

# JUSTIFICATION, INTEGRATION, AND EXPERTISE: SOUTH AFRICA'S REGULATORY RESPONSE TO COVID-19

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## INTRODUCTION

In a country that is still tending to the wounds of *apartheid*, a system of government that was characterized by racially-based oppressive regulation of every detail of people's lives,<sup>1</sup> the regulatory imposition of sweeping restrictions

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1. As Arthur Chaskalson, who became the first President of the post-*apartheid* Constitutional Court and later Chief Justice of South Africa, wrote in 1989:

In the recent history of this country the pillars upon which racial discrimination has stood have been the Population Registration Act, the pass laws, the land laws, the labour laws, the homeland policy and citizenship, the laws regulating and controlling education, and the key to them all, the franchise laws. They constituted a network of interlocking legislation through which it was sought to regulate and control the day to day lives of people. In turn they spawned a massive bureaucracy charged with the task of administering these laws. Intricate regulations were enacted to provide the levers for bureaucratic control and at the centre was the notion that society could best be regulated by a system geared to administrative discretion. The law was built on a structure of privilege dispensed by the state through its officials, rather than upon the recognition of fundamental rights. Permits became the order of the day; and if you were black, they were the key to your very existence.

A. Chaskalson, *The Past Ten Years: A Balance Sheet and Some Indicators for the Future*, 5 SAJHR 293, 294 (1989); see also Jean Burdzik & Dawid van Wyk, *Apartheid Legislation 1976-1986*, 1987

on all aspects of South African society in response to the COVID-19 pandemic is a painful experience. The state of disaster issued on March 15, 2020,<sup>2</sup> the national lockdown from March 27, 2020,<sup>3</sup> and the accompanying all-embracing legal measures that followed,<sup>4</sup> are the most significant restrictions of the freedoms that South Africans obtained only twenty-five years ago upon democratization. Furthermore, as one of the world's most unequal societies,<sup>5</sup> the response to—and ability to respond to—the imposed restrictions is also highly unequal. Compare, for example, the context within which a typical suburban family faces strict stay-at-home lockdown conditions with that of a person living in an informal settlement. The former faces lockdown in a leafy suburb with a nuclear family in a stand-alone house, shopping online, and having groceries delivered to the front door. The experience is vastly different for a person living in one of South Africa's peri-urban informal settlements<sup>6</sup> in a single-room, informal structure along with multiple generations, and having access to public services (sanitation, water) only in communal form and food only from informal traders.

The pandemic hit South Africa relatively late compared to countries in the northern hemisphere.<sup>7</sup> The first case was officially confirmed only in

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CILSA 119, 119–21 (1987) (setting out the various ways *apartheid* has influenced the political system and became embedded in law and practice keeping it alive in South Africa today). See generally RACE AND THE LAW IN SOUTH AFRICA (A.J. Rycroft et al. eds., 1987) (providing a collection of essays identifying the ways racially-based oppressive regulation influenced every detail of the lives of South Africans).

2. Declaration of a National State of Disaster, GN 313 of GG 43096 (15 Mar. 2020).

3. See Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2), GN R.398 of GG 43148 (25 Mar. 2020).

4. See Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002, GN 318 of GG 43107 (18 Mar. 2020) as amended [hereinafter DMA Regulations (18 Mar. 2020)]; Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002, GN R.480 of GG 43258 (29 Apr. 2020) as amended [hereinafter DMA Regulations (29 Apr. 2020)].

5. STAT. S. AFR., INEQUALITY TRENDS IN SOUTH AFRICA: A MULTIDIMENSIONAL DIAGNOSTIC OF INEQUALITY 2 (2019).

6. In 2016, one in five households in South Africa lived in informal dwellings in metropolitan areas. Conservative estimates in 2011 indicated that between 2.9 and 3.6 million people lived in informal settlements in South Africa and that the percentage of households living in informal dwellings increased between 2002 and 2016. SOCIO-ECONOMIC RTS. INST. OF S. AFR., INFORMAL SETTLEMENTS AND HUMAN RIGHTS IN SOUTH AFRICA 6 (2018).

7. See Alexander Winning, *Puzzled Scientists Seek Reasons Behind Africa's Low Fatality Rates from Pandemic*, REUTERS (Sept. 28, 2020, 10:29 PM), <https://www.reuters.com/article/us-health-coronavirus-africa-mortality-i/puzzled-scientists-seek-reasons-behind-africas-low-fatality-rates-from-pandemic-idUSKBN26K0AI> (stating that the pandemic arrived in the African continent later than it arrived in the rest of the world).

early March 2020.<sup>8</sup> By September 12, 2020, about four million tests had been conducted, 648,214 positive cases had been identified, and 15,427 individuals had died of COVID-19 related deaths,<sup>9</sup> all in a population of about sixty million.<sup>10</sup> On this same date, the recovery rate stood at 89%,<sup>11</sup> and South Africa had the eighth-most confirmed cases worldwide.<sup>12</sup> The spread of the virus peaked (at least during the first wave) in mid-July, when new cases rose to just short of 13,000 daily.<sup>13</sup> New cases subsequently declined to 2,000 daily in early September.<sup>14</sup>

Against this backdrop, the regulatory response to the COVID-19 pandemic in South Africa is noteworthy for at least two reasons. First, the relative calm with which South Africans initially accepted the severe restrictions on their daily lives and the changes in attitude over time says something about the authority enjoyed by the government in this crisis based on a culture of justification. Second, the ongoing (almost daily) regulatory adjustments speak to the challenges of regulating in a highly complex environment, especially challenges of regulatory coordination.

