The initial cut-off date to apply for the payment was 28 February 2022 but this was subsequently extended to 11 March 2022.¹³⁶

7.3. Food Relief from CSOs and NGOs

Civil society groups played an important role in responding to the COVID-19 crisis through the distribution of food parcels. There were a number of community action networks in Cape Town, Gauteng and the Eastern Cape organised by CSOs such as Boost Africa and Umgibe, and Food Flow. Moreover, a network of faith-based organisations was also involved in disaster management and response work, through food and sanitary product donations to needy families.¹³⁷

7.4. Internet access and schooling

The education sector was widely affected due to the school closures announced in March 2020. The school closures interrupted the learning of almost 17 million learners from pre-school to secondary school and close to 2,3 million students enrolled in post-school education and training institutions.¹³⁸ In response to this, new educational policies and regulations were adopted, including the adjustment of the academic timetable, new teaching programmes, mode of delivery, catch up of the curriculum, health and safety measures as well as financial relief packages were designed for the education sector.¹³⁹

The introduction to virtual learning had its benefits, but also magnified the extent of inequality within the country. For example, not all schools offered remote learning options to their students. According to Statistics South Africa, close to six per cent of individuals aged 5-24 years participated in remote

¹³⁵ "Taxi Relief Fund," *National Empowerment Fund* (blog), accessed May 24, 2022, <https://www.nefcorp.co.za/taxi-relief-fund/>.

¹³⁶ Loyiso Sidimba, "Applications for R1.1bn Covid-19 Taxi Relief Fund Extended by Two Weeks," *IOL*, March 3, 2022, <https://www.iol.co.za/news/politics/applications-for-r11bn-covid-19-taxi-relief-fund-extended-by-two-weeks-050e44dc-e79b-41a5-a4be-dede525b5dce>.

¹³⁷ K Taruona, "Churches Respond to COVID-19 Pandemic," 2020, <https://methodist.org.za/wp-content/uploads/2017/09/Churches-respond-to-the-novel-Coronavirus-COVID.pdf>.

¹³⁸ "COVID-19 and Barriers to Participation in Education in South Africa, 2020" (Statistics South Africa, 2020), https://www.statssa.gov.za/?page_id=1854&PPN=Report-92-01-08&SCH=73260.

¹³⁹ "COVID-19 and Barriers to Participation in Education in South Africa, 2020."

learning in 2020.¹⁴⁰ A participation gap in remote learning exists by population group as it appears that white students were three times more likely than black students to participate in remote learning in 2020 (18,3% and 5,3%, respectively). Close to 91% of black Africans aged 5-24 years attended schools that did not offer remote learning options compared to 63,3% among white students.

Moreover, children living in informal dwellings or backyard rooms had to cope with features available in shared spaces, interruptions and distractions from family members. In South Africa, close to 14% of households that had at least one individual aged 5-24 years were backyard dwellers or stayed in informal dwellings in 2020. The school closures also affected the National Schools Nutrition Programme (NSNP). However, in July 2020, a court order was made for schools to continue providing meals to learners during the COVID-19 pandemic.¹⁴¹

7.5. Good practice for future use in the criminal justice sector

There were a number of good practices adopted in the criminal justice sector during this period that can be replicated in the future.

The Minister of Justice and Correctional Services issued Directives on the functioning of courts ('Court Directions') which assisted with initiatives to reduce overcrowding in detention facilities, and ensured that justice was expedited during its limited operations.¹⁴² The Directions allowed an accused person arrested for a petty offence, to be released and warned to appear in court on a future date. Also, cases that qualifies for police or prosecutorial bail were issued by police officials or prosecutors instead of referring those accused persons to court for bail proceedings. This ensured that other bail cases and urgent matters are dealt with and prioritized by the Courts and also expedited the administration of justice.

Moreover, detained children's cases were also considered as urgent, and this allowed their cases to be brought before court for consideration of their continued detention.

The use of virtual courts by using audio visual and other electronic communication proceedings allowed for cases to continue without the need for individuals to be physically present in court. The Criminal Procedure Act already allows for the use of virtual proceedings only for certain proceedings. This include amongst others, the postponement of cases after first appearance, unopposed bail

¹⁴⁰ "COVID-19 and Barriers to Participation in Education in South Africa, 2020."

