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Governing Urban Crisis Through Adaptive Urban Law: Lessons from City Responses to COVID-19 in the Netherlands and South Africa

ARTICLE

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ABSTRACT

The global Covid-19 pandemic exposed the fragility of urban systems and underscored the need to recalibrate regulatory and institutional frameworks for an anticipated crisis-prone future. This article explores the notion of 'adaptive law and governance' as a lens through which city authorities can test and modify legal and governance responses to future urban crises. It compares the experiences of managing Covid-19 in the two biggest cities in the Netherlands (Amsterdam and Rotterdam) and in South Africa (Johannesburg and Cape Town). This comparison, between two sets of urban municipal governments functioning under different constitutional systems and in different socio-economic contexts, provides insights pertaining to how adaptive urban governance during the pandemic was constrained or enabled by the interaction between the regulatory and institutional frameworks for and political realities of urban autonomy and intergovernmental relations. The article demonstrates that cities that govern within a flexible and decentralised legal and governance system are better positioned to develop and implement responsive measures to address crises or uncertainty. To enhance resilience, legal systems should promote transparent, risk-responsive, and reflective local governance tools to enable agile, context- specific and decisive crisis responses that can be employed as a matter of course rather than exception.

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1. INTRODUCTION

The global Covid-19 pandemic exposed the fragility of urban systems like never before. Urban conditions both fuelled the spread of the virus and presented the most common setting for response measures aimed at curbing its impact. As the virus spread, healthcare systems were overwhelmed, local economies came to a halt, public transport systems, schools and universities shut down, food supplies dwindled and housing and basic service provision backlogs increased.[1]

Beyond stretching social, economic and health systems, Covid-19 also presented legal challenges. Faced with public health laws and regulations, intergovernmental relations frameworks and public order statutes that were simply unable to respond to the pandemic with the speed and forcefulness and at the required scale, states around the world triggered temporary legal frameworks tailored for states of emergency or disaster, or enacted new laws aimed specifically at combatting Covid-19.[2] Not uncommonly, these new or 'exceptional' legal frameworks allowed for the centralised concentration of state power in national executive branches of government, for reduced state accountability and for the significant restriction or suspension of individual human rights.[3]

At local government level, meanwhile, city authorities frequently found themselves in a quagmire of having to urgently meet enhanced pandemic-related responsibilities with legally constrained (or even reduced) autonomy and capacity.[4] Not only were city authorities typically burdened with the practicalities of implementing some of the strictest public health measures observed in recent years, but also with managing the economic fallout and social conflict sparked by these measures.[5]

In the pandemic's aftermath, and coupled with the climate crisis, the realisation is dawning that the world is moving into an era where pandemics, disasters and crises will occur with increasing regularity.[6] As such, city authorities need to urgently enhance their resilience and governance capacity by adapting governance systems and processes in light of lessons learnt from Covid-19. This requires, inter alia, an urgent review of the legal rules that regulate, enable and constrain urban governance.

After explaining the notion of adaptive law in an urban governance context in Section 2, this article compares experiences of managing Covid-19 in the two biggest cities in the Netherlands (Amsterdam and Rotterdam) and in South Africa (Johannesburg and Cape Town). Given the differences in socio-economic contexts and between the legal frameworks in question, we hope that this comparison might yield insights pertaining to how adaptive urban governance during the pandemic was constrained or enabled by the interaction between the regulatory and institutional frameworks for and political realities of urban autonomy and intergovernmental relations. Accordingly, Section 3 sets out the pre-existing legal framework for urban governance in the respective countries before describing how this was employed and/or altered during the national legal and policy response to Covid-19, paying particular attention to experiences in the major urban centres. Finally, in Section 4, we reflect on the adaptability and effectiveness of institutional and regulatory frameworks for urban governance in both systems.

2. ADAPTIVE LAW FOR RESILIENT URBAN GOVERNANCE

Closely linked to sustainability, the notion of urban resilience has come to be at the forefront of discussions over the ability of urban systems to withstand and respond to the pressures

1 United Nations, *Covid-19 in an Urban World* (UN New York 2020), 1–30.

2 UN Habitat, *Cities and Pandemics: Towards a More Just, Green and Healthy Future* (2021), 125, 135–143.

3 S Kipler & K Mohamud, 'The Pandemic as Political Emergency' (2021) 102(3) *Studies in Political Economy* 268; D Mednicoff, 'The Rule of Law, Covid-19 and the Struggle Against Autocratic Power – Towards a Multifaceted Approach' (Lex Covid Atlas, 8 April 2022) <https://lexatlas-c19.org/the-rule-of-law-covid-19-and-the-struggle-against-autocratic-power-towards-a-multi-faceted-approachntitle/> (last visited 24 February 2024).

4 R Hirschl, *City, State: Constitutionalism and the Megacity* (OUP 2020), 10–11; P McGuirk et al., 'Urban Governance Innovation and Covid 19' (2021) 59 *Geographical Research* 188; M Nathan, 'The City and the Virus' (2023) 60(8) *Urban Studies* 1346, 1347, 1358.

5 T Ticlau et al., 'Adaptive and Turbulent Governance: Ways of Governance that Foster Resilience – the Case of the Covid-19 Pandemic' (2020) special issue *Transylvanian Rev Administrative Sciences* 167, 175–177.

