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Tension between the individual's fundamental human rights and the protection of the public from infectious and formidable epidemic diseases

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Summary: *Emerging infectious and formidable epidemic diseases are a cause for concern and a serious threat to the global health. At the time of writing a number of these diseases have no cure. States in their domestic legislation applicable to matters of public health have come up with approaches to deal with such diseases. Zimbabwe has enacted primary legislation and regulations dealing with public health in an effort to suppress and prevent these diseases. The Zimbabwean Public Health Act, for example, authorises the notification of infectious and formidable epidemic diseases and the inspection of infected premises. The Act further empowers the Minister of Health and Child Care to enact regulations. Through the Public Health Regulations, the government of Zimbabwe declared COVID-19 a formidable epidemic disease. Warranted by the Health Act, the Minister of Health and Child Care made treatment, testing, detention and isolation compulsory during the period in which COVID-19 is declared a formidable epidemic disease. This article seeks*

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to provide a critical analysis of these measures as provided in the Public Health Act and health regulations in light of the constitutionally-guaranteed rights of privacy, freedom of security, liberty and freedom of movement. The question sought to be answered by the author is whether these measures justifiably trumps the rights of individuals.

Key words: *infectious diseases; formidable epidemic diseases; public health; fundamental human rights; legislation*

1 Introduction

The twenty-first century has seen the emergence of many new high-profile diseases, including the severe acute respiratory syndrome (SARS) to avian influenza A (H 7N9).¹ Such diseases are called emerging infectious diseases and are of serious public health concern. They also have a huge economic and social impact.² Emerging infectious diseases are diseases that have appeared and affected a population for the first time, or have existed previously but are rapidly increasing either in terms of the number of new cases within a population, or its spread to new geographical areas.³ Diseases that have affected a given area in the past, declined or were controlled, but are again being reported in increasing numbers are also grouped under emerging infectious diseases.⁴ A number of emerging and re-emerging diseases have emerged from animals and crossed the species barrier to infect humans.⁵ There are a number of emerging infectious diseases but for the purposes of this discussion, the article will focus on those included in section 46 of the Public Health Act.⁶

1 World Health Organisation, Regional Office for South-East Asia 'A brief guide to emerging infectious diseases and zoonoses' 2014, <https://apps.who.int/iris/handle/10665/204722> (accessed 12 November 2020).

2 As above.

3 World Health Organisation, Regional Office for South-East Asia 'Combating emerging infectious diseases in the South East Asia region' 2005.

4 As above.

5 As above.

6 Zimbabwean Public Health Act 11 of 2018 (Public Health Act). Sec 46 states that '[f]or the purposes of this Act, the term "infectious disease" includes any of the following diseases: (a) chicken pox; (b) diphtheria; (c) erysipelas; (d) pyraemia and septicaemia; (e) scarlet fever; (f) typhus fever; (g) plague; (h) cholera; (i) typhoid or enteric fever (including para-typhoid fever); (j) undulant or Malta fever; (k) epidemic cerebro-spinal meningitis (or cerebro-spinal fever or spotted fever); (l) acute poliomyelitis; (m) leprosy; (n) anthrax; (o) glanders; (p) rabies; (q) trypanosomiasis (or sleeping sickness); (r) yellow fever; (s) viral haemorrhagic fevers; and all forms of tuberculosis and such other infections or communicable diseases including sexually-transmitted diseases as the Minister may declare, by statutory instrument, to be infectious diseases either throughout Zimbabwe or in any part of Zimbabwe'.

Section 64⁷ of the Public Health Act interprets the term formidable epidemic disease as follows:

A formidable disease means cholera, epidemic influenza, typhoid, plague, viral haemogagic fevers and any other disease which the Minister may by statutory instrument, declare to be a formidable epidemic disease for the purposes of this Act.

COVID-19 was proclaimed a global pandemic by the World Health Organisation (WHO) on 11 March 2020. The Public Health (COVID-19 Prevention, Containment and Treatment) Regulations 2020, published as Statutory Instrument 77 of 2020,⁸ were made law by the Minister of Health and Child Care. The Public Health Regulations were passed on the basis of section 64 of the Public Health Act which provides for ‘special provisions regarding formidable epidemic diseases and conditions of public health importance’. The Public Health Regulations declared COVID-19⁹ a formidable epidemic disease and the declaration had effect until 1 January 2021 unless the Minister earlier terminated or extended the regulations. A number of regulations were passed which had a foundation on Statutory Instrument 77 of 2020. Although the aim of the regulations was to contain COVID-19, they infringed a number of constitutionally-guaranteed rights. Statutory Instrument 77 of 2020 lapsed on 1 January 2021 and with the Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No 5),¹⁰ which were published as Statutory Instrument 314 of 2020, COVID-19 was declared a formidable epidemic disease until such a time as the Minister by General Notice in the Gazette terminates the declaration.

The Public Health Act provides for the notification¹¹ of infectious diseases. In terms of the Act, formidable epidemic diseases are

7 Public Health Act (n 6); see sec 64(1)(a).

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

9 The World Health Organisation defines the corona virus disease (COVID-19) as an infectious disease caused by a newly-discovered corona virus. Abebe et al define corona viruses as large family RNA viruses that belong to the order *Nidovirales*, family *Coronaviridae*, subfamily *Coronaviridae*. The authors state that COVID-19 infection is caused by a beta corona virus called SARS-COV-2. They explain that the most common symptoms of the disease are fever, cough and dyspnea. See EC Abebe et al ‘The newly emerged COVID-19 disease: A systematic review’ (2020) 17 *Virology* 96, <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01363-5> (accessed 24 November 2020).

