

COVID-19 and human rights limitations: Taking public opinion into account

Summary

In this policy brief we analyse the willingness to sacrifice specific human rights in the context of COVID-19 in South Africa. It is argued that the suspension of certain freedoms is sometimes considered or perceived as necessary under the dire and life-threatening circumstances of the pandemic. This complex issue has critical policy and social implications that need to be considered and addressed as part of an effective strategic and regulatory response that minimises risk and promotes recovery, while considering public needs and preferences. For this reason, the role of social sciences – and in particular public opinion research – in thinking through challenges and solutions is encouraged.

Introduction

The South African Bill of Rights is the cornerstone of South African democracy, as articulated in section 7 of the Constitution of the Republic of South Africa, 1996. However, the devastating global COVID-19 pandemic has shown that national responses to such health crises will often involve the temporary limitation of some fundamental rights. This is rationalised

as necessary to flatten the curve and to prevent the spread of the virus for the security and good of all, with lives literally depending on sacrificing certain liberties. Following the first confirmed case on 5 March 2020, government heeded the advice of leading medical researchers and introduced a national lockdown consisting of far-reaching regulatory measures under the Disaster Management Act No. 57 of 2002. Among the rights that were limited under the lockdown are freedoms of movement, assembly, association and trade, as well as the rights to education and privacy. This policy brief focuses only on the issue of the limitation of freedoms by policy makers under the Act and its regulations, and does not address the plethora of other consequential violations of the rights of women, the right to food, and the right to physical and bodily integrity, amongst others.

Section 36 of our Constitution allows for the limitation of rights, when such limitation is 'deemed reasonable and justifiable in an open and democratic society'. The 'invisible enemy' represented by COVID-19 leaves us – authorities and citizens alike – with few choices. It happened suddenly, and lives

were irrevocably changed across the globe. Despite initial praise for decisive leadership in instituting the lockdown, the adoption of some of the most severe restrictions globally has led to appeals by organisations such as Human Rights Watch (2020) for a more rights-centred approach when imposing regulations that restrict certain rights in the interests of protecting lives. The role of public support and opinion as a precursor to regulatory adherence has been somewhat overlooked, as have other factors (Naicker, 2020).

This policy brief uses survey evidence to address fundamental questions about the nature of public willingness to act for the greater good (namely preventing the spread of the virus), the interpretation of rights and whether people are more willing to sacrifice certain freedoms over others, and the factors associated with views on the temporary limitation of human rights.

A public perspective on human rights sacrifice

To address the aforementioned questions, use was made of the COVID-19 Democracy Survey (UJ & HSRC, 2021). This was an online survey conducted by the University of Johannesburg (UJ) and the Human Sciences Research Council (HSRC). It consisted of two rounds of surveying, the first taking place between 13 April and 11 May, with 12 312 completed questionnaires, while the second took place between 3 July and 8 September, comprising an analysis of 7 966 completed questionnaires. The survey collected data from respondents aged 18 and older using the #datafree Moya Messenger App on the #datafree biNu platform. The data were weighted to align with StatsSA's demographic estimates on the basis of age, population group and education. This makes the survey findings broadly indicative of the attitudes and behaviour of the South African population.

A resolute commitment to conditionally sacrificing rights

During the hard lockdown (Level 5) period, a significant majority (78%) of the adult public was willing to sacrifice some human rights if it helped reduce the spread of COVID-19 (Bohler-Muller, Davids, Roberts & Bekker, 2020). As the country moved to lower lockdown levels, a modest decline in support for the limitation of freedom occurred as frustration and anger over the pandemic and restrictive government regulations intensified, falling six percentage points to 72%.