## I. CULTURE OF JUSTIFICATION

Early on in South Africa's transition to democracy, leading local administrative law scholar, Etienne Mureinik, typified the constitutional transition as one from a culture of authority to a culture of justification.<sup>15</sup> Mureinik was exploring the purpose of the new Constitution generally and the expansive Bill of Rights it contained more specifically.<sup>16</sup> In doing so, he was formulating an understanding of the legal basis for the exercise of public power in the new, democratic South African state.<sup>17</sup> Using the bridge metaphor that appeared in the postamble of

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8. Press Release, Zwelini Mkhize, Minister of Health, S. Afr. Dep't of Health, First Case of COVID-19 Coronavirus Reported in SA (Mar. 5, 2020), <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/>.

9. Press Release, Zwelini Mkhize, Minister of Health, S. Afr. Dep't of Health, Update on COVID-19 (Sept. 12, 2020), <https://sacoronavirus.co.za/2020/09/12/update-on-covid-19-12th-september-2020/>.

10. STAT. S. AFR., MID-YEAR POPULATION ESTIMATES 2020, at 9 (2020).

11. Press Release, Mkhize, *supra* note 9.

12. Hannah Ritchie et al., *Coronavirus (COVID-19) Cases*, OUR WORLD IN DATA, <https://ourworldindata.org/covid-cases?country=~ZAF> (Dec. 8, 2020, 9:35 AM).

13. *Id.*

14. *Id.*

15. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31, 32 (1994).

16. *See id.* at 31.

17. *See id.* at 32–33.

the 1993 South African Constitution,<sup>18</sup> Mureinik thus depicted the shift in the foundation of public power in South Africa from power premised on authority in the *apartheid* state to power premised on justification in the new democratic dispensation.<sup>19</sup> With “authority,” Mureinik was not simply referring to brute force, which was certainly a characteristic of public power in the *apartheid* state, but more specifically to the doctrine of parliamentary supremacy.<sup>20</sup> In terms of that doctrine, Parliament’s word was quite literally law and had to be followed and enforced by the courts. There was no need for Parliament to justify its enactments to any other actor within the legal framework and, most specifically, not the courts.<sup>21</sup> Since Parliament was elected by the white minority, this doctrine meant that Parliament did not even have to justify its decisions to the majority of those governed by the law. Mureinik argued that the effect of this constellation of public power was “to foster an ethic of obedience.”<sup>22</sup> The political elite-controlled Parliament commanded the state administration, and the administration governed every detail of South Africans’ lives.<sup>23</sup> As Mureinik explained, it was the doctrine of parliamentary supremacy that largely made the legal edifice of *apartheid* possible by establishing a culture of authority.<sup>24</sup>

In breaking with this culture of authority, Mureinik depicted the new constitutional dispensation to be one premised on a culture of justification. He defined this as:

A culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>25</sup>

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18. The S. AFR. (INTERIM) CONST., 1993, was commonly referred to as the interim Constitution because it was meant to govern only the transitional period between the end of *apartheid* and a permanent new constitutional state during which a final democratic constitution was drafted, viz. the S. AFR. CONST., 1996. The S. AFR. (INTERIM) CONST., 1993, contained both a preamble and a postamble. The latter was titled, *National Unity and Reconciliation*, and read in part:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

*Id.*

19. See Mureinik, *supra* note 15, at 31–32.

20. *Id.* at 32.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

Mureinik's depiction of the legal transition in South Africa has been particularly influential, and several scholars have subsequently used his framework to assess aspects of constitutional democracy in South Africa.<sup>26</sup> His account has also found favor with the courts. In *Prinsloo v. Van der Linde*,<sup>27</sup> the Constitutional Court explained both the right to equality and its requirement of rationality with reference to Mureinik's formulation as follows:

It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation." In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification."<sup>28</sup>

And in the celebrated case of *State v. Makwanyane*,<sup>29</sup> Justice Ackermann wrote with reference to Mureinik:

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary

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26. See, e.g., David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, 14 SAJHR 11, 11 (1998); Hugh Corder, *Administrative Justice: A Cornerstone of South Africa's Democracy*, 14 SAJHR 38, 38 (1998); Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 146 (1998); Cora Hoexter, *Contracts in Administrative Law: Life After Formalism*, 121 SALJ 595, 599 (2004); Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 SAJHR 383, 385 (2004); Cora Hoexter, *Judicial Policy Revisited: Transformative Adjudication in Administrative Law*, 24 SAJHR 281, 286–87 (2008); David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, 25 SAJHR 38, 39 (2009); SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 45–46 (2010); Dennis Davis, *Transformation: The Constitutional Promise and Reality*, 26 SAJHR 85, 85 (2010); Geo Quinot, *Substantive Reasoning in Administrative-Law Adjudication*, 3 CONST. CT. REV. 111, 111 (2010); Shanelle van der Berg, *A Capabilities Approach to the Adjudication of the Right to a Basic Education in South Africa*, 18 J. HUM. DEV. & CAPABILITIES 497, 502 (2017).