10 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations 2020 (No 5) (Statutory Instrument 314 of 2020). See sec 2 of the statutory instrument.

11 A notifiable disease is one required to be reported to the local authorities and health officials when diagnosed, because of infectiousness, gravity and prevalence of occurrence. See the *Free medical dictionary* by Farlex: Notifiable diseases, <http://medical-dictionary.thefreedictionary.com/notifiable+diseases> (accessed 11 March 2021). Notification of diseases in terms of the Public Health

also notifiable. The Act also provides for the inspection of infected premises of persons suspected to be suffering from infectious diseases, mandatory isolation and that the Minister of Health and Child Care may make regulations related to the imposition of quarantine, the regulation of the movement of persons, the medical examination of persons who are suspected of being infected with the disease and the detention and isolation of persons who may have been exposed to the disease. Statutory Instrument 77 of 2020,¹² which declared COVID-19 a formidable epidemic disease, provides for compulsory treatment, testing and detention of persons suspected to be infected with COVID-19 in order to contain the disease.

What is clear from the above is that the legislation regulating public health accords health authorities powers of notification, the inspection of infected premises, mandatory treatment, isolation and compulsory testing. The Constitution of Zimbabwe provides for the rights to privacy,¹³ personal liberty,¹⁴ freedom of movement¹⁵ and personal security.¹⁶ This article discusses the above measures in light of the individual's fundamental rights to privacy, personal security, personal liberty and freedom of movement. The question sought to be answered by the article is the extent to which fundamental freedoms can be limited by public health and policy. Public health has generally been defined to include the safety of population of people, society and community. The article reflects the decision in the South African case of *Minister of Health, Western Cape v Goliath*¹⁷ where the respondents, (XDR-TB) patients, in a counter-application argued that their detention at the Brooklyn Chest Hospital was inconsistent with their right to bodily integrity, freedom of movement and their right to personal freedom. The decision is important for this article as the Court discussed the right of the public to be protected from infectious diseases juxtaposed with the individual's rights to bodily integrity, freedom of movement and the right to personal freedom. The Court answered the question of whether or not the isolation of the respondents at the Brooklyn Chest Hospital was 'arbitrary', or 'without just cause' in light of justifiable limitation of rights in an

Act entails the reporting of notifiable diseases to the local and health authorities when a diagnosis has been made. Infectious and formidable epidemic diseases are notifiable in terms of the Public Health Act. The aim of notification is to monitor and investigate the cases, thus averting their spread.

12 Statutory Instrument 77 of 2020 (n 8).

13 The Constitution of Zimbabwe Amendment (No 20) (Constitution). See sec 57 which provides for the right to privacy.

14 See sec 49 of the Constitution.

15 See sec 66 of the Constitution.

16 See sec 52(c) of the Constitution.

17 *Minister of Health, Western Cape v Goliath* 2009 (2) SA 248 (C).

open and democratic society based on human dignity and equality and freedom.

The maxim *salus populi suprema lex*, applied in the case of *Rodger Dean Stringer v Minister of Health and Child Care and Sakunda Holdings*,¹⁸ will also be discussed. The maxim *salus populi suprema lex* translates into 'the health (or welfare, good, salvation, felicity) of the people is the supreme law', or 'let the welfare of the people be the supreme (or highest) law'.¹⁹ The article will discuss the regional and international human rights framework as it is the best standard for the protection and limitation of rights. It will further discuss the Zimbabwean legislative framework in so far as the freedoms under discussion are concerned. By way of comparison, the article will analyse the Ghanaian Constitution,²⁰ in so far as it limits the protection of personal liberty in the case of a person suffering from an infectious disease.

2 Regional and international human rights structure

It is important for this article to look at regional, international treaties and conventions, legislation and case law of foreign countries. When interpreting the Declaration of Rights, the courts are required by section 46(1)(c) of the Constitution to take into account international law, treaties and conventions to which Zimbabwe is a party.²¹ It is mandatory for the courts to consider international law when interpreting the Declaration of Rights,²² and courts must prefer an interpretation that is consistent with international law.²³ Guided by section 46(e) of the Constitution, the courts may also consider relevant foreign law when interpreting the Declaration of Rights.²⁴

A number of regional and international human rights instruments deal with the right to health. The African Charter on Human and Peoples' Rights (African Charter)²⁵ provides for the right to health.

18 *Rodger Dean Stringer v Minister of Health and Child Care and Sakunda Holdings* HH259/20.

19 MT Cicero *On the Republic and on the laws* trans D Fott (2014).

20 Ghana's Constitution of 1992 with amendments through 1996.

21 JA Mavedzenge & DJ Coltart *A constitutional law guide towards understanding Zimbabwe's fundamental socio-economic and cultural rights* (2014) 21.

22 Mavedzenge & Coltart (n 21).

23 As above.

24 As above.

25 African Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986. Art 16 provides as follows: '1 Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2 State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'

The International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶ compels governments to take steps for the 'prevention, treatment and control of epidemic, occupational and other diseases'. The Zimbabwean government has an obligation to protect the health of its citizens. The measures taken in the protection of the public health should meet the international human rights standards. It is important in this discussion to refer to the recent position taken by the African Commission on Human and Peoples' Rights (African Commission) regarding the COVID-19 pandemic. In the face of the threat posed by COVID-19, the African Commission recognised the necessity of maintaining public health measures to contain the disease. However, the African Commission noted the disproportionate impact on fundamental human rights some of the measures adopted by governments to contain COVID-19.