6 C Fabre, *Urban Crisis* (OECD, Paris 2017), 1–20; see Kipler & Mohamud, supra note 3, 279; see Ticlau et al., supra note 5, 168–170.

associated with climate change. Resilience entails the 'ability of a system and its component parts to anticipate, absorb, accommodate, or recover from the effects of a hazardous or extreme event in a timely and efficient manner, including through ensuring the preservation, restoration, or improvement of its essential basic structures and functions'.[7]

When it comes to cities, 'resilience' refers both to the durability of physical urban infrastructure as well as to the adaptability and pliability of a city's social, economic and governance systems.[8] A state of urban resilience is therefore an on-going, iterative process which recognises that vulnerability and risk are constantly evolving, as cities and their systems (infrastructure and ecosystems), their local communities (with specific social and cultural norms and values) and their institutional features (laws, policies and political systems) evolve and interact.[9]

The adaptive capacity of an urban system, referring to its ability to anticipate, respond to, recover and where possible benefit from various economic, environmental, and social stressors,[10] is regarded as central to its resilience. Enhancing urban resilience thus requires strengthening the adaptive capacity of urban infrastructure as well as of urban governance, economic and social systems. In this context, it has been argued that urban authorities should aspire to structured and iterative processes of 'adaptive management' or 'adaptive governance', that are sufficiently open, flexible, capable of learning and responsive to be able to cope with uncertainty, shocks, stressors and change.[11]

While much has been written about such adaptive governance, especially within the contexts of environmental crisis and socio-ecological instability,[12] research related to the interplay between adaptive governance and law remains limited. It is, however, accepted that law is a central determinant of adaptive governance, in that it dictates the framework, boundaries, rules, and processes within which governance occurs.[13] Of particular importance for present purposes, law animates the adaptive capacity of governance entities through the ways in which it allocates and distributes power between different state entities at national, provincial and local levels.[14]

Many features of legal systems are inherently rigid, intractable and top-down in nature, thereby posing challenges for adaptive governance and urban resilience.[15] But law is also an important stabilising force in times of flux and can ensure that governance systems and processes remain open, participatory and accountable, and that they have due regard for the rights and interests of vulnerable groups.[16] Provided that legal systems themselves evolve so as to be

7 SC Holling, 'Resilience and Stability of Ecological Ecosystems' (1973) 4 *Annual Review of Ecology and Systematics* 1, 10. See also CA Arnold, 'Resilient Cities and Adaptive Law (2014) 50(2) *Idaho LR* 245; Ticlau et al., supra note 5, 169–170.

8 T-L Humby, 'Law and Resilience: Mapping the Literature' (2014) 4(1) *Seattle Journal of Environmental Law* 85, 129; J Struggles, 'Climate Disasters and Cities: The Role of Local Governance in Increasing Urban Resilience' (2016) 18 *Asia Pacific Journal of Environmental Law* 91, 93.

9 S Tyler & M Moench, 'A Framework for Urban Climate Resilience' (2012) 4(4) *Climate and Development* 311, 311–326.

10 See A van der Berg, 'Climate Adaptation Planning for Resilient and Sustainable Cities: Perspectives from the City of Antwerpen (Belgium) and the City of Rotterdam (Netherlands)' (2022) 1 *European Journal of Risk Regulation* 1, 1–19.

11 See e.g. Arnold, supra note 7, 246; B Chaffin & L Gunderson, 'Emergence, Institutionalization and Renewal: Rhythms of Adaptive Governance in Complex Social-Ecological Systems' (2016) 165 *Journal of Environmental Management* 81, 83; A Craig et al., 'Adaptive Management for a Turbulent Future' (2011) 92(5) *Journal of Environmental Management* 1339, 1339–1345; M Pieraccini, 'Towards Just Resilience: Representing and Including New Constituencies in Adaptive Governance and Law' (2019) 31 *Journal of Environmental Law* 213, 214.

12 See e.g. C Allan et al., 'Climate Change and Water Security: Challenges for Adaptive Water Management (2013) 6 *Current Opinion in Environmental Sustainability* 625, 626–632; B Chaffin et al., 'A Decade of Adaptive Governance Scholarship: Synthesis and Future Directions' (2014) 19(3) *Ecology and Society* 56, 56–70.

13 Arnold, supra note 7, 251; B Cosens et al., 'Designing Law to Enable Adaptive Governance of Modern Wicked Problems' (2020) 73(6) *Vanderbilt LR* 1687, 1704–1705.

14 See Humby, supra note 8, 117–118; M Pieterse, 'Urban Governance and the Right to a Healthy City' (2020) 2 *European Yearbook of Constitutional Law* 185, 191–194.

15 A van der Berg & J Verschuuren, *Urban Climate Resilience: The Role of Law* (Edward Elgar 2022), 6–15; CA Arnold & L Gunderson, 'Adaptive Law and Resilience' (2013) 43(5) *Environmental Law Reporter* 10426, 10427; Cosens et al, supra note 13, 1724–1725; Humby, supra note 8, 106–111; D Matyas, 'Towards a Legal Toolkit for Disaster Resilience and Transformation' (2020) 45(2) *Disasters* 453, 455; Struggles, supra note 8, 112–113.

16 Van der Berg & Vershuuren, supra note 15, 15–17.

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more accommodating of contingency, instability and change, law can facilitate and support adaptive governance.[17]

According to Arnold and Gunderson, an adaptive legal system should articulate a multiplicity of goals, should comprise polycentric, multimodal and integrated governance structures, should embody open-ended, flexible and context-dependent decision-making methods and processes, and should make allowance for feedback loops, learning and accountability.[18]

In terms of goals, an adaptive legal system should endeavour to enhance the adaptive capacity and resilience of the entire governance system as it intersects with ecological and social systems. This would require paying attention to the articulation and interdependencies between goals of different sectors and levels of government, and to the integration and mainstreaming of crosscutting objectives (such as the protection of public health or human rights) across instruments, institutions and scales.[19]

As it relates to structure, an adaptive law system is polycentric, diversifies exposure to risk, creates redundancies that can absorb shock, and facilitates innovation by spreading power and authority among multiple authorities.[20] While there should be a guard against fragmentation, the temptation to locate all power and responsibility in a single body, which might be incapacitated by a crisis, should be resisted.[21] In particular, legal authority (and thereby ability) to address complex problems should generally inhere at the level and agencies of government that are most closely located to the problems, and should be capable of being delegated to, or shared with, a range of state and non-state actors that might be well situated to address the problem.[22] In other words, urban local governments should be adequately empowered and capacitated to steer responses to local crises by leveraging the resources and capacities of local networks and actors from all of society.[23]