27. 1997 (30) SA 1012 (CC) at 1–47 (S. Afr.).

28. *Id.* at 19–20 para. 25 (footnotes omitted).

29. 1995 (3) SA 391 (CC) at 200 (S. Afr.) (finding the death penalty unconstitutional).

application can, in any real sense, be tested against the precepts or principles of the Constitution.<sup>30</sup>

Mureinik's framing of the post-*apartheid* South African legal order, in terms of a culture of justification, is accordingly a widely accepted and useful way of not only understanding the transition from *apartheid* to the current constitutional state but also interrogating the exercise of public power in terms of this constitutional dispensation.

## II. JUSTIFICATION IN RESPONDING TO COVID-19

The framework of a culture of justification can be useful to explore the experience of the South African government's response to COVID-19 from a regulatory perspective. Conversely, the COVID-19 regulatory experience sheds some light on the cogency of the framework of a culture of justification.

On March 15, 2020, the government declared a national state of disaster in terms of the Disaster Management Act 57 of 2002.<sup>31</sup> While such a declaration does not allow the same level of restrictions, including derogation of constitutional rights, as under a declaration of a state of emergency,<sup>32</sup> the Disaster Management Act still grants extensive regulatory powers to government to respond to the national disaster. These powers include the authority to "make regulations or issue directions or authorise the issue of directions" concerning a very wide range of issues<sup>33</sup> and may include penalties for contravention of such

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30. *Id.* at 96–97, para. 156 (footnote omitted).

31. Declaration of a National State of Disaster, GN 313 of GG 43096 (15 Mar. 2020).

32. A state of emergency is declared in terms of the State of Emergency Act 64 of 1997 (S. Afr.) read with section 37 of the S. AFR. CONST., 1996, which determines the extent to which constitutional rights may be derogated under a state of emergency.

33. The Disaster Management Act, 2002 § 27(2) (S. Afr.) (2003) lists the following as the areas that may be covered by these regulations/directions if a national state of disaster is declared:

- (a) the release of any available resources of the national government, including stores, equipment, vehicles, and facilities;
- (b) the release of personnel of a national organ of state for the rendering of emergency services;
- (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
- (g) the control and occupancy of premises in the disaster-stricken or threatened area;
- (h) the provision, control, or use of temporary emergency accommodation;

regulations. Two distinct sets of regulations were issued in terms of this power, both of which were amended multiple times.<sup>34</sup> Furthermore, the regulations authorized many cabinet members to issue directions within their particular portfolios.<sup>35</sup> This prompted cabinet members to subsequently issue a large number of additional directions with particular topics under the regulations in specific sectors.<sup>36</sup> The regulations placed South Africa under an effective and strict lockdown beginning March 26, 2020.<sup>37</sup> From March 26 to April 30, the regulations dictated, *inter alia*, that during the lockdown period:

- [E]very person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention;<sup>38</sup>

.....

All businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service.<sup>39</sup>

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- (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
  - (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
  - (k) the dissemination of information required for dealing with the disaster;
  - (l) emergency procurement procedures;
  - (m) the facilitation of response and post-disaster recovery and rehabilitation;
  - (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain, and minimise the effects of the disaster; or
  - (o) steps to facilitate international assistance.

34. See DMA Regulations (18 Mar. 2020), *supra* note 4 (issuing regulations pursuant to schedule to prevent worsening the national state of disaster or its effects, in terms of section 27(2) of the Disaster Management Act of 2002); DMA Regulations (29 Apr. 2020), *supra* note 4 (making “Regulations in the Schedule” in terms of section 27(2) of the Disaster Management Act of 2002).

35. See DMA Regulations (18 Mar. 2020), *supra* note 4, § 10 (designating the authority of ministers to issue sector-relevant directions to alleviate the COVID-19 pandemic) and DMA Regulations (29 Apr. 2020), *supra* note 4, § 4 (designating the authority of cabinet members to issue relevant directions to alleviate the COVID-19 pandemic).

36. Lists of these directions can be found at *Covid-19 Materials*, SAFLII, <http://www.saflii.org/content/covid-saflii-0> (last visited Mar. 3, 2021); *COVID-19 Corona Virus South African Resource Portal*, S. AFR. DEP'T OF HEALTH, <https://sacoronavirus.co.za/> (last visited Mar. 3, 2021).

37. See Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2), GN R.398 of GG 43148 (25 Mar. 2020), § 11A (defining lockdown movement restrictions starting on March 26, 2020).