The African Commission also noted severe violations of human rights by states during the COVID-19 pandemic. With this background, the Commission through Resolution 449 of 2020 urged governments in the enforcement of COVID-19 regulations to ensure that the response to states of emergency during the COVID-19 pandemic is legal, necessary and proportional. The Resolution emphasises the prohibition against torture and that 'national emergencies' or 'public order' shall not be invoked as a justification for the violation of fundamental human rights, in particular the freedom from torture, cruel, inhuman or degrading treatment or punishment.

It was the African Commission's emphasis that measures adopted by governments in an effort to curb COVID-19 should meet the minimum standards for the protection of human rights. The African Commission urged governments to ensure that law enforcement institutions are given stern guidelines on enforcing emergency regulations and that no arbitrary arrests and detentions should be carried out.

The African Commission's position on COVID-19 is in line with the article's argument. It endorses the line of reasoning of this article that measures adopted by governments in the control of epidemic and formidable epidemic diseases to protect public health are necessary. However, the measures adopted should meet the standards for the protection of human rights. The African Commission also endorsed

26 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27.

the article's argument that the limitation of fundamental human rights should not be arbitrary or unreasonable.

The benchmark for the protection of the right to privacy on the international plane can be found in the United Nations Universal Declaration of Human Rights (Universal Declaration).²⁷ Article 12 of the Universal Declaration states that 'no one shall be subjected to arbitrary interference with his privacy'. The right to privacy is also entrenched in article 17 of the United Nations International Covenant on Civil and Political Rights (ICCPR),²⁸ which states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy'. Article 8 of the European Convention on Human Rights (European Convention)²⁹ provides for the right to privacy and states that 'everyone has the right to respect for his private and family life'.

The right to liberty is also protected on the regional and international domain. Article 19 of the Universal Declaration³⁰ provides that everyone has the right to liberty. Article 6 of the African Charter states that 'every individual shall have the right to liberty and to the security of his person'. The right to liberty is also guaranteed in terms of article 9 of ICCPR.³¹ Article 5 of the European Convention provides for the right to liberty and states that 'everyone has the right to liberty and security of person'.

The liberty of movement is guaranteed in article 12 of ICCPR. Articles 12(1) and (2) of ICCPR states that every citizen of a state has a right to liberty of movement, to choose his residence and also the freedom to leave any country. What is clear from the above discussion is that the rights to health, privacy, liberty and security of the person and the liberty of movement are fundamental freedoms that are protected under the regional and international human rights framework. However, it is important to note that the rights contained in regional and international treaties and conventions are not absolute. They can be limited by the rights of others, public order, safety, public health and democratic principles. The next part of the article looks at the limitation of rights under regional and international law.

27 United Nations Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly Resolution 217A).

28 International Covenant on Civil and Political Rights, adopted for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1996, entry into force 23 March 1976.

29 European Convention on Human Rights, as amended by Protocols 11 and 14 supplemented by Protocols 1, 4, 6, 7, 12, 13 and 16.

30 Universal Declaration (n 27).

31 ICCPR (n 28). The article also protects the right to security.

3 Limitation of rights in regional and international law

The Universal Declaration provides for the limitation of rights in article 29(2).³² The Declaration endorses that rights and freedoms may be limited in instances of morality, public order and the welfare of a democratic society. Article 19 (3) of ICCPR states that rights may be limited as provided for by the law as well as for the protection of public health, the rights of others, public safety, public order and morals. ICESCR provides for the limitation of rights in articles 4³³ and 5.

Article 8(2) of the European Convention³⁴ states that the right to privacy may be interfered with by public authorities in the interests of public safety and health. The European Convention also provides that 'the lawful detention of persons for the prevention of the spreading of infectious diseases'³⁵ is a justifiable limitation of the right to liberty. ICCPR states that the right to freedom of movement may be limited by restrictions provided for by law, public health and the freedoms of others.³⁶ Section 25 of the Siracusa Principles on the limitation and derogation of provisions in ICCPR³⁷ provide:

Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

The regional and international human rights framework provides that fundamental freedoms may be limited when the limitation is provided for by the law, and the limitation is legitimate and proportional. The health of the public is one legitimate basis for the limitation of freedoms under regional and international law.

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

33 Art 4 states that '[t]he state parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for promoting the general welfare in a democratic society'.

34 European Convention (n 29). See art 8(2).

35 Art 5(e) European Convention.

36 Art 12(3) ICCPR.

37 Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights UN Doc E/CN.4/1984/4 (1984).

4 Zimbabwean legal framework on public health

The Public Health Act and the Public Health Regulations provide for the notification of infectious and epidemic diseases, the inspection of premises as well as an examination of persons suspected to be infected with infectious diseases. The legislation also provides for mandatory treatment, detention and isolation of infected persons as well as mandatory testing in a bid to prevent and suppress the spread of infectious and formidable epidemic diseases. In this part the article will discuss these measures in light of the constitutionally-guaranteed fundamental freedoms including the rights to privacy, liberty, movement and personal security. The question sought to be answered is whether or not the measures justifiably infringe the freedoms.

4.1 Notification of infectious, formidable epidemic diseases and inspection of premises

Section 46 of the Public Health Act provides for the notification of infectious diseases. In terms of the provision, other infectious or communicable diseases may be declared to be infectious by the Minister. Notification of infectious diseases can be done in the cases of children as well as adults³⁸ who are suffering from infectious diseases and who are patients.³⁹ In the case of an outbreak, all cases and deaths from infectious diseases are to be notified to the Chief Health Officer.⁴⁰

Section 47 provides for notification of infectious diseases in cases of children attending school and any person residing in institutions including hotels and boarding houses. The section states:

Whenever any child attending school, orphanage or other like institution, or any person residing in any hotel, boarding-house or other like institution, is known to be suffering from any infectious disease ... the principal or the person in charge of such school, orphanage or other like institution, or the manager or proprietor or person in charge of such hotel, boarding house or other like institution shall forthwith send notice thereof to the local authority of the district, and shall furnish to the Director of health services, on his or her request, a list of scholars or residents thereat, together with their addresses.