As to legally determined methods and processes for taking decisions and the tools for implementing them, flexibility is key. Decision-makers should be enabled to use multiple methods, instruments or processes underpinned in law to address problems at various scales, instead of being bound to a single (ostensibly optimal) mode, method, instrument or process that has the potential to fail, or of being confined to a single response scale that is poorly matched to the diverse and often conflicting features of complex problems. This means that decision-makers should have a sufficient margin of discretion to modify or adapt governance methods or instruments, in order to address challenges or changes in the system.[24]

Finally, adaptive law should provide for a continuous flow of feedback loops that monitor the effectiveness of decisions, systems and processes and that point, where necessary, to the need for their adjustment.[25] In addition, systems and processes should aim to provide for rigorous accountability throughout[26] and should, as far as possible, make allowance for participation or collaboration by those affected both by crises and the decisions aimed at responding to them.[27]

17 See Cosens et al., supra note 13, 1732; Humby, supra note 8, 130; Pieraccini, supra note 11, 219; Struggles, supra note 8, 95.

18 See Arnold & Gunderson, supra note 15, 10428.

19 ibid., 10429–10431. See also B Cosens, 'The Role of Law in Adaptive Governance' (2017) 22(1) *Ecology and Society* 30; JB Ruhl, 'Panarchy and The Law' (2012) 17(3) *Ecology and Society* 31.

20 Arnold & Gunderson, supra note 15, 10433–10434.

21 ibid. See also Arnold, supra note 7, 252; Humby, supra note 8, 110–111; Struggles, supra note 8, 112–113.

22 See Arnold & Gunderson, supra note 15, 10434–10435. See also Arnold, supra note 7, 253–254; Cosens et al., supra note 13, 1727; Humby, supra note 8, 112–113; Struggles, supra note 8, 112–114.

23 See Arnold, supra note 7, 254, 257; Arnold & Gunderson, supra note 15, 10431; Cosens et al., supra note 13, 1730; Nathan, supra note 4, 1349; Pieterse, supra note 14, 193.

24 See Arnold & Gunderson, supra note 15, 10429, 10436–10438. See also Arnold, supra note 7, 253–254; Cosens et al., supra note 13, 1730; Humby, supra note 8, 117–119; Matyas, supra note 15, 465–466; Ruhl, supra note 19.

25 See Arnold, supra note 7, 254; Arnold & Gunderson, supra note 15, 10441; Humby, supra note 8, 119; Ruhl, supra note 19, 31.

26 See Arnold & Gunderson, supra note 15, 10441; Matyas, supra note 15, 465–466.

27 See Arnold, supra note 7, 257; Pieraccini, supra note 11, 220–232.

3. URBAN GOVERNANCE THROUGH COVID-19

3.1 THE NETHERLANDS

3.1.1 Institutional and legal context

The Netherlands is a constitutional monarchy and a decentralised unitary state with a three-tier government comprising central (national) government, twelve provinces and 345 municipalities (city authorities or *Gemeente* in Dutch).[28] The Dutch Constitution declares that central government is solely responsible for matters of defence, foreign affairs, the monetary system, administration of justice, and regulating civil and criminal law.[29] All other matters may be delegated through national legislation to provinces and municipalities or to specific organs of state.[30] The Constitution contains no further detail regarding limits to the legislative and executive competence of decentralised government authorities.

Public health decision-making in the Netherlands has been described as complex and fragmented, due to its layered and decentralised nature.[31] Control of infectious diseases is jointly regulated by the Municipalities Act (*Gemeentewet* 1992), the Public Health Act (*Wet op Publieke Gezondheid* 2008), and the Security Regions Act (*Wet op Veiligheidsregios* 2010), which each assigns responsibilities to different administrative bodies at different levels of government and requires them to cooperate in managing public health crises.[32]

Under the Municipalities Act, Municipal Councils are vested with legislative authority as well as autonomy to legislate for matters related to the performance of local government functions.[33] Mayors are ordinarily responsible for maintaining public order and safety,[34] which includes overseeing the health and safety of public gatherings, buildings and areas open to the public.[35] In 'emergency situations', mayors may issue orders or bylaws deemed necessary to maintain public order or to limit danger, even in derogation of ordinary law, as long as constitutional provisions are upheld.[36] Such measures, which may include measures necessary to prevent the spread of a virus such as regulating behaviour in a public space, must be ratified by the Municipal Council and communicated to relevant central government officials.[37]

In terms of the Public Health Act, the central Ministry of Health, Welfare and Sport (hereafter Ministry of Health) is responsible for promoting the quality and efficiency of public health measures and for promoting interdepartmental and international cooperation around public health.[38] The Ministry of Health is supported by the National Institute for Public Health and Environment (RIVM), which advises it on the development and enforcement of national public health policies.[39] Such policies are mostly implemented by municipal mayors (together with the executive boards of municipalities), who are generally responsible for the establishment, continuity and cohesion of public health for municipal areas, which includes obligations to 'acquire an understanding of the health situation of the population based on an epidemiological analysis' and to coordinate health care and medical assistance in the event of accidents or disasters.[40]

28 W Voermans, 'Constitutional Law' in J Chorus , E Hondius and W Voermans (eds.) *Introduction to Dutch Law* (5th edn, Wolters Kluwer 2016), 317–367.

29 Constitution of the Kingdom of the Netherlands 2018, Arts. 106–107.

30 Constitution of the Kingdom of the Netherlands 2018, Art. 124(2).

31 HM van de Bovenkamp et al., 'Institutional Layering in Governing Healthcare Quality' (2014) 92(1) *Public Administration* 208, 208–223.

32 I Wallenburg et al., 'Unmasking a Health Care System: The Dutch Policy Response to the Covid-19 Crisis' (2022) 17(1) *Health Economics, Policy and Law* 27, 27–36. For a similar overview to what follows, see MF Cavalcanti & MJ Terstegg, 'The Covid-19 Emergency in the Netherlands: A Constitutional Law Perspective' (2020) 43(2) *DPCE Online* 1691, 1691–1710.