38. *Id.* § 11B(1)(a)(i).

39. *Id.* § 11B(1)(b).

Retail shops and shopping malls must be closed, except where essential goods are sold . . . .<sup>40</sup>

. . . .

Any place not involved in the provision of an essential good or service must remain closed to all persons for the duration of the lockdown.<sup>41</sup>

- Schools and partial care facilities must be closed by 18 March 2020 until 15 April 2020 which period may be extended for the duration of the national state of disaster by the cabinet member responsible.<sup>42</sup>

These restrictions were subsequently incorporated in a “risk adjusted strategy”<sup>43</sup> as level 5, the most restrictive of the five alert levels that may be determined.<sup>44</sup> Subsequent, lower alert levels involved the gradual easing of restrictions by allowing particular activities to resume under strict conditions.<sup>45</sup> Alert level 4 was implemented from May 1,<sup>46</sup> level 3 from June 1,<sup>47</sup> and level 2 from August 18.<sup>48</sup>

The government’s far-reaching interventions at the outbreak of the COVID-19 pandemic in South Africa were remarkably calmly received and enjoyed across-the-board political support.<sup>49</sup> President Cyril Ramaphosa’s

40. *Id.* § 11B(1)(c).

41. *Id.* § 11B(1)(e).

42. DMA Regulations (18 Mar. 2020), *supra* note 4, § 6.

43. *COVID-19 Risk Adjusted Strategy*, S. AFR. DEP’T OF HEALTH (May 28, 2020), <https://sacoronavirus.co.za/covid-19-risk-adjusted-strategy/>.

44. DMA Regulations (29 Apr. 2020), *supra* note 4, § 3.

45. See Winnie Theletsane, *Level 1 to 5: Here’s What the Lockdown Levels Mean for You*, EYEWITNESS NEWS, (Apr. 23, 2020) <https://ewn.co.za/2020/04/23/stage-1-to-5-here-s-what-the-lockdown-levels-mean-for-you> (describing the applicable restrictions at each alert level).

46. DMA Regulations (29 Apr. 2020), *supra* note 4, § 15.

47. Disaster Management Act, 2002: (Act No. 57 of 2002): Determination of Alert Level and Hotspots, GN 608 of GG 43364 (28 May 2020).

48. Disaster Management Act, 2002: (Act No. 57 of 2002): Determination of Alert Level, GN 891 of GG 43620 (17 Aug. 2020).

49. See Press Release, President Cyril Ramaphosa, Extension of Coronavirus COVID-19 Lockdown to the End of April (Apr. 9, 2020) <https://www.gov.za/speeches/president-cyril-ramaphosa-extension-coronavirus-covid-19-lockdown-end-april-9-apr-2020-0000> (detailing President Cyril Ramaphosa’s three-part lockdown strategy); Univ. of Johannesburg, *Research Survey Shows that the Lockdown Fosters Distress and Social Division*, POLITY (Apr. 21, 2020), <https://www.polity.org.za/article/research-survey-shows-that-the-lockdown-fosters-distress-and-social-division-2020-04-21> (reporting on a survey, conducted by the University of Johannesburg’s Centre for Social Change and the Human Sciences Research Council during the early phases of government’s response to the pandemic, that indicated that “43% of South Africans supported the lockdown with its current level of restrictions”).

leadership in the crisis was largely met with admiration.<sup>50</sup> This is significant given the severity of the restrictions imposed against the backdrop of hard-won (and fairly recent) individual freedoms. These initial reactions can plausibly be understood as bearing out a culture of justification that has taken root in South Africa. Put differently, it is arguable that the justifications offered for government's initial, drastic regulatory interventions resulted in the legitimacy of those interventions in the eyes of those affected. The Ramaphosa government's approach to COVID-19 regulation was firmly led by expert, scientific guidance.<sup>51</sup> A COVID-19 Ministerial Advisory Committee was established, consisting of internationally-respected scientists in various relevant fields and chaired by world-renowned epidemiologist Professor Salim Abdool Karim.<sup>52</sup> In taking and announcing regulatory interventions, the government was careful to relate those interventions to scientific explanations.<sup>53</sup> The Ministerial Advisory Committee and, in particular, Professor Karim, became as familiar voices in communicating government's interventions as has Health Minister Doctor Zweli Mkhize. There can be little doubt that this approach has generated high levels of trust and support for the government's actions.<sup>54</sup>

The government's response to COVID-19 is in stark contrast to the not-unrelated experience of the government's response to the HIV/AIDS epidemic in the early 2000s during President Thabo Mbeki's term. The AIDS denialism that characterized the Mbeki government's response to the

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50. See Univ. of Johannesburg, *supra* note 49 (reporting on a survey conducted by the University of Johannesburg's Centre for Social Change and the Human Sciences Research Council during the early phases of government's response to the pandemic that indicated that 73% of respondents believed that President Ramaphosa was doing a good job in handling the pandemic and only 4% indicating that he was doing a bad job).