38 Sec 47 Public Health Act (n 6).

39 Sec 48 Public Health Act.

40 Sec 49 Public Health Act.

Failure to give notice shall result in a fine not exceeding level eight or to imprisonment not exceeding six months. Section 48 provides for notification by medical practitioners. It states:

If a patient suffering, to the knowledge of the medical practitioner attending him or her, from an infectious disease dies therefrom, such medical practitioner shall immediately furnish to the local authority of the district and district medical officer a written certificate containing the appropriate particulars relating to the patient's illness and cause of death.

Failure to furnish a certificate of notification by the medical practitioner shall result in imprisonment for a period not exceeding three months or a fine not exceeding level five. In the case of an outbreak, local authorities shall transmit to the chief health officer particulars of all cases of infectious diseases and of all deaths from infectious diseases.⁴¹

Formidable epidemic diseases are also notifiable in terms of the Act. Section 65 of the Act provides for notification of suspected cases of formidable epidemic diseases. In terms of section 65, medical practitioners, principals of schools, heads of families or households, employers of labour, owners or occupiers of land or premises, chiefs, headmen and 'others' shall notify the district medical officer, local authority or district administrator of any illness and death due to any formidable epidemic disease. Failing to comply with the section attracts imprisonment for a period not exceeding six months or a fine not exceeding level eight. Considering the penalty that the provision carries, it is key to analyse its wide scope. What does the term 'others' mean in this context?

The literal approach to statute interpretation provides that the words of a statute must be given their ordinary literal meaning. In determining what Parliament has said, courts several times use dictionaries in ascertaining terms used in a statutory provision.⁴² The *Cambridge dictionary*⁴³ states that the word 'others' 'refers to the

41 Sec 49 Public Health Act. Sec 49 states that '[i]n the time of an outbreak, every local authority shall, at the end of each week and on the form prescribed, transmit to the Chief Health Officer particulars of all cases of infectious diseases and of all deaths from infectious diseases notified to it during the week, and all information which it may possess as to the outbreak or prevalence of any infectious, communicable or preventable disease in the district'. Failure to comply with the provision shall attract a fine not exceeding level eight or imprisonment not exceeding two years.

42 See the case of *Agricultural and Rural Development Authority (ARDA) v Francis Baureni & Others* SC 284/18, where the Court referred to the Cambridge dictionary to interpret the word 'respond'.

43 *Cambridge dictionary* OTHERS; meaning in the *Cambridge English dictionary*, <https://dictionary.cambridge.org/dictionary/english/others> (accessed 12 March 2021).

people in general, not the person you are talking to or about'. The paper concludes that the word 'others' in section 65 of the Public Health Act refers to the public entailing that all Zimbabwean citizens are covered under this provision.

Local authorities shall also report to the chief health officer cases suspected of being any formidable epidemic disease.⁴⁴ Notification of infectious diseases and formidable epidemic diseases conflict with the fundamental freedom of the right to privacy.

The Public Health Act also provides for the inspection of premises and the examination of persons suspected to be suffering from infectious diseases. This is provided for in section 51 of the Act, which states:

Director health services of any urban or rural area or any medical practitioner duly authorised thereto by the local authority may at any reasonable time enter and inspect any premises in which he or she has reason to believe that any person suffering or who has recently suffered from any infectious disease is or has recently been exposed to the infection of any infectious disease, and may medically examine any person in such premises for the purpose of ascertaining whether such person is suffering or has recently suffered from any such disease.

Section 51 of the Public Health Act also infringes the right to privacy. The right to privacy includes the right not to have one's home or property searched and possessions seized.⁴⁵ The next part of the article will analyse the right to privacy as provided for in the Zimbabwean legislation. It will answer the question of whether or not the provisions on notification of infectious and formidable epidemic diseases that are provided for by the Public Health Act justifiably limit the right to privacy.

4.2 Right to privacy

The right to privacy entails that every person has the right not to be exposed to scrutiny of his or her business life.⁴⁶ In the case of *National Media Ltd v Jooste*⁴⁷ Harms JA accepted the definition of privacy as put forward by⁴⁸ Neethling et al, that⁴⁹

44 Sec 67 Public Health Act.

45 I Currie *The Bill of Rights handbook* (2013) 259.

46 *Netone Cellular (Private) Limited v Econet Wireless SC 695/15.*

47 *National Media Ltd v Jooste* 1996 (3) SA 262.

48 South African Law Reform Commission Project 124 'Privacy and data protection' Issue paper 24 December 2003 48.

49 J Neethling, J Potgieter & A Roos *Neethling's law of personality* (2005) 132.

[p]rivacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the outsiders and in respect of which he has the will that they be kept in private.⁵⁰

The right to privacy is described as ‘the right to be left alone’.⁵¹ It embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a ‘private sphere’ with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals.⁵² The right to privacy is closely linked with the right to dignity and freedom of expression.