Some might find this pro-sacrifice tendency surprising. However, the fielding of the survey question in 28 other countries by Gallup International during March 2020 (Gallup International Association, 2020) clearly suggests that South Africans are by no means exceptional in this predisposition. An average of 75% reported a willingness to sacrifice some human rights to flatten the curve of the pandemic, ranging from a low of 32% in Japan and 45% in the USA to a high of more than 90% in Austria, North Macedonia, Italy and the Netherlands. Conducted in a similar time

period, the UJ/HSRC Survey Round 1 figure of 78% for South Africa falls in the middle of this distribution, placing us slightly above average alongside countries such as Pakistan, Ecuador and Turkey.

Emerging divisions

While the observed change between the South African survey rounds was not especially large, it masks more substantive and growing variations within society over the April to September period (Figure 1). The largest observed declines in willingness to sacrifice rights are evident among white adults, those older than 55 years and suburban residents. A clear class divide exists, with middle-class suburbanites far less open to sacrificing human rights than their less affluent peers.

Round 2 of our data also points to an appreciable political divide in willingness to sacrifice rights. African National Congress (ANC) supporters largely approved of such sacrifice (78%), while similar levels of support were manifest among Economic Freedom Fighters (EFF) supporters (74%). By contrast, only 54% of Democratic Alliance (DA) supporters

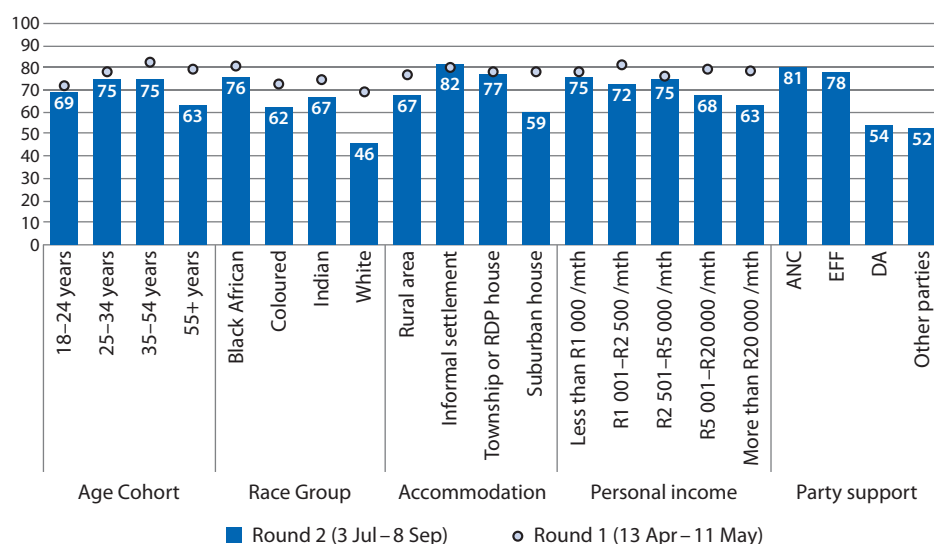


Figure 1: Willing to sacrifice some human rights to prevent the spread of COVID-19, by select socio-demographics (% agree/strongly agree)

Source: UJ/HSRC Democracy Survey Round 1 & 2 (UJ & HSRC, 2021)

said that they would be prepared to have their individual liberties limited. These results partly reflect attitudes towards government and confidence in President Ramaphosa in particular (discussed further below). Party position on government's COVID-19 response is also likely to form part of the explanation, with initial inter-party support for lockdown being increasingly replaced with criticism of government lockdown measures by opposition parties, arguing that they were excessive and irrational (Deochand, Mafuma & Baduza, 2020).

Taken together, these socio-demographic, spatial and political differences contributed to rights-based polarisation and demonstrate that deep societal fault lines exist in how freedom – as a constitutional right and value – is understood and practiced, and whether rights are perceived to be *meaningful* in creating a better life for all.

Foregoing which rights?