51. See *Ministerial Advisory Committees on COVID-19*, S. AFR. DEP'T OF HEALTH (Apr. 21, 2020), <http://www.health.gov.za/index.php/component/phocadownload/category/636#> (describing the team of pathologists, clinicians, and other public health experts tapped to respond to COVID-19 in South Africa).

52. *Id.*

53. See Judd Devermont & Topaz Mukulu, *South Africa's Bold Response to the Covid-19 Pandemic*, CTR. FOR STRATEGIC & INT'L STUD. (May 12, 2020), <https://www.csis.org/analysis/south-africas-bold-response-covid-19-pandemic> (discussing the government's science-based approach to imposing and removing COVID-19 interventions).

54. See IPSOS, CORONAVIRUS: OPINION AND REACTION 3, 5, 8–9 (2020), [https://www.ipsos.com/sites/default/files/ct/news/documents/2020-04/coronavirus\\_online\\_polling\\_south\\_africa\\_wave\\_1.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2020-04/coronavirus_online_polling_south_africa_wave_1.pdf) (noting that South Africans trust the transparency in both the media and their government in conveying COVID-19 information, but place the most confidence in the World Health Organization (WHO)).

epidemic<sup>55</sup> caused relentless public outcry and condemnation,<sup>56</sup> and was only reversed on the back of arduous public interest litigation resulting in a bruising defeat of government's policy in the Constitutional Court.<sup>57</sup> The difference between the two experiences is an important lesson in justification, which links to the debate about the role of experts in public policy and regulatory functions that long precedes the COVID-19 crisis. One of the key differences in Mbeki's handling of the HIV/AIDS epidemic and Ramaphosa's initial response to COVID-19 is their reliance on experts and scientific input. Mbeki—and especially his Health Minister, Doctor Manto Tshabalala-Msimang—eschewed leading scientific opinion and advice on how to deal with the HIV/AIDS epidemic (ironically from some of the very same scientists serving on the COVID-19 Ministerial Advisory Committee), and formulated government's response based on widely discredited views of the epidemic and how to treat it (such as notoriously promoting African potato, beetroot, garlic and lemon instead of antiretrovirals (ARVs) as effective treatment options).<sup>58</sup> The effect of this approach has been calculated to have resulted in 330,000 premature deaths.<sup>59</sup> The Mbeki government's explanations for its approach—with explicit reliance on its questionable scientific basis—played a major role in the widespread rejection and opposition, and eventual judicially-enforced turnaround in regulatory approach.

The stark difference between these two responses to public health crises illustrates the potential power of justification as a basis for legitimizing exercises of public power. However, the South African government's handling of COVID-19 also illustrates that it is not the simple act of justifying an intervention that sustains legitimacy, but the *culture* of justification that does so. That is, legitimacy does not flow from a single act of justification, but from the continuous, permanent entrenchment of justification as a mode of public

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55. See Pride Chigwedere et al., *Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa*, 49 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 410, 410 (2008) (listing President Mbeki's actions in response to the AIDS epidemic); Nicoli Nattrass, *AIDS and the Scientific Governance of Medicine in Post-Apartheid South Africa*, 107 AFR. AFFS. 157, 159 (2008) (discussing how the South African government under Mbeki served as an obstacle to treating the HIV/AIDS crisis because it denied the scientific basis of the diseases).

56. See generally EDWIN CAMERON, WITNESS TO AIDS (2005) (chronicling leading South African activist, jurist, and Constitutional Court Justice, Edwin Cameron's battle with AIDS).

57. In *Minister of Health v. Treatment Action Campaign 2002 (2) SA 75 (CC)* at 78–81 para. 135 (S. Afr.), the Constitutional Court reviewed and set aside government's policy for reducing the risk of mother-to-child transmission of HIV and ordered government to provide antiretroviral treatment at public healthcare facilities.

58. Nattrass, *supra* note 55, at 158–62, 167–68; Chigwedere et al., *supra* note 55, at 414.

59. Chigwedere et al., *supra* note 55, at 412.

decisionmaking. This is effectively illustrated by the growing disillusion and resultant resistance to the government's COVID-19 measures.

As the alert levels were reduced, differentiated treatment of activities and sectors emerged in the overall regulatory approach. Increasingly, these differences in treatment were perceived to be irrational, leading to acts of resistance. In particular, judicial challenges to specific decisions started to appear on the court rolls.<sup>60</sup> While these cases dealt with various different aspects of the COVID-19 regulatory measures and attacked them on different grounds, a common theme was an attack on the rationality of the regulatory decisions at issue. This is vividly illustrated in the High Court judgment in *De Beer v. Minister of Cooperative Governance and Traditional Affairs*,<sup>61</sup> where the court found that one set of regulations issued under the Disaster Management Act was invalid on the basis of irrationality. In reaching this conclusion, the court noted a number of discrete measures that it considered to be irrational when viewed together.<sup>62</sup> Two examples noted by the court are that:

