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What is the role of the SANDF during the lockdown?

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The role of the South African Defence Force ("SANDF") during the lockdown has proven to be unclear for many South Africans. Since the commencement of the lockdown, there have been reported cases of abuse of power, torture and humiliation allegedly committed by members of the SANDF. One particular matter recently made its way to the Constitutional Court. This article outlines the current law governing the SANDF, the role of the SANDF prior to and post democracy. It will also highlight the danger of the current uncertainty regarding the role of SANDF during the lockdown.

The Union Defence Force, the SADF and the SANDF

Before the establishment of the SANDF, there was the South African Defence Force ("SADF") and the Union Defence Force. The SADF comprised of South African armed forces from 1957 to 1994. Shortly before South Africa reconstituted itself as a Republic in 1961, the Union Defence Force was succeeded by the SADF, which was established in terms of the Defence Act 44 of 1957. The SADF was then superseded by the SANDF in 1994.

The SADF had a dual function: to counter possible uprisings in any form and to defend the Republic's borders. During apartheid, the SADF was also used as a support to the South African Police in resisting minority opposition.

Today, the Constitution of the Republic of South Africa, 1996 ("Constitution") states that the SANDF is established to "provide for the defence of the Republic." The Defence Act 42 of 2002 further sets out the parameters on how the military interacts with civil society. The SANDF is subject to civilian oversight and control by the Minister of Defence.

Accountability, transparency and responsiveness are the cornerstones of the Republic and these principals are equally applicable to the SANDF. In our democratic society, it is necessary for the SANDF to act in the interests of the public at all times. It is therefore imperative that the SANDF conducts itself in a transparent manner.

However the question remains, what is the role of the SANDF, particularly during the lockdown period?

The role of the SANDF during lockdown

Upon declaring a national lockdown to curb the spread of Covid-19, President Cyril Ramaphosa indicated that the SANDF will be deployed to assist the South African Police Services ("SAPS") in ensuring that the public obey the lockdown restrictions. For instance, roadblocks have been put in place across the country in order to ensure that people only travel for permitted purposes.

There have been many reported cases of people breaking the lockdown restrictions, in various ways including, illegally travelling between provinces, to breaking in and looting liquor stores. As such, the deployment of the SANDF appears to be necessary to support the SAPS. However, there have been several allegations of torture, humiliation and overall abuse of power by the SANDF when enforcing the rules of the lockdown.

Recent case of alleged murder by members of SANDF in Alexandra Township

One report of alleged abuse of power by members of the SANDF is the matter concerning the late Mr Collins Khosa ("the deceased").

The deceased's partner deposed to an affidavit where she gives details on how the deceased was allegedly assaulted by members of the SANDF and later died as a result.

Direct petition to the Constitutional Court

On 20 April 2020, the deceased's family made an application directly to the Constitutional Court against the State, with a number of representatives of the State cited as respondents. Part of the relief sought by the deceased's family is a clear outline from government indicating how the SANDF is to be integrated into the SAPS and a clear outline as to how the SAPS and the SANDF should enforce the rules of the lockdown.

In short, the deceased's family seeks clarity from the State on the manner in which the SANDF is required to operate during the lockdown.

The Constitutional Court, however, dismissed the application for direct access to hear the matter and did not deal with the merits of the case.

In terms of section 167(6)(a) of the Constitution, read with Rule 18 of the Constitutional Court Rules, a person may bring a matter directly to the Constitutional Court if it is in the interest of justice to do so and with leave of the Constitutional Court.

The Constitutional Court is reluctant to permit direct access to hear matters, except in extraordinary circumstances. The usual process before a matter is brought before the Constitutional Court is to first approach the High Court, which has jurisdiction to hear constitutional matters. Therefore, it is rare for the Constitutional Court to allow direct access unless it is in the interest of justice. As to what "in the interests of justice" entails, is determined on a case by case basis.

Commentary

International law requires that guidelines pertaining to the function of State institutions, such as the SANDF, be made available to the public. South Africans have little to no source of reference in understanding what the role of the SANDF is during the lockdown period and are further unsure of how to enforce their rights when there is a threat or abuse thereof.

A clear outline on what is permissible and what is not permissible by the SANDF should have been made known to the public at the commencement of the lockdown. Therefore, seeking the court's intervention in directing government to issue a clear outline on the scope and function of the SANDF during this lockdown period is not only reasonable, but it is necessary.

The enforcement of a lockdown justifiably limits certain human rights, however, it does not diminish all rights, particularly the rights to dignity and life. As such, a clear outline from government on how the SANDF is expected to conduct itself by ensuring that lockdown restrictions are adhered to, whilst also respecting and protecting human rights, is urgently required.



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