Combating the COVID-19 pandemic does, of course, not require the suspension of all freedoms. One obvious question then is which *specific* human rights would South Africans be prepared to concede? Our results suggest that individuals possess differentiated views on which human rights they would sacrifice, with some favoured more than others (Bohler-Muller, Davids, Roberts, Gordon & Runciman, 2020) (Figure 2). Respondents were provided with a predefined list of six fundamental freedoms they might be willing to forgo for the greater good. A majority said that they would surrender their right to religious assembly (56%) and their freedom of travel (51%). Only between a fifth and a third were willing to temporarily suspend the right to work (27%), attend an educational institution (33%), or the right to protest (31%). Less than a fifth (16%) felt that their right to privacy should be limited.

There was a significant clash in the pattern of responses, with better-off South Africans more prepared to sacrifice their freedom to gather for worship as well as their right to privacy than their poorer counterparts. This speaks to further polarisation on the nature and meaning of rights and how these are understood, with individual liberties being most important to the wealthy, whose privilege lends itself to greater enjoyment of individual rights, while poorer citizens tend to see rights within the context of social solidarity and the greater good.

The relevance of willingness to sacrifice

At an individual level, attitudes towards human rights sacrifice have a bearing on compliance with regulations, illustrating the important behavioural impact of these views. The wearing of facemasks in public is a case in point. Coronavirus-related research has repeatedly established and promoted the health benefit of mask wearing. For this reason, governments around the world (including South Africa) have mandated that masks be worn in all public places (WHO, 2020). This prevention measure has been quite successful in reducing infection rates (Mitze, Kosfeld, Rode &

Wälde, 2020). In Round 2 of the UJ/HSRC Survey, a substantial minority (25%) of participants said that they did not always wear a facemask when they were in public. Three-quarters (74%) of survey participants that were willing to sacrifice their rights reported always wearing a facemask, compared to 63% of those who were unwilling to sacrifice their rights.

Factors associated with willingness to sacrifice

Whether or not South Africans supported the suspension of liberties to fight the pandemic was strongly influenced by how they felt about the president and national government. More than two-thirds (69%) of those who felt the president was performing well in his handling of the pandemic were inclined to accept limitations on their rights. This can be compared to only 31% of those who were critical of his performance (Figure 3).

However, trust has diminished over the period of surveying and, as Mark Heywood (2020) has observed:

until recently there was overwhelming support for the country's measures to stop the

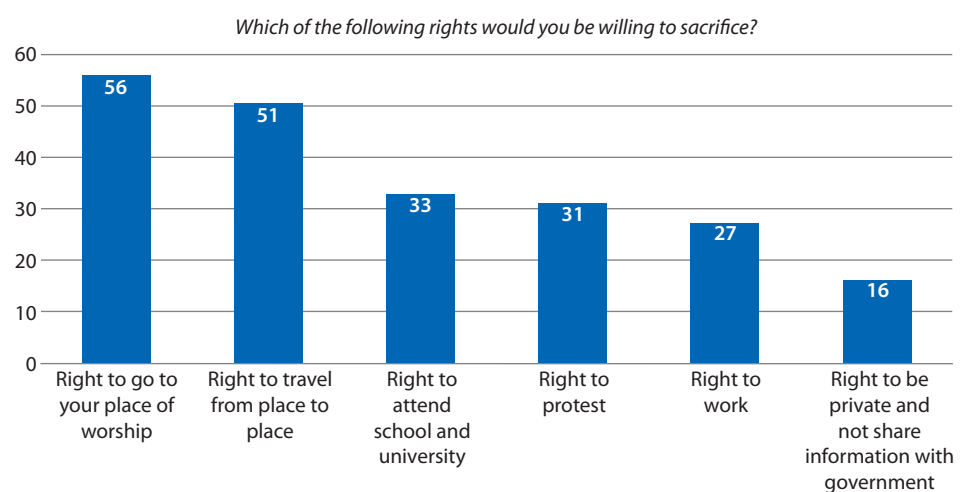


Figure 2: Specific rights that South Africans would be willing to sacrifice to prevent the spread of COVID-19 (%)

Source: UJ/HSRC Democracy Survey Round 2 (UJ & HSRC, 2021)