- (i) Loved ones are by the lockdown regulations prohibited from leaving their home to visit [an ill relative] if they are not the care-givers of the patient, being prepared to limit their numbers and take any prescribed precautions[.] But once the person has passed away, up to [fifty] people armed with certified copies of death certificates may even cross provincial borders to attend the funeral of one who has departed and is no longer in need of support. The disparity of the situations are not only distressing but irrational.<sup>63</sup>
- (ii) To illustrate this irrationality further in the case of hairdressers: a single mother and sole provider for her family may have been prepared to comply with all the preventative measures proposed in the draft Alert Level 3 regulations but must now watch her children go hungry while witnessing minicab taxis pass with passengers in closer proximity to each other than they would have been in her salon. She is stripped of her rights of dignity, equality, to earn a living and to provide for the best interests of her children.<sup>64</sup>

The court accordingly invalidated the regulations because, in the court's view, they constituted a "paternalistic approach, rather than a [c]onstitutionally

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60. *Freedom Front Plus v. President of the Republic of S. Afr.* 2020 (3) All SA 762 (GP) at 2, 11–12, 26 paras. 1, 3, 28, 76; *Skole-Ondersteuningsentrum NPC v. Minister of Soc. Dev.* 2020 (4) All SA 285 (GP) at 2 paras. 1.2–1.4; *De Beer v. Minister of Coop. Governance & Traditional Affs.* 2020 (11) BCLR 1349 (GP) at 2 paras. 1–2; *Fair-Trade Indep. Tobacco Ass'n v. President of the Republic of S. Afr.* 2020 ZAGPPHC 246 (GP) at 2 paras. 2–2.4; *Equal Educ. v. Minister of Basic Educ.* 2020 (4) All SA 102 (GP) at 3–4 paras. 2–4; *Esau v. Minister of Co-Operative Governance & Traditional Affs.* 2020 (11) BCLR 1371 (WCC) at 2–3 paras. 1.1.1–1.6.

61. *De Beer*, 2020 (11) BCLR 1349 (GP) at 30, 32.

62. *Id.* at 21–24 para. 7–7.13.

63. *Id.* at 21 para. 7.1.

64. *Id.* at 22 para. 7.3.

justifiable approach . . . .”<sup>65</sup> It seems that as the restrictive measures started losing their justificatory cogency, the judicial challenges surfaced.

Particularly, at the same time, questions were being raised about the government starting to sideline the advice of scientists. This was especially evident in the acrimonious exchange between the Minister of Health and a leading member of the COVID-19 Ministerial Advisory Committee, Professor Glenda Gray. Gray, who is the President of the South African Medical Research Council and a member of the Advisory Committee, publicly questioned some of the restrictions under the distinct alert levels.<sup>66</sup> Noting that some of the continued restrictions made no sense and could do more harm than good, she stated that government was ignoring advice from scientists and formulated specific measures without input from the scientific advisors.<sup>67</sup> In an extraordinary step, the Minister of Health issued a comprehensive statement attacking Gray and labelling her statements as “devoid of the truth.”<sup>68</sup> The Head of the National Department of Health consequently called for an official investigation into the conduct of Gray, stating that her statements were “damaging to government’s response to COVID-19.”<sup>69</sup> The Medical Research Council subsequently cleared Gray of any wrongdoing.<sup>70</sup> This episode seems to support the growing unease over government’s justification of far-reaching measures aimed at COVID-19 and the general populace’s willingness to accept the limitations imposed by these.

### III. EXPERTISE AS JUSTIFICATION

The particular role (or absence thereof) of experts in public decisionmaking during the COVID-19 pandemic in South Africa highlights the importance of the ongoing debate about the role of scientists and other experts in regulatory

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65. *Id.* at 26 para. 7.18.

66. Clement Manyathela, *Health Dept Met with Ministerial Advisory Board After Public Criticism by Member*, EYEWITNESS NEWS (May 17, 2020), <https://ewn.co.za/2020/05/17/health-dept-meets-with-critics-in-ministerial-advisory-board-who-claim-they-were-ignored>.

67. Refilwe Pitjeng, *What Happened with Glenda Gray? A Timeline*, EYEWITNESS NEWS (May 27, 2020), <https://ewn.co.za/2020/05/27/what-happened-with-glenda-gray-timeline>.

68. Press Release, Minister of Health, *Health Minister’s Statement on Prof Glenda Gray’s Public Attack of Government Based on Inaccurate Information* (May 20, 2020), <https://sacoronavirus.co.za/2020/05/20/health-ministers-statement-on-the-prof-glenda-grays-public-attack-of-government-based-on-inaccurate-information/>.

69. *Health Dept Boss Calls for Investigation into Glenda Gray*, EYEWITNESS NEWS (May 25, 2020), <https://ewn.co.za/2020/05/25/health-dept-boss-calls-for-investigation-into-glenda-gray>.