33 Municipalities Act 1992, Arts. 110, 147.

34 Municipalities Act 1992, Art.172.

35 Municipalities Act 1992, Art. 174.

36 Municipalities Act 1992, Art. 175.

37 Municipalities Act 1992, Art. 176(1)–(2).

38 Public Health Act 2008, Art. 3.

39 Public Health Act 2008, Art. 1. See Cavalcanti and Terstegg, supra note 32, 1703.

40 Public Health Act 2008, Art. 2(1)–(2)(a). See also art. 6.

Mayors' powers and responsibilities extend to the management of infectious disease outbreaks, through ordinary public health tools and processes such as notification, isolation and quarantine.[41] The mayors must also actively contribute to the design, implementation and coordination of central infectious disease control and prevention programmes, including health promotion programmes.[42] However, in the case of outbreaks of certain serious diseases (designated as 'group A' diseases by the Public Health Act or by the Minister),[43] control of epidemic management is vested in the management structure of security regions established under the Security Regions Act, whereas the national Ministry of Health is granted the power to direct security region chairpersons in the exercise of their public health competencies.[44]

The Security Regions Act establishes twenty-five Security Regions (*Veiligheidsregios*) across the Netherlands,[45] with membership of these public bodies consisting of the mayors and municipal executives of the relevant clusters of municipalities.[46] Security Regions are typically chaired by the mayor from the largest municipality in the region and are responsible, inter alia, for managing the risks of fire, disasters and crises that extend beyond the boundaries of a single municipality.[47] Policy decisions in response to a particular disaster, crisis (or, as explained above, 'group A' public health threat) are made by a 'regional policy team', which typically comprises the mayors of the municipalities affected by the calamity.[48] The policy team provides written reports to the councils of affected municipalities, which play a key role in implementing the decisions made to manage the crisis in their local contexts.[49] Mayors may also request further information or may lodge written objections to proposed decisions that could disproportionately harm the interests of the municipal area.[50]

Where a crisis or disaster extends beyond regional boundaries, Security Regions are instructed by the King's Commissioner (an official advised by the central government, in the case of a public health threat presumably the Health Ministry and the RIVM) on the appropriate emergency response or crisis management policy and procedures.[51] It is envisioned that the Security Region's chairperson will drive the implementation of the King's Commissioner's decisions and that information and implementation instructions will be clearly communicated to local government.[52] Municipal mayors who are part of the Security Region must have the opportunity to provide input in the implementation of these decisions in their local contexts.[53]

3.1.2 Responding to Covid-19

The first Covid-19 case in the Netherlands was reported on 27 February 2020, after which the number of infections snowballed rapidly into a full-blown first wave of the pandemic.[54] The Dutch government's response to the pandemic has been described as 'meandering and reactive',[55] and complied imperfectly with the fragmented legal framework set out above.

41 Public Health Act 2008, Arts. 21–38.

42 Public Health Act 2008, Art. 2(1)–2(2)(b).

43 Infectious diseases are grouped into Groups A, B1, B2 and C. Group A diseases include Middle East Respiratory Syndrome Coronavirus (MERS-CoV), smallpox, polio, severe acute respiratory syndrome (SARS) and viral haemorrhagic fever. Public Health Act 2008, Art. 1.

44 Public Health Act 2008, Arts. 6–7.

45 Public Health Act 2008, Art. 8 read with Security Regions Act 2010, Annex I.

46 Public Health Act 2008, Art. 9.

47 Public Health Act 2008, Art. 10(b).

48 Public Health Act 2008, Art. 39(2).

49 Public Health Act 2008, Art. 40(1)–(2).

50 Security Regions Act 2010, Art. 40(1) read with Municipalities Act 1992, Art 180.

51 Security Regions Act 2010, Art. 42(1)–(2).

52 Security Regions Act 2010, Art. 46.

53 E Wayenberg et al., 'Vlaamse en Nederlandse Burgemeesters in Volle Corona (s)t(r)ijd' (2021) (75) *Bestuurswetenschappen* 3–30.

54 For a timeline of Covid-19 infections and measures in the Netherlands see <https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn> (last visited 24 February 2024).

55 M Janssen & H van der Voort, 'Agile and Adaptive Governance in Crisis Response: Lessons from the COVID-19 Pandemic' (2020) 55 *International Journal of Information Management* article number 102180, 4.

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Notwithstanding Parliament's far-reaching legislative powers,[56] and despite the highly decentralised administration, the initial response was driven by the central executive. While constitutionally empowered to declare a state of emergency, which would enable it to assume command over provincial and municipal executives and to adopt measures that derogate from certain fundamental rights,[57] the executive instead opted to use its powers to direct responses to serious public health threats in terms of the Public Health Act,[58] with Covid-19 eventually classified as a Group A infectious disease.[59]

The central Health Ministry and the RIVM established an Outbreak Management Team (OMT) comprising doctors and scientists, who provided 'expert advice' on the efforts needed to control the spread of the virus.[60] The initial intention was to manage the pandemic through an 'intelligent' lockdown, with social distancing and hygiene prescriptions as well as initial movement and behaviour restrictions being framed as recommendations, with compliance left to people's sense of personal responsibility.[61] While this approach can be lauded for allowing individuals to tailor health and safety recommendations to their own circumstances, the ambiguity of this approach seriously complicated implementation at community level, and caused confusion and frustration amongst citizens and local government officials alike.[62]

With the central government sensing a need for a more consistent and a more mandatory approach, measures were both increased, standardised and formalised in the course of the second wave of the pandemic. Upon Covid-19's classification as a Group A disease, the authority and responsibility to devise and implement measures aimed at curbing its spread was 'transferred' from municipal mayors to Security Region chairpersons, who took instructions from central government through the Ministry of Justice and Social Security, rather than the Ministry of Health.[63]

Restrictions were henceforth formulated as 'emergency' ordinances for the Security Regions.[64] The choice of using emergency ordinances is particularly telling, since these may restrict fundamental rights and freedoms if justified by the severity of the emergency and are not reviewable under administrative law.[65] Initially slightly different per region, the ordinances were rapidly harmonised so as to prevent 'waterbed effects' (people moving from one part of the country to another part with 'lighter' rules).[66] The contents of the harmonised ordinances