4.3 Zimbabwean domestic law on privacy

In May 2013 the Zimbabwean government affirmed citizens’ fundamental rights to privacy by including in the Constitution a specific guarantee of the right to privacy.⁵³ The constitutional guarantee represented a significant improvement on the rights set out by international covenants and declarations that had already been ratified by the country.⁵⁴ Unlike its predecessor the Constitution has reached a major milestone in protecting the right to privacy. The previous Zimbabwean Constitution⁵⁵ did not contain an explicit constitutional right to privacy. The right was deduced from sections 17⁵⁶ and 20(1).⁵⁷

The right to privacy is enshrined in section 57 of the Constitution, which provides:⁵⁸

Every person has the right to privacy, which includes the right not to have

50 South African Law Reform Commission Project (n 48) (translation from Afrikaans).

51 WL Prosser *Handbook of the law of torts* (1971) 802, citing TM Cooley *Cooley on torts* (1888) 29; D Samuel et al ‘The right to privacy’ (1890) 4 *Harvard Law Review* 193.

52 M Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* 2009, A/HRC/17/34.

53 Submissions by the Zimbabwean Human Rights NGO Forum ‘The right to privacy in a digital age, General Assembly Resolution 67/167’ 25 March 2014.

54 As above..

55 Constitution of Zimbabwe, as amended on 14 September 2005 (up to and including Amendment 17).

56 See sec 17 of the Constitution of Zimbabwe which provided for protection from arbitrary search or entry.

57 Sec 20(1) of the Constitution of Zimbabwe which provided for protection of freedom of expression.

58 Sec 57 Constitution.

- (a) their home, premises or property entered without their permission;
- (b) their person, home, premises or property searched;
- (c) their possessions seized;
- (d) the privacy of their communications infringed; or
- (e) their health condition disclosed.

The Constitution entrenches the right of a person not to have their person, home, premises or property searched or entered without permission. In the South African constitutional case of *Mistry v The Interim National Medical and Dental Council of South Africa & 6 Others*⁵⁹ the Court reiterated that '[t]he existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state'.

The right of freedom from arbitrary searches therefore is important in a constitutional democracy. The Constitution also guarantees non-disclosure of a person's health status. This is of paramount importance as the information concerning one's health is sensitive or delicate in nature.⁶⁰ Releasing the information without the consent of the person concerned may give rise to serious emotional and material harm.⁶¹ In the Kenyan case of *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others*⁶² the Court held:

A person's privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwarranted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable.

The Court further held that the right to privacy is central to the protection of human dignity and forms the basis of democratic societies. It further held that the right also reinforces other rights such as freedom of association, expression and information.

The question raised in this part of the article is whether or not the notification of infectious and formidable epidemic diseases as well as the inspection of premises and examining persons suspected to be suffering from infectious diseases justifiably infringes the right to privacy. The article will answer this question by exploring the

59 *Mistry v The Interim National Medical and Dental Council of South Africa & 6 Others* CCT 13/97.

60 JL Nell 'Aspects of confidentiality in medical law' LLM dissertation, University of Pretoria, 2006 15.

61 As above.

62 *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others* (2018) EKL.R.

limitation of rights as provided for by the domestic legislation. It will also discuss case law where the right to privacy was limited on the basis of public health and interest. The earlier discussion on regional and international law established that fundamental freedoms may be limited justifiably when the limitation is legitimate, proportional and provided for by the law. The article noted that the legitimate aims in the limitation of rights under regional and international law include public health, public order, national security, morals as well as protecting the rights of others.

4.4 Limitations to the right to privacy

Fundamental human rights and freedoms are not absolute.⁶³ They have limitations that are set out by the rights of others and social concerns such as public order, safety and health.⁶⁴ The Constitution provides for the limitation of rights in section 86(2).⁶⁵ 'Limitation' is a synonym for a 'justified infringement'.⁶⁶ In terms of section 86(2) of the Constitution the limitation should only be in terms of a law of general application and should be fair, reasonable, necessary and justifiable. The law of general application is the 'expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law'.⁶⁷ The article concedes that the Public Health Act is a law of general application that can limit the right to privacy. The author submits that section 47, which provides for notification of infectious diseases, and section 51, which provides for the inspection of infected premises cannot be said to be unfair, unreasonable, unnecessary and unjustifiable in a democratic society. The limitation is legitimate as it aims to protect the public health and interests.

63 Currie (n 45).

64 As above.

65 Sec 86(2) of the Constitution states that '[t]he fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent to which the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, taking into account all relevant factors, including: (a) the nature of the right concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation'.

66 Currie (n 45).

67 As above.

The question of whether or not the right to privacy may be limited in light of public interest has been litigated before the courts. In the case of *The Minister of Safety and Security v Gaqa*⁶⁸ the applicant sought an order from the Court that the bullet lodged in the respondent's leg be removed, without his consent, for the purposes of conducting ballistic tests. The applicant believed that the respondent had been shot while he was committing the crime of robbery. The Court cited with approval the United States Supreme Court case of *Winston v Lee*,⁶⁹ where Brennan commented as follows:

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers.

The Court granted an order for the removal of the bullet. In the case of *S v Orrie*⁷⁰ the accused were charged with two counts of murder. They were alleged to have broken into a safe house and shot two witnesses. The state sought an order from the Court that it be authorised to take blood samples of the accused in order to 'ascertain whether such sample(s) had any mark, characteristic or distinguishing feature by means of DNA analyses'. The accused opposed the application. In explaining the limitation of the right to privacy in light of public policy, Bozalek J reiterated as follows:

There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the subject's right to privacy and an infringement albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for use in criminal proceedings infringes his or her right to privacy, dignity and bodily integrity, I am of the view that the limitation clause in the constitution (section 36 of Act 108 of 1996) permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e), such limitation is necessary and justifiable in an open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples for DNA testing for the purposes of a criminal investigation is reasonable and necessary in balancing the interests of justice against those of individual dignity.