70. Zintle Mahlati, *SAMRC Clears Professor Gray for Controversial Comments Made to Media*, MSN NEWS (May 26, 2020), <https://www.msn.com/en-za/news/other/samrc-clears-professor-gray-for-controversial-comments-made-to-media/ar-BB14BBNL>.

programs. This is, of course, not a new debate,<sup>71</sup> and the COVID-19 experience will certainly not bring the final word in this debate. However, the current experience gives one the opportunity to reflect on the importance of an appropriate and visible link between (political) policy action and the expertise on which it is based. The South African experience in particular illustrates how that link can make or break a regulatory program in embedding such program in a culture of justification as opposed to a culture of authority. The contrasting experiences of the Ramaphosa government's response to COVID-19 and the Mbeki government's response to HIV/AIDS shows how the presence or absence of expert, scientific justification for a regulatory intervention can be critical in its perceived legitimacy.<sup>72</sup> But the Ramaphosa government's response to COVID-19 over time also illustrates how it is not a mere one-off presence of scientific justification at the outset of a regulatory intervention that serves to legitimize it, but, rather, embedding regulatory decisionmaking within a culture of justification that is required. That is, there is a need for continuous justification as the program unfolds.

The COVID-19 regulatory experience in South Africa illustrates a further critical point in establishing a culture of justification. The experience shows that the justification required is more nuanced than simply pointing to scientists and scientific advice; even scientists or scientific explanations can amount to a culture of authority. Justification in Mureinik's framework of a culture of justification is thus not simply about *having* an explanation; it is about the cogency of that explanation.<sup>73</sup> In a constitutional democracy, such as South Africa, the cogency of that explanation must be determined within the constitutional normative framework. It does not matter how good the science is. If the decision cannot be justified with reference to the constitutional normative framework, it does not meet the standard of a culture of justification. Such a decision simply reflects another form of a culture of authority: the culture of scientific authority. What is required in a culture of justification is a balance of scientific reasoning and constitutional norms.

This balance can perhaps be illustrated with reference to some of the decisions taken by the South African government in its COVID-19 interventions, such as the decision to close schools.<sup>74</sup> The scientific explanation

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71. See Gary Edmond & David Mercer, *Experts and Expertise in Legal and Regulatory Settings*, in EXPERTISE IN REGULATION AND LAW 1–2 (Gary Edmond ed., 2004) (explaining that questions regarding expertise in legal and regulatory issues are not new).

72. Geo Quinot, *Regulatory Justification and Coordination in South Africa*, REGUL. REV. (Apr. 29, 2020), <https://www.theregreview.org/2020/04/29/quinot-regulatory-justification-coordination-south-africa/>.

73. Mureinik, *supra* note 15, at 32.

74. DMA Regulations (18 Mar. 2020), *supra* note 4, § 6.

for closing schools to stop the community spread of the virus may be compelling, but if that decision does not align with the constitutional normative framework, it does not meet the test of justification. This is indeed the case in South Africa, where this scientific solution needs to be balanced against children's constitutional rights to food<sup>75</sup> within the context of large-scale reliance on school feeding programs to realize such rights.<sup>76</sup> Within this context, a blanket decision to close schools cannot be viewed as legitimate within a culture of justification.

#### IV. INTEGRATION AND COORDINATION

The realization that justification within a culture of justification is not merely about having explanations, even scientific ones, for public decisions, but is about grounding the explanations for public decisionmaking in the constitutional normative framework, brings to the fore the heightened need for integration and coordination in regulatory approaches.

As much as expertise in particular niche areas seems to have been a leading factor in the (early) success of COVID-19 regulatory interventions in South Africa, there may also be the risk that such an expert focus may prevent a more holistic regulatory approach, as the school closure example above illustrates. The continuous adjustments in the regulations aimed at managing the pandemic in South Africa<sup>77</sup> show how the complexity of dealing with this crisis calls for high levels of regulatory coordination. This coordination poses particular challenges for traditional approaches to regulation, which, in South Africa, is typically a sector-specific, vertical approach. That is, line departments are given statutory authority to implement particular regulatory interventions, which they do with minimal interaction with other line departments. Coordination happens only at a very high level and mostly on political terms within Cabinet, i.e., there is very limited regulatory coordination at a horizontal level on the detail of regulatory programs between departments. The shortcomings of such an approach are evident in the COVID-19 context, which calls for integrated, holistic regulatory intervention.

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75. S. AFR. CONST., 1996. §§ 27–29.

76. *See* *Equal Educ. v. Minister of Basic Educ.* 2020 (4) All SA 102 (GP) at para. 2 (holding that restrictions under the COVID-19 regulations breach the government's constitutional duty to provide basic nutrition to school children under the National School Nutrition Programme).

77. DMA Regulations (29 Apr. 2020), *supra* note 4, § 2(1); Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2), GN 999 of GG 43725 (18 Sept. 2020) § 1. The regulations from April 29, 2020 repeal the first set of regulations from March 18, 2020 and were amended five times between March 18 and April 16. The second set of regulations, originally passed on April 29, 2020, were also amended five times, as of September 18, 2020, when published in GG 43725.