56 Constitution of the Kingdom of the Netherlands 2018, Art. 81.

57 Constitution of the Kingdom of the Netherlands 2018, Art. 103.

58 For critical discussion see A Buyse & R de Lange, 'The Netherlands: Of Rollercoasters and Elephants' (2020) *VerfBlog* <https://verfassungsblog.de/the-netherlands-of-rollercoasters-and-elephants/> (last visited 24 February 2024); Cavalcanti & Terstegg, supra note 32, 1703–06; Janssen & van der Voort, supra note 55, 4; M Julicher & M Veto, 'COVID-19 in the Netherlands: of Changing Tides and Constitutional Constants' (2021) Verfassungsblog <https://verfassungsblog.de/covid-19-in-the-netherlands-of-changing-tides-and-constitutional-constants/> (last visited 24 February 2024).

59 This classification requires a 'scaled up' approach and enables central government to implement far-reaching measures to manage the outbreak of the disease. See Art. 1 of the Public Health Act.

60 See Julicher & Veto, supra note 58. The political loyalties of the OMT and the quality of its advice have been questioned. See W Kieskamp, 'Andere Experts Naast het OMT Zijn Voor het Kabinet nog Niet zo Makkelijk te Vinden' (2020) Trouw <https://www.trouw.nl/binnenland/andere-experts-naast-het-omt-zijn-voor-het-kabinet-nog-niet-zo-makkelijk-te-vinden~b3330617/> (last visited 24 February 2024).

61 M Esra Kuiper et al., 'The Intelligent Lockdown: Compliance with COVID-19 Mitigation Measures in the Netherlands' (2020) *Amsterdam Law School Research Paper* 1–38. See also Janssen & van der Voort, supra note 55, 2. For an overview of initial recommendations see Rijksoverheid, (2020) 'Ontwikkelingen Coronavirus in 2020' <https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/2020> (last visited 24 February 2024).

62 See Janssen & van der Voort, supra note 55, 2. See also B van Klink et al., 'The Utopia of Legality: A Comparison of the Dutch and Polish Approaches to the Regulation of the COVID-19 Pandemic' (2022) 27(2) *Białostockie Studia Prawnicze* 9, 9–30; 'Rotterdam Mayor Wants More Resources To Enforce Coronavirus Measures' *NL Times*, 23 March 2020 <https://nltimes.nl/2020/03/23/rotterdam-mayor-wants-resources-enforce-coronavirus-measures> (last visited 24 February 2024).

63 See Julicher & Veto, supra note 58; H Broeksteeg, 'Corona en Noodverordeningen' 2020 Montesquieu Instituut <https://www.montesquieu-instituut.nl/id/vl7ah9uq3xl7/nieuws/corona_en_noodverordeningen> (last visited 24 February 2024).

64 Security Regions Act 2010, Art. 39. The Municipalities Act 1992 (Arts. 172 and 174) provides for two subtly different legal instruments for emergency measures, namely emergency orders (*noodbevelen*) and emergency ordinances (*noodverordeningen*). Unlike emergency ordinances, emergency orders are subject to administrative law review.

65 See Cavalcanti & Terstegg, supra note 32, 1705.

66 See Buyse & de Lange, supra note 58.

varied over time in keeping with the ebbs and flows of the pandemic and included, inter alia, control over gatherings of persons, prohibition of events, the imposition of a curfew and closure of public places.[67] To be implemented uniformly at local level, the emergency ordinances were eventually written into a 'model emergency ordinance' to be adopted by municipalities.[68] Ironically, this overwrote mayors' existing authority to adopt the exact same or even stricter measures for securing public order and safety.[69] This effectively betrayed the consultative spirit of both the Municipalities Act and the Security Regions Act, as mayors and municipal councils were neither consulted in relation to, nor afforded the opportunity to request further information or to lodge objections to the content of emergency ordinances, which were also not ratified by municipal councils.[70]

As a governance tool, the emergency ordinances had the advantage that they were capable of swift implementation without undergoing the normal (lengthy) procedures for ratification. However, the lack of consultation with mayors meant that the measures were not attuned to local contexts. In addition, the lack of oversight and accountability inherent in the process raised serious concerns, especially insofar as ordinances impacted on fundamental rights.[71] Some measures, particularly those relating to the number of guests permitted to visit Dutch homes, the curfew, mask mandate and the 'hard lockdown' of 2021, were challenged in court for limiting the rights to privacy (Article 10 of the Dutch Constitution and Article 8 of the European Convention on Human Rights) and the right to self-determination and inviolability of the body (Article 11 of the Dutch Constitution). However, these challenges were unsuccessful, since the court in each instance was of the opinion that the relevant measures were reasonable, in the public interest, and necessary to combat the pandemic.[72]

Given the extent of opposition to emergency ordinances, it was decided to replace them with a special national Act. A Temporary Act for Covid-19 Measures[73] came into effect on 1 December 2020. In both its initial draft and 'final' versions, the Temporary Act has come under fire for creating a parallel structure to the legal framework for managing public health, for the sweeping powers and discretion it conferred on the Minister of Health, for its preponderant top-down approach in terms of which mayors and Security Regions were effectively relegated to mere functionaries of the central Ministry, for the extent to which and ease with which it permitted restrictions of individual liberties and for the feebleness of its (at least initial) oversight and accountability mechanisms.[74] Attempts to make the Act permanent were accordingly strongly resisted and ultimately unsuccessful. The law expired in May 2022.[75]

While the above discussion attests to the ultimate side-lining of municipalities and the effective 'recentralization' of public health functions, Dutch cities were, at least early in the pandemic, very active in their attempts to manage it. Reacting to the ambiguities of the initial 'intelligent lockdown', the cities of Amsterdam and Rotterdam proclaimed measures in terms

67 See Cavalcanti & Terstegg, supra note 32, 1705–1706.

68 Rijksoverheid, (2020) 'Noodverordening COVID-19 Veiligheidsregio' <https://www.rijksoverheid.nl/documenten/rapporten/2020/06/12/ek-bijlage-modelnoodverordeningen> (last visited 24 February 2024).