¹⁴¹ "COVID-19 and Barriers to Participation in Education in South Africa, 2020."

¹⁴² ACJR, "COVID-19 ALERT LEVEL 4: The Operation of Courts, Police & Correctional Services."

applications and cases involving children.¹⁴³ It has however been argued by some that by extending the use of virtual proceedings to all types of proceedings during the state of disaster, infringes upon inmates fair trial rights in section 35(3) (c) and (e) of the Constitution because it denies the inmate the right to be present and tried before an ordinary court.¹⁴⁴

Furthermore, there were also efforts to reduce overcrowding in prisons by releasing prisoners on parole. In May 2020, the President announced the placement on parole of approximately 19 000 offenders to curb the spread of COVID-19 in correctional facilities.¹⁴⁵ The parole would only apply to low-risk inmates who have passed their minimum detention period or will approach this period in the coming five years and excluded inmates sentenced to life imprisonment or serving terms for specified other serious crimes, including sexual offences, murder and attempted murder, gender-based violence and child abuse.¹⁴⁶

8. Conclusion

South Africa, like many other African countries enacted special measures to curb the spread of COVID-19. These measures elevated a number of challenges, both socially and economically; and affected various sectors and members of society. Unfortunately, the poor and marginalised were most impacted by these measures; particularly the ones restricting the movement of persons. The pandemic exposed the stark gap between the rich and poor. The severe restrictions on social and economic activity imposed by the government, particularly at the start of the pandemic in March and April 2020 disproportionately affected vulnerable groups without basic needs such as water and housing and who rely on the informal economy to provide food for their families.

Many mistakes were made by the state during this period. When the government implemented COVID-19 measures or legislation, some practical areas or aspects were overlooked that may have affected the enforcement of COVID-19 measures; the impact on the criminal justice system and the effect on prisoner's emotional wellbeing and their access to justice. Moreover, the poor were often overlooked in areas of prioritisation. For instance, their reliance for survival on the informal economy were initially overlooked and they were not seen as 'essential' enough to be service providers (i.e.

¹⁴³ Correctional Services Act 111 of 1998, sec. 159A.

¹⁴⁴ Jason Brickhill, "Constitutional Implications of COVID-19," *Juta Journals* 10, no. 1 (2020): 3.

¹⁴⁵ Hassan Isilow, "COVID-19: South Africa Grants Parole to 19,000 Inmates," *AA*, May 8, 2020, <https://www.aa.com.tr/en/africa/covid-19-south-africa-grants-parole-to-19-000-inmates/1833867>.

¹⁴⁶ Hassan Isilow.

informal traders, hawkers, waste pickers;) and even where they were catered for in legislation (homeless, individuals without fixed abode) the state was not progressive enough to ensure that measures were in place to protect their vulnerability before implementing a 'hard lockdown.'

There seems to have been an over-reliance on the criminal justice system to enforce COVID-19 measures. The overzealous enforcement of the lockdown resulted in unnecessary, excessive and deadly use of force. Not only did the less fortunate bear the economic burden of the lockdown, they also bore the brunt of the brutal enforcement of COVID-19 measures. Moreover, the lack of accountability of law enforcement officials for human rights violations and deadly use of force two years post the pandemic is unconscionable and a cause of concern.

South Africa is one of the world's most unequal countries; and the virus exposed this inequality and the levels of rampant corruption by state officials. Despite efforts by government to put in place various social relief initiatives such as financial support and grants to ameliorate the effects on the virus on the poor; corruption by state officials continued without accountability and this hampered the country's ability to provide a sustainable development for all.

South Africa's state of disaster has been lifted and new measures are currently being put in place to regulate the COVID-19 situation. Efforts are being made to include the public in the post-state of disaster decision making process through open calls for comment on regulations. As the country navigates through the post-pandemic process, it will be important to hone into areas of concern in order to better understand the challenges that the COVID-19 pandemic had on the rights of people and the criminal justice system and prevent such mistakes from happening in future.

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