In an attempt to overcome this challenge, the regulations issued under the Disaster Management Act authorized any cabinet member to issue and vary “directions,” “as required, within his or her mandate, to address, prevent and combat the spread of COVID-19, and its impact on matters relevant to their portfolio, from time to time, as may be required . . . .”<sup>78</sup> However, despite the overarching grant of regulatory power to deal with sector-specific issues as part of the pandemic response, no provision is made for coordination at the administrative, implementation level. As a result, the dozens of directions that have been issued under authority of various cabinet members have not always been aligned.<sup>79</sup>

For example, it is at the administrative level that provision for continued payout of social grants in order not to inadvertently harm those vulnerable members of society dependent on social assistance needs to be aligned to health restrictions on: gathering of groups and movement of people; public transport restrictions; operation of particular businesses, including hours of operation; continued importation of fuel cargo; and the distribution and sale of fuel. It is evident that the South African government has not consistently succeeded to achieve such levels of alignment. This is, for example, evident in comparing the continued curfew under alert level 2, set between 10:00 PM and 4:00 AM daily when “[e]very person is confined to his or her place of residence”<sup>80</sup> and the directions governing the opening hours of restaurants and bars, which allow such establishments to serve patrons until 10:00 PM.

The COVID-19 pandemic starkly illustrates the impracticability, even senselessness, of the continued vertical concentration of regulatory structures.

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78. DMA Regulations (29 Apr. 2020), *supra* note 4, § 4(10).

79. See Press Release, Madeleine Hickin, Member of Parliament, South Africa: DA Calls for Urgent Resolution to Inconsistent COVID-19 Test Requirements for Students Crossing SA's Borders (Oct. 5, 2020), <https://allafrica.com/stories/202010050779.html> (describing how border officials have inconsistently applied COVID-19 testing requirements to different types of students travelling to and from South Africa); Bradley Prior, *Western Cape Defends Decision to Reopen Schools*, MYBROADBAND (June 4, 2020), <https://mybroadband.co.za/news/government/354637-western-cape-defends-decision-to-reopen-schools.html> (describing conflicting directions about reopening schools); Zintile Mahlati, *Some Lockdown Regulations Have Been Contradictory and Poorly Explained – Ramaphosa*, IOL (May 13, 2020), <https://www.iol.co.za/news/politics/some-lockdown-regulations-have-been-contradictory-and-poorly-explained-ramaphosa-47909996> (quoting President Ramaphosa as acknowledging that some COVID-19 rules have been “contradictory and some poorly explained”); Bert Olivier, *South Africa's Fumbling Response to COVID-19 Poses Questions*, MAIL & GUARDIAN (May 10, 2020), <https://mg.co.za/coronavirus-essentials/2020-05-10-south-africas-fumbling-response-to-covid-19-poses-questions/> (noting contradictory stances on exercise by the health and policy ministers respectively).

80. Regulations Issued in Terms of Section 27(2) of the Disaster Management Act of 2002, GN 891 of GG 43620 (17 Aug. 2020), §§ 50, 55(n).

The pandemic calls for renewed attention, at an institutional dimension, to how regulation within particular sectors is formulated, with the particular aim of achieving higher levels of coordination and integration across the entire regulatory state, not only for the benefit of enhanced responses to major crises, like COVID-19, but also, more generally, in pursuit of a culture of justification.

### CONCLUSION

The COVID-19 pandemic has called the South African administrative state to action in a way that is unprecedented in its twenty-five years as a democratic state. As such, the pandemic has created a harsh testing ground for the entrenchment of the constitutional ideal of an administratively just bureaucracy. That is, a state administration characterized by a culture of justification as distinct from the culture of authority that characterized the preceding *apartheid* state.

At the same time, the COVID-19 pandemic provides a field test (of sorts) for the theoretical framework of a culture of justification, put forward by Mureinik,<sup>81</sup> as a way to legitimize the exercise of public power.

An analysis of the South African government's regulatory response to COVID-19 within the framework of a culture of justification shows the potential power of justification in generating legitimacy of even severely limiting regulatory actions.<sup>82</sup> However, it also demonstrates that a once-off justification, especially of a scientific nature, at the outset of a regulatory program is inadequate to meet the standard of a culture of justification. Justification must be an ongoing characteristic of regulatory interventions in order for them to maintain their legitimacy. The COVID-19 regulatory experience furthermore illustrates that the scientific nature of an explanation for regulation does not guarantee its justification. To provide legitimacy, the explanation must also be anchored within the normative framework of the constitutional state. It is the combination of the objective, scientific pedigree of the explanation and its alignment to the normative framework that generates justification. Within a complex social environment, in which virtually all regulation exists, this required level of balance and alignment can only be achieved with high levels of coordination and integration between different sites of regulatory interventions.

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81. Mureinik, *supra* note 15, at 32; Press Release, Mmamoloko Kubayi-Ngubane, Minister of Tourism, Media Statement on Coronavirus COVID-19 Alert Level-2 Tourism Sector Directions (Aug. 19, 2020), <https://www.gov.za/speeches/minister-tourism-mmamoloko-kubayi-ngubane-coronavirus-covid-19-alert-level-2-tourism-sector>.

82. *See supra* Section II (describing the South African government's interventions at the start of the pandemic and the nation's response as indicative of the culture of justification that had been established).