69 Municipalities Act 1992, Arts. 172–177.

70 See Buyse & De Lange, supra note 58; Center for Public Order and Security (2020), *Corona Crisis and the Law* Parts 3 and 12 <https://www.openbareorde.nl> (last visited 24 February 2024); see Wayenberg et al., supra note 53, 30. Mayors must be consulted over the local implementation of measures under Art. 39(2) of the Security Regions Act and Art. 180 of the Municipalities Act.

71 See Buyse & De Lange, supra note 58; Cavalcanti & Terstegg, supra note 32, 1707–1709; European Union Agency for Fundamental Rights, 'Coronavirus Pandemic in the EU: Fundamental Human Rights Implications' (EUFRA Vienna 2020), 2.

72 See, amongst others, Netherlands, Court of Appeal of the Hague, 14 December 2021, No. 200.293.171/01 and District Court of the Hague (ECLI:NL: RBDHA:2022:41), 5 January 2022.

73 *Tijdelijke Bepalingen In Verband Met Maatregelen Ter Bestrijding Van De Epidemie Van Covid-19 Voor De Langere Termijn (Tijdelijke Wet Maatregelen Covid-19)* 35526–2 of 2020.

74 See S Aksünger (2022) 'Dutch Government under Fire for Permanent Coronavirus Law Proposal' Anadolou Agency <https://www.aa.com.tr/en/europe/dutch-government-under-fire-for-permanent-coronavirus-law-proposal/2656754> (last visited 24 February 2024); Julicher & Veto, supra note 58; Nederlandse Vereniging Voor Raadsleden (2020), 'Nieuwe coronawetsvoorstel: minister krijgt alle ruimte' <https://www.raadsleden.nl/actueel/nieuws/nieuwe-coronawetsvoorstel-minister-krijgt-alle-ruimte> (last visited 24 February 2024); van Klink et al., supra note 62, 18.

75 See van Klink et al., supra note 62, 15–16.

of their residual public order powers under the Municipalities Act, to operate in their respective city centres. In some respects (notably pertaining to mask mandates), these measures were stricter than those prevailing nationally.

Measures adopted in Amsterdam included stricter controls over public space (with public parks, for instance, being closed at night to minimise gatherings), creating one-way foot traffic in shopping streets, closing canal ways to prohibit people from boating, and stipulating special opening hours of public facilities like libraries and municipal offices for the elderly and those in poor health, reduced operating schedules and increased cleaning for public transport, a mask mandate on public transport, and adjusting traffic lights to stay 'green' longer for cyclists and pedestrians, so as to promote adherence to social distancing.[76]

The Rotterdam Security Region announced similar measures, such as special opening times for the elderly and risk groups at libraries and city halls, the closure of public parks at midnight and a requirement that public gatherings of more than fifty people had to be registered with the municipality.[77] The mayor also imposed a stringent facemask rule (for everyone aged thirteen and over) in public transport, selected public places and crowded areas,[78] and the council released statements advising that visitors to Rotterdam who failed to adhere to these rules would be fined or asked to leave.[79] Notably, the mayor closed three cafes and a sports canteen for two weeks, for failing to adhere to measures.[80] The council further developed local educational campaigns in certain neighbourhoods with high infection rates to disseminate information on the importance of complying with measures.[81]

Inevitably, the Covid crisis placed a significant strain on socio-economic conditions in both Amsterdam and Rotterdam. Both municipalities adopted temporary income support schemes for small businesses in the tourism and hospitality industries, which provided support over and above that for which beneficiaries qualified in terms of national measures.[82] A similar temporary income support scheme was adopted for qualifying low-income residents, and the council temporarily stopped municipal tax collections for qualifying residents.[83]

Despite their proactive approaches, both Amsterdam and Rotterdam experienced upheaval in the form of public protests and riots in response to both local and national measures.[84]

76 See City of Amsterdam (2020) 'Amsterdam's Response to Covid-19 Summary of City Measures' <https://globalparliamentofmayors.org/wp-content/uploads/2020/06/COVID-19-Overview-measures-city-of-Amsterdam-02062020.pdf> (last visited 24 February 2024).

77 Veiligheidsregio Rotterdam-Rijnmond Noodverordening COVID-19 Veiligheidsregio Rotterdam-Rijnmond 15 juni (2020) <https://vr-rr.nl/publish/pages/51797/getekende_noodverordening_covid-19_veiligheidsregio_rotterdam-rijnmond_van_15_juni_2020_1.pdf> (last visited 24 February 2024).

78 See 'Face Masks Mandatory in Parts of Amsterdam, Rotterdam from Aug. 5', *NL Times*, 30 July 2020 <https://nltimes.nl/2020/07/30/face-masks-mandatory-parts-amsterdam-rotterdam-aug-5> (last visited 24 February 2024).

79 Gemeenteblad Rotterdam (2020) 'Anwijzingsbesluit van de Vorzitter van de Veiligheidsregio Rotterdam-Rijnmond Houdende Voorschriften ter aanwijzing van Gebieden of Locaties waar het verplicht is een Mondkapje te dragen als bedoeld in artikel 2.5a Noodverordening COVID-19 Veiligheidsregio Rotterdam-Rijnmond van 4 Augustus 2020' <https://zoek.officielebekendmakingen.nl/gmb-2020-203438.pdf> (last visited 24 February 2024).

80 This decision was made three days after the City of Amsterdam closed three cafes that ignored the Council's rules. Rijnmond (2020) 'Aboutaleb Sluit Vier Uitgaansplekken, Coronaregels Herhaaldelijk Overtreden' <https://www.rijnmond.nl/nieuws/197776/aboutaleb-sluit-vier-uitgaansplekken-coronaregels-herhaaldelijk-overtreden> (last visited 24 February 2024).