The cases brought it to clarity that freedoms can be limited for broad public considerations. Public health is a legitimate aim for

68 *The Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

69 *Winston v Lee* 470 US 753 1985.

70 *S v Orrie* 2004 (3) SA 584 (C).

the limitation of fundamental rights. The infringement will not be unconstitutional if it can be a justified 'infringement' of rights in an open and democratic society based on human dignity, equality and freedom.⁷¹

4.5 Mandatory detention, isolation and testing

Section 68 of the Public Health Act provides for regulations regarding formidable epidemic diseases. Section 68(1) empowers the Minister of health to make regulations concerning:

- (a) the imposition and enforcement of quarantine and the regulation of the movement of persons;
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) the medical examination of persons who are suspected of being infected with, or who may have recently been exposed to the infection of such disease, and of persons about to depart from any infected area, and the disinfection of their baggage and the detention of such persons until they have after such examination been certified to be free from any infectious diseases and until their baggage and personal effects have been disinfected;
- (g) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have been recently exposed to the infection of, and who may be in the incubation stage of such disease, the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and in the case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant any person who has escaped from such detention or isolation;
- (h) the establishment of isolation hospitals and the removal and isolation of persons who are or suspected to be suffering from such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such disease ... and other matters that the Minister of Health may deem necessary for the prevention and spread of the diseases.

Failure to comply with the regulations made under section 68(1) attracts a fine not exceeding level 12 or imprisonment for a period not exceeding one year. The Public Health Regulations that were

71 Currie (n 45).

passed in terms of section 68 of the Public Health Act provide for compulsory testing, detention and isolation of persons suspected of being infected with COVID-19 in order to contain the disease. Section 6 of the Public Health Regulations provides that an enforcement officer may in relation to persons who are suspected of being infected with COVID-19:

- (a) order an examination for an individual or individuals which may include taking any bodily sample by a health practitioner;
- (b) order the mandatory treatment or prophylaxis of the individual or individuals concerned;
- (c) ...
- (d) ...
- (e) order the on-site detention, isolation or quarantining of the individual or the individuals concerned.

The next part of the article analyses the measures provided in section 68 of the Public Health Act as well as the Public Health Regulations juxtaposed with the individual's constitutionally-guaranteed rights to personal security, personal liberty and movement.

4.6 Right to personal security

The article argues that the procedures infringe the individual's rights personal security, liberty and freedom of movement. Ordering an examination on individuals, which may include the taking of body samples and mandatory treatment or prophylaxis without consent, contradicts section 52 of the Constitution. Section 52 of the Constitution provides:

Every person has the right to bodily and psychological integrity which includes the right –

- (a) ...
- (b) ...
- (c) not to be subjected to medical or scientific experiments, or to the extraction or use of their bodily tissue, without their informed consent.

The section brings out the concept of informed consent when extracting bodily tissue from every person. Informed consent is the voluntary and revocable agreement given by a competent individual to participate in a therapeutic or research procedure.⁷² The Public Health Act provides for consent of user in section 35. However, the informed consent is limited when the 'provision of a health service

⁷² J Sim *Informed consent: Ethical implications for physiotherapy* (1986) 584-587.

without informed consent is authorised in terms of any law or court order'.⁷³ The right to personal security thus is not absolute.

4.7 Right to personal liberty and freedom of movement

The article further argues that ordering the on-site detention, isolation or quarantining of individuals who are suspected of being infected with or have been recently exposed to the infection of COVID-19 infringes their rights to liberty and movement. The right to liberty seeks to avert the unjustified use of detention powers on citizens by governments. The right to personal liberty is guaranteed in terms of section 49 of the Constitution which provides as follows:

- (1) Every person has the right to personal liberty, which includes the right –
 - (a) not to be detained without trial, and
 - (b) not to be deprived of their liberty arbitrarily or without just cause.

In terms of the section, a person cannot be detained arbitrarily or without a just cause. In the case of *Allan v Minister of Home Affairs*⁷⁴ Reynolds J reiterated:

Since time immemorial, the liberty of the individual has been regarded as one of the fundamental rights of man in a free society ... Revolutions have been staged in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe and courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principles involved.

The case brought to clarity that the right to liberty is one of the important fundamental freedoms in a democratic society. As the freedoms referred to above, the right to liberty is not absolute.⁷⁵ By way of comparison, the author refers to section 14 of the Ghanaian Constitution,⁷⁶ which provides for the right to liberty and its limitation in the cases of infectious diseases. Section 14 of the Ghanaian Constitution provides as follows:

⁷³ Sec 35(2)(c) Public Health Act. The section provides that '(2) a health service shall not be provided to a user without the user's informed consent unless ... (c) the provision of a health service without informed consent is authorised in terms of any law or court order'. See also the case of *S v Orrie* referred to earlier (n 70).

⁷⁴ *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H). See also the South African case of *Ochse v King William's Town Municipality* 1990 (2) SA 855, where the Court held that the right to personal liberty is one of the fundamental freedoms that has always been jealously guarded by the courts.

⁷⁵ Sec 86(2) Constitution.

⁷⁶ The Constitution of the Republic of Ghana (Amendment) Act 1996.

Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law:

- (a) ...
- (b) ...
- (c) ...
- (d) in the case of persons suffering from an infectious or contagious disease.