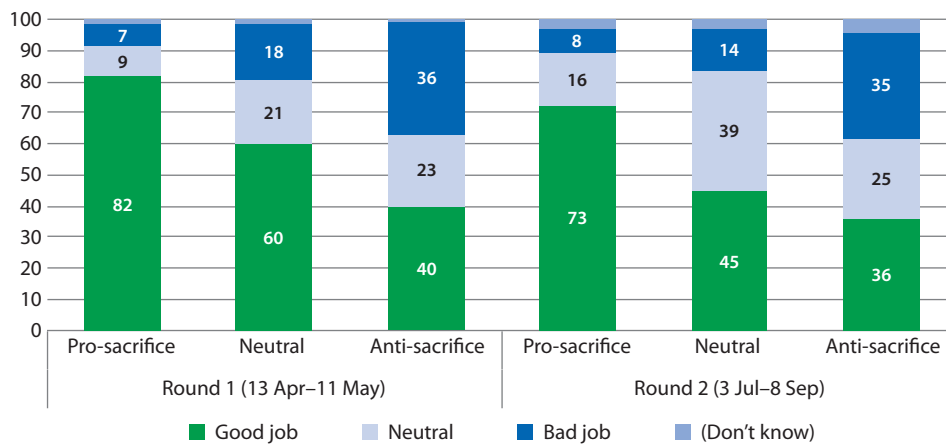


Figure 3: Willingness to sacrifice human rights in South Africa to help prevent the spread of COVID-19, by trust in President Ramaphosa (%)

Source: UJ/HSRC Democracy Survey Round 1 & 2 (UJ & HSRC, 2021)

Note: the survey question asked: “Would you say that the President is doing a good job or a bad job in responding to the Coronavirus outbreak?”

spread of COVID-19. A survey by the Human Sciences Research Council (released on April 26th) revealed high levels of compliance. An informal and undeclared social contract came into effect: although there have been multiple violations of rights, initially there was a high degree of trust in the government response.

However, South Africa is now entering a very difficult phase of the epidemic: infections and deaths are increasing rapidly and chronic hunger, malnutrition, and unemployment are making themselves felt. Reflecting this, there are a growing number of legal challenges to the Constitutionality of regulations issued via the Disaster Management Act.

Significantly, on 2 June 2020, Judge Norman Davis made a sweeping judgment stating that the regulations’ ‘encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open and democratic society based on human dignity, equality

and freedom’ (*De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020)). Without going into the merits of this much analysed and maligned case, it could be seen, together with other court challenges, as contributing to the unravelling of the initial fragile social compact, leading to a decline in confidence and thus a tendency amongst certain demographics to be less willing to have human rights limited, and therefore to comply less with regulations restricting such rights.

The survey suggests an association between human rights sacrifice and policy preferences. For instance, those who held an anti-sacrifice stance were more than twice as likely to favour lifting tobacco and alcohol bans compared to those willing to sacrifice. Similarly, those against human rights sacrifice were more inclined to support removing all restrictions on movement, opening up places of worship, and refunding school fees. It could be argued that these restrictions were not perceived as rational and fair, which reduced confidence in lockdown regulations and national leadership, and consequently

weakened public willingness to adopt a pro-sacrifice position. As participants wrote in the open-ended questions:

- “Government destroyed goodwill systematically and deliberately. The regulations don’t make sense to me: I don’t believe tobacco should be banned for example – and I am not a smoker.”
- “The rules are irrational. Can’t visit family, can’t buy smokes at a normal price, curfew, can’t drink a glass of wine with dinner. No communication daily from our President, etc.”

However, many of the messages praised President Ramaphosa:

- “Thank you Mr President for taking rational decisions on the lockdown regulations and for always being our leader.”