81 Veiligheidsregio Rotterdam-Rijnmond, 'Grip op Coronavirus met Regionale Maatregelen' (2020) <https://vr-rr.nl/@57686/grip-coronavirus/> (last visited 24 February 2024).

82 S-J Kim et al., 'Cities Policy Responses: Tackling Coronavirus (COVID-19)' (OECD Publishing 2020) <https://read.oecd-ilibrary.org/view/?ref=126_126769-yen45847kf&title=Coronavirus-COVID-19-Cities-Policy-Responses> (last visited 24 February 2024) 34–38.

83 Watdoetdegemeenterotterdam (2020) 'Effecten en Maatregelen Covid-19 in 2020' <https://www.watdoetdegemeente.rotterdam.nl/jaarstukken2020/getekendejaarstukken/xhtml/apps/jaarstukken2020/paragrafen/bedrijfsvoering/08-corona/index.html> (last visited 24 February 2024). Also see Iamsterdam (2022) 'Do I Need to Pay Back Covid Financial Support?' <https://www.iamsterdam.com/en/business/connect-and-grow/financial-support> (last visited 24 February 2024).

84 'Rotterdam Police Open Fire as Covid Protest turns into "Orgy of Violence"', *The Guardian*, 19 November 2021 <https://www.theguardian.com/world/2021/nov/19/the-netherlands-rotterdam-police-open-fire-as-covid-protest-turns-violent> (last visited 24 February 2024); 'Dutch Police Disperse Anti-Lockdown Protesters in Amsterdam', *Reuters*, 2 January 2021 <https://www.reuters.com/business/media-telecom/dutch-police-disperse-thousands-protesting-against-lockdown-measures-2022-01-02/> (last visited 24 February 2024).

3.2 SOUTH AFRICA

3.2.1 Institutional and legal context

The 1996 Constitution of the Republic of South Africa ('South African Constitution') embraces a model of co-operative government across 'distinctive, interdependent and interrelated' national, provincial and local 'spheres'.[85] Legislative competence and executive authority over various functional areas is divided (and often shared) between the spheres,[86] which are constitutionally enjoined to coordinate and streamline their governance activities so as to 'provide effective, transparent, accountable and coherent government for the Republic as a whole'.[87]

Different devolution arrangements accordingly operate in different functional areas, although national government not uncommonly retains a coordinating stake. Of interest for present purposes, the Disaster Management Act 57 of 2002 (DMA) makes provision for disaster responses at national, provincial or municipal levels, with co-ordinating responsibility located in disaster management centres established at the relevant levels, which are meant to function according to level-specific disaster management plans providing for co-ordinated efforts between actors from across the public and private sectors, and civil society.[88] The National Health Act 61 of 2003 (NHA) further locates co-ordinating powers in respect of health and medical services during national and provincial disasters, in national and provincial health departments respectively,[89] while requiring the national health department to 'facilitate and promote the provision of health services for the management, prevention and control of communicable and non-communicable diseases'.[90]

At the local sphere, municipal councils are democratically elected and are constitutionally charged with a developmental mandate to be achieved through participatory and sustainable local governance.[91] In pursuit of this mandate, municipalities are granted 'executive authority', bylaw-making power and the 'right to administer' a significant list of functional areas pertaining to urban form and function, supplemented by an expectation to also be assigned authority over other functional areas which can 'most effectively be administered locally', where municipalities have the requisite capacity.[92] The national and provincial spheres of government must 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'[93] and 'may not compromise or impede a municipality's ability or right' to do so.[94]

Municipalities' constitutional powers and responsibilities are operationalised through the Municipal Systems Act 32 of 2000 (MSA). This Act further elaborates on community participation structures and municipal service delivery mechanisms. Most significantly, the MSA contains a chapter on integrated development planning,[95] in terms of which a municipality's Integrated Development Plan (IDP) functions simultaneously as its method to diagnose prevailing challenges, its strategic plan, its priority list and its primary governance tool. IDPs, which must be regularly reviewed, are meant to mainstream municipal priorities across sectors and line functions, and to align them with the municipal budget and performance management system.

The IDP chapter is also the MSA's point of articulation with provisions detailing municipal powers and responsibilities in a wide range of sector-specific legislation. Importantly, section 33 of the

85 South African Constitution 1996, Section 40(1).

86 South African Constitution 1996, Sections 44, 104 and 156 read with South African Constitution 1996, Schedules 4 and 5.

87 South African Constitution 1996, Section 41(1)(c).

88 On national disasters, as declared in response to Covid-19, see Sections 7(2)(d), 7(2)(f) and 26(1)(3) of the DMA. On municipal disasters see Sections 42(1), 51–53 DMA.

89 Sections 21(2)(e) and 25(2)(g) NHA.

90 Section 21(2)(k) NHA.

91 South African Constitution 1996, Section 152.

92 South African Constitution 1996, Section 156 read with South African Constitution 1996, Schedules 4B and 5B.

93 South African Constitution 1996, Section 154(1).

94 South African Constitution, Section 151(4).

95 Sections 23–37 MSA.

NHA requires local health districts to align their planning with municipal IDPs, whereas the DMA requires municipalities to prepare, canvass and regularly update disaster management plans based on prevailing local circumstances and to incorporate these into their IDPs. These plans must, inter alia, 'anticipate the types of disaster that are likely to occur in the municipal area and their possible effects', 'place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households', 'identify and address weaknesses in capacity to deal with possible disasters', 'provide for appropriate prevention and mitigation strategies' and 'contain contingency plans and emergency procedures in the event of a disaster, providing for the allocation of responsibilities to the various role-players and co-ordination in the carrying out of those responsibilities; prompt disaster response and relief; the procurement of essential goods and services; the establishment of strategic communication links; [and] the dissemination of information'.[96]

Translating the constitutional devolution scheme into practice has been a fraught undertaking. This is partly because the constitutional lists apportioning functional powers and responsibilities between the three spheres of government are vague, contradictory and full of lacunae and overlaps, while the legislative decentralisation of powers and functions of non-listed functions has been uneven, incomplete and not always accompanied by sufficient resource-backing.[97]