The right to liberty can thus be limited as a way of public health enforcement. Closely linked to the right to liberty is the right to freedom of movement. In terms of section 66⁷⁷ of the Constitution, 'every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to move freely within Zimbabwe'. The article concludes that the right to liberty and freedom of movement may be limited in cases of public health. The author's concern is section 68(1)(g) of the Public Health Act which provides for the use of force and in the case of necessity the use of firearms and weapons. The author urges the enforcement authorities to adhere to the Basic Principles.

5 *Minister of Health, Western Cape v Goliath*

To buttress the discussion above, the article reflects on the decision in the South African case of *Minister of Health, Western Cape v Goliath*⁷⁸ where the Court was faced with balancing the public's right to be protected from infectious diseases and the freedoms of individuals. The judgment was delivered by Griesel J.

5.1 The facts

The respondents were diagnosed with the infectious disease of tuberculosis (XDR-TB). The question for determination was whether their mandatory detention and isolation at Brooklyn Chest Hospital (the detention facility) was legally justifiable. The Minister of Health of the Province of the Western Cape brought the application before the Court in his official capacity as the Provincial Minister of the Western Cape. The Minister of Health filed the application in terms of section 38 of the South African Constitution,⁷⁹ and also in the interests of

⁷⁷ Sec 66(2)(a) Constitution.

⁷⁸ *Minister of Health, Western Cape v Goliath* (n 17).

⁷⁹ See sec 38 of the Constitution of the Republic of South Africa, 1996. Sec 38 provides that anyone acting in the public interest has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.

persons who were likely to contract tuberculosis (XDR) from the respondents. A *rule nisi* was issued calling upon the respondents to show cause why the following order was not to be granted:

- (1) compelling the respondents to be admitted to the Brooklyn Chest Hospital;
- (2) authorising the sheriff, if necessary, to request members of the South African Police Service to assist him in ensuring that the respondents were admitted to Brooklyn Chest Hospital and remained there until compliance with paragraph 4 below;
- (3) ...
- (4) compelling the respondents to remain at Brooklyn Chest Hospital until they had fulfilled the criteria for negative sputum culture conversion for XDR tuberculosis for a period of consecutive months;
- (5) compelling the respondents to adhere to the rules of behaviour for XDR tuberculosis patients at the Brooklyn Chest Hospital.⁸⁰

In their counter-application Cedric Goliath and Cornell Gideon (respondents) sought an order that declared their detention at the Brooklyn Chest Hospital inconsistent with their right to personal freedom as enshrined in section 12 of the South African Constitution.⁸¹

5.2 Legal issues

The legal issue for determination was whether or not the compulsory isolation and detention of the respondents amounted to arbitrary infringement of their rights to liberty and freedom of security of the person. The Court's reasoning was that their isolation and detention did not infringe on their rights without just cause. Griesel J reiterated:

Isolation of patients with infectious diseases is universally recognised in open and democratic societies as a measure that is justifiable in the protection and preservation of the health of citizens, even though it necessarily involves some intrusions upon the individual liberty of the patients concerned.

The Court referred to an article by Singh et al⁸² in which the authors stated that 'WHO recommends that persons with MDR-TB voluntarily refrain from mixing with the general public'. The authors stated that infection control measures that depend on voluntary cooperation and least restrict human rights are favoured. However, if the measures are ineffective, restrictive measures may be adopted. The authors stated

80 *Minister of Health, Western Cape v Goliath* (n 17).

81 Constitution of the Republic of South Africa (n 79). See sec 12 which provides for freedom and security of the person.

82 JA Singh, R Upshur & N Padayatchi 'XDR-TB in South Africa: No time for denial or complacency' (2007) 4 *Public Library of Science* 19, <http://medicine.plosjournals.org> (accessed 12 March 2021).

that involuntary detention may be permitted as a means to prevent the spread of infection to others. They further stated that involuntary treatment and isolation measures in the interests of the public health are justifiable and necessary measures that limit fundamental human rights.

The Court cited with approval the decision in the Canadian case of *Toronto (City Medical Officer of Health) v Deakin*⁸³ where the Court held that the detention of the respondent, a tuberculosis patient, by the medical officer of health under a regulatory scheme was justifiably to protect public health and the spread of the disease. The decision in the case is important for this article as the Court endorsed the position that the limitation of the rights to liberty and freedom of movement of patients with infectious diseases is not arbitrary and is reasonable and justified in an open and democratic society.

5.3 *Salus populi suprema lex maxim*

Of paramount importance to the discussion in this article is the principle of *salus populi suprema lex* which is the foundation of every modern constitution, including the Zimbabwean Constitution. The maxim *salus populi suprema lex* translates into 'the health (or welfare, good, salvation, felicity) of the people is the supreme law', or 'let the welfare of the people be the supreme (or highest) law'.

It finds its origin as early as 100BC-1AD, and is found in the book *De legibus* written by Cicero.⁸⁴ John Locke uses it as the inscription in his *Second treatise on government* and refers to it as the fundamental rule of government. The maxim has been applied in a number of jurisdictions. In India the principle was invoked in many cases. In the Indian case of *Gargula Chandra Sekhar & Others v State Through Police Station*⁸⁵ it was held:

The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the *detenus*, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (the safety of the state is the supreme law) co-exist and are not only

83 *Toronto (City Medical Officer of Health) v Deakin* (2002) OJ No 2777 (Ont Crt Just).

84 Cicero (n 19).

85 *Gargula Chandra Sekhar & Others v State Through Police Station* 2006 5 ALD 504; 2006 4 ALT 726.

important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community.

The Court emphasised that the action of the state must be 'just' and 'fair'. In *Viswanatha Reddy*⁸⁶ the Court stated:

It must be remembered that ... the public interest should prevail over the private interest, be it at ownership or be it at a possessory ownership by reason of a lease. There is nothing wrong to apply the legal maxim *salus populi suprema lex* with regard to public welfare and the court is bound to follow the same when almost a million residents ... are suffering the shortage of drinking water and the after effects.