In addition, negative emotional experiences during the lockdown influenced attitudes towards human rights. The experience of feelings of anger and irritability in particular, but also depression, sadness and stress, diminished public readiness to have their freedoms curtailed. As people became more frustrated and distressed by the COVID-19 lockdown, their commitment to the common good wavered:

- “We have sacrificed so much for this country, yet you ask more of us. We can’t keep going on like this ... People are safer from the virus in some aspects, but now they are dying of hunger rather than the virus.”
- “I think you should consider the psychological effects of the lockdown and learn to TRUST citizens.”

Recommendations

1. **Participatory, inclusive and adaptive processes will be essential to maintaining support and adherence to regulations.**

The stringent lockdown adopted in South Africa meant that people were expected to comply with far-reaching measures that severely limited their human rights, especially the freedom of movement, association, assembly, trade and education. While the public demonstrated a striking willingness to cooperate with such demands during Level 5, the survey evidence suggests that this commitment was tested as the lockdown was extended.

In response, participation has been advanced as a fundamental principle of human rights that needs to be emphasised (UNAIDS, 2020). All government policy and action must allow for the direct and meaningful participation and consultation of people – particularly those affected and most vulnerable. If trust and compliance are to be maintained, this will require openness, transparency and inclusive forms of decision-making, effective communication about why certain regulations are necessary and rational, and provide individuals, communities and stakeholders space to provide feedback and share views.

Part of the challenge of promoting greater inclusivity is to ensure that formal decision-making bodies, such as the National Coronavirus Command Council, and the structures reporting to it, such as the Ministerial Advisory Committee (MAC) on COVID-19, include adequate representation of diverse voices. Recognising this, the South

African Academy of Science (ASSAf, 2020) issued a statement appealing for the inclusion of ‘scientists from a much broader range of disciplines ... we believe that the pandemic is not simply a medical problem but a social problem as well. This means that social scientists and humanities scholars should also form part of these advisory structures’. The announcement by the Department of Health of a reconfiguration of the MAC in mid-September 2020 to ‘take into account the need for the inclusion of social and behavioural scientists among other factors’ (Citizen, 2020) is an opportunity to plug the gaps.

While there have been many instances of poor public engagement, an example that stands out can be found in education. Initially, the Minister of Education had announced that the phased re-opening of schools would begin on 1 June 2020. However, in the face of outcry from unions, civil society organisations, learners and their families, the Minister took an ‘about-turn’ and announced that the re-opening would be postponed (Motshekga, 2020).

2. **Regulations must be of limited duration, evidence-based, and reviewable.**

The United Nations and local human rights watchdogs have warned against overly draconian measures that are restrictive of human rights. International law already recognises the grave impact of pandemics on social order and provides criteria to guide states in their emergency action. The International Covenant on Civil and Political Rights (United Nations General Assembly, 1966) permits curbs on the right to ‘liberty of movement’

if restrictions are provided by law, deemed necessary to protect public health, and consistent with other rights. Freedom of expression and association, and the rights to privacy and family life are also qualified in emergencies. But, as emphasised in the Siracusa Principles (United Nations Commission on Human Rights, 1984), any limitations must be (a) temporary, (b) subject to review, and (c) must not discriminate unfairly. Blanket bans – such as that imposed on tobacco products – are arguably ineffective and deeply polarising, to the extent that they reduce confidence in government’s handling of the pandemic and pro-sacrifice orientations.

3. **Independent oversight of government actions impacting on rights of society, communities and individuals.**

Since public health emergencies place immense power in the hands of executive leadership, there is a risk of leaders tending to authoritarianism. For this reason, there is a need for active and continuous independent oversight by civil society, and accountability mechanisms, such as Chapter 9 Institutions (notably the South African Human Rights Commission) and the courts, to address unlawful conduct and, where necessary, challenge regulations on the grounds of rationality and their impact on fundamental human rights (Heywood, 2020). This has been the case in South Africa and, as such, any authoritarian tendencies were kept in check. This should continue as South Africa’s response to COVID-19 has mostly respected the rule of law, but whether it ultimately comes out on the right or wrong side of human rights remains to be seen (Heywood, 2020).

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