In the health sector, the Constitution allocates shared legislative competence over 'health services' to national and provincial governments but simultaneously assigns executive and administrative authority over 'municipal health services' to local government. Section 1 of the NHA defines 'municipal health services' as encompassing a range of environmental health functions including 'surveillance and prevention of communicable diseases', while the NHA embodies a district-based devolution model in terms of which municipalities would gradually be enabled to govern the provision of comprehensive primary health care services.[98] However, this model was never fully operationalised beyond the devolution of conventional environmental health functions. In practice, municipalities in bigger cities are responsible for delivering primary health care but have been granted neither the commensurate decision-making authority nor the required budget. The resultant incomplete institutionalisation of health functions at municipal level has caused responsibility for public health functions to be scattered between different line departments within municipalities, while health is typically poorly mainstreamed in municipal planning and governance instruments.[99]

South African cities and towns are further plagued with acute capacity and resource shortages and have struggled to cope with their developmental mandate amidst pervasive poverty, unemployment and underdevelopment, infrastructural shortages, service delivery backlogs and political instability.[100] Especially in smaller municipalities, the capacity and resources to appreciate and respond appropriately to complex phenomena such as climate change have simply been absent, IDPs have not represented the outcomes of either meaningful participatory or strategic planning processes and municipal priorities have neither been appropriately mainstreamed nor adequately resourced.[101] Prior to Covid-19, for instance, very few municipal

96 Respectively Sections 53(2)(b), (c), (h), (i) and (k) of the DMA.

97 See A Christmas & J de Visser, 'Bridging the Gap Between Theory and Practice: Reviewing the Functions and Powers of Local Government in South Africa' (2009) (2) *Commonwealth Journal of Local Governance* 107; M Pieterse, 'Urban Autonomy in South African Intergovernmental Relations Jurisprudence' (2019) 13(2) *ICL Journal* 119, 130.

98 Sections 1, 29–34 NHA.

99 See A May & M Agenbag, 'Environmental Health and Municipal Public Health Services' in A Du Plessis (ed.), *Environmental law and Local Government in South Africa* (2nd edn, Juta 2021), 34–37, 43–46, 52–53, 58–64; HCJ van Rensburg & MC Engelbrecht, 'Transformation of the South African Health System: Post-1994' in HCJ van Rensburg (ed.), *Health and Health Care in South Africa* (Van Schaik 2012), 121, 149–151, 157–161, 181.

100 See Christmas & De Visser, supra note 97, 110; Pieterse, supra note 97, 130; South African Cities Network (SACN), *State of South African Cities Report* (SACN 2022), 86–91.

101 See W Faling et al., 'Rhetoric or Action: Are South African Municipalities Planning for Climate Change?' (2012) 29(2) *Development Southern Africa* 241, 246; May & Agenbag, supra note 99, 14; A van der Berg, 'The Pursuit of SDG 11 through the Lens of Integrated Development Planning' in HP Aust & A Du Plessis (eds.), *The Globalisation of Urban Governance: Legal Perspectives on Sustainable Development Goal 11* (Routledge 2019), 208, 219; D van Niekerk, 'A Critical Analysis of the South African Disaster Management Act and Policy Framework' (2014) 38(4) *Disasters* 858, 864.

IDPs in fact contained disaster management plans or meaningfully reflected on disaster-related vulnerability or risk.[102]

3.2.2 Responding to Covid-19

South Africa reported its first confirmed case of Covid-19 on 5 March 2020. The government had to urgently decide on an appropriate legal framework within which to respond to the looming pandemic. While existing regulations promulgated under the NHA[103] provided, inter alia, for surveillance of notifiable communicable diseases and for the isolation and quarantine of certain categories of infected persons, they were not conceived to operate at the scale presented by Covid-19 and were not regarded as sufficiently wide-ranging, far-reaching or dynamic.

The South African Constitution provides for the declaration of states of emergency, complete with suspension of certain fundamental rights, in circumstances where 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency'.[104] However, the country has an uncomfortable history with the abuse of states of emergency during the dying years of apartheid and it was decided not to pursue this route.[105] Instead, government opted for the framework presented by the DMA and a national state of disaster was declared under section 27(1) of the DMA on 15 March 2020. This was the first time a state of disaster had been declared at a national level and the first time that one was invoked as a preventative, rather than reactive, measure.[106]

On the one hand, the ready availability of the detailed emergency governance framework presented by the DMA, which bestows wide-ranging regulatory powers on the Minister of Co-operative Government and Traditional Affairs (COGTA), was fortuitous. This is because the DMA contains elaborate frameworks and processes for intergovernmental cooperation and for the alignment of disaster management efforts at different levels, and also because it allows for the release and flexible use of emergency funding. On the other hand, it would prove challenging to manage the ongoing and constantly evolving threat posed by Covid-19 through an instrument that is explicitly geared towards governing short-term and reactive responses in the immediate aftermath of natural disasters.[107] For instance, while its definition of 'disaster' was broad enough to encompass a pandemic, the DMA contains neither provisions pertaining to infectious disease control nor provisions articulating explicitly with the regulatory framework under the NHA (which was essentially bypassed for the bulk of the country's initial Covid-19 response).[108]

In addition, the DMA's institutional mechanism had not previously been test-driven at national scale. It provides for the establishment of a National Disaster Management Centre within the national department of COGTA, tasked with promoting 'an integrated and coordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state'[109] and granted a long list of advisory, coordinating, information-gathering and oversight functions.[110] However, this structure was found to be clunky and cumbersome and the President instead established a 'National Coronavirus Command Council' (NCCC) as a committee of (and consisting mostly of members of) cabinet.[111] An accountability-based constitutional challenge against the NCCC's establishment was

102 See Faling et al., supra note 101, 246, 253; van Niekerk, supra note 101, 865–866; D van Niekerk, 'Disaster Risk Reduction and Climate Change Adaptation and Resilience' in A Du Plessis (ed.) *Environmental law and Local Government in South Africa* (2nd edn, Juta 2