This principle is part of Zimbabwean law and should apply in cases of extreme emergency when the welfare of the people has to be protected. An exchange has to take place between the safety of the people and the rights of an individual. The principle *salus populi suprema lex* places the welfare of the public above the rights of an individual where the welfare of the populace is threatened. However, the author argues that the principle is not absolute. It has the potential of being misinterpreted and abused by dictatorial governments. Public health cannot be protected outside the law. If the principle of *salus populi suprema lex* was intended for unlimited application, it would legitimise all dictatorial regimes and their arbitrary limitation and derogation of fundamental rights.

5.4 Application of the *salus populi suprema lex* maxim in the *Rodger Dean Stringer* case⁸⁷

In this case the applicant filed an urgent chamber application with the High Court of Zimbabwe alleging a violation of his constitutional right to an environment that is not harmful to his health or well-being if the Arundel hospital to accommodate COVID-19 patients was to be set up in his neighbourhood. It was the applicant's contention that his right to protection by the law would be violated if the isolation hospital was established without him being given a chance to object to it. In this vein the applicant's case was that he was exposed to the corona virus by reason of the proximity of his residence to the hospital.

The maxim *salus populi suprema lex* was applied in this matter. It was held that the rights of an individual cannot override the rights of the public. The establishment of Arundel hospital was meant to serve

86 *D Viswanatha Reddy And Company v Government of Andhra Pradesh & Others* 2002 4 ALD 161. See para 19.

87 *Rodger Dean Stringer* (n 18).

the interests of the public to a greater extent. Given the fact that COVID-19 was a global pandemic, the government of Zimbabwe was obliged to prepare a proper infrastructure to curb the spreading of COVID-19. The obligation to respect, protect, promote and fulfil the fundamental rights and freedoms enshrined in the Constitution was imposed upon the state and on every person by the Constitution. The applicant in this case, as all other persons, had the rights to equal protection and benefit of the law. However, the rights that the applicant alleged to have been violated were limited by the same Constitution in terms of section 86. What is fundamental to note is that the action to save the public interest, public health, welfare good or interest must be right, just and fair. The action taken must not be more than what is reasonably necessary to protect the welfare of the public from the threatening danger. The Court emphasised that in appropriate cases, fundamental human rights may be limited where public safety, public health and the public interest so demand.

6 Conclusion

The article sought to discuss striking a balance between the individual's fundamental human rights and the protection of the public from infectious and formidable epidemic diseases. The article was divided into five parts. The first part gave an introduction and also defined emerging infectious and formidable epidemic diseases. The article then analysed the regional and international human rights framework in so far as it provides for the protection and limitation of fundamental rights. This was key as regional and international is the best standard in the protection and limitation of fundamental freedoms. The article proceeded to analyse the Zimbabwean legal framework on public health. For the purposes of the article, the author referred to the infectious and formidable epidemic diseases referred to in the Public Health Act and the public health regulations. The article noted that primary legislation applicable to matters of public health (the Public Health Act) and its regulations authorises the notification of infectious diseases and formidable epidemic diseases.

The Public Health Act empowers the Minister of Health to enact regulations encompassing the imposition and enforcement of quarantine, the regulation of the movement of persons, the medical examination of persons who are suspected of being infected with the disease and the detention and isolation of persons who may have been exposed to the disease. The Public Health Act and the Public Health Regulations also provide for the inspection of infected premises and the examination of persons suspected of suffering from

infectious diseases, mandatory treatment, isolation and detention. The article then analysed the measures of notification of infectious and formidable epidemic diseases as well as the inspection of premises in light of the right to privacy. The article discussed the right to privacy as provided for by the Zimbabwean domestic legislation. The limitations on the right to privacy were discussed and the article concluded that the right to privacy may be limited by public health and policy. The author concluded that the limitation of the right to privacy for the aim of protecting public health is not arbitrary and is justifiable in a democratic society. This part also discussed the measures of mandatory treatment, detention, isolation and testing in light of the rights to personal security, freedom to personal liberty and freedom of movement. The limitations of the rights were discussed and the article concluded that the limitations of the rights in terms of the Public Health Act and the Public Health Regulations are not unconstitutional. For comparison, the article referred to the Constitution of Ghana which provides for the limitations to the right to liberty as well as case law authority, both regionally and internationally.

The article proceeded to discuss the case of *Minister of Health, Western Cape v Goliath* where the Court was faced with the question of whether or not mandatory detention and isolation of patients at a tuberculosis detention centre arbitrarily violated their rights to personal liberty and movement. The Court's reasoning was that their isolation and detention did not infringe on their rights without just cause. The practice of isolation of patients with infectious diseases was universally recognised in open and democratic societies as a justified measure to protect the public's health. The decision in the case is important for this article. It endorsed the position that fundamental human rights may be justifiably limited as a measure of protecting the public's health.

The last part of the article discussed the maxim *salus populi suprema lex* and its application in the *Rodger Dean Stringer* case. The Court in the *Stringer* case held that the rights of an individual cannot override the rights of the public. The rights that the applicant alleged to have been violated are limited by section 86 of the Constitution. However, the article concluded that the maxim *salus populi suprema lex* is not absolute. The principle has to be applied within the confines of the law. The author thus concludes that fundamental freedoms may be limited constitutionally when the limitation is legitimate, proportional and provided for by the law. Public health is one legitimate aim that can constitutionally limit fundamental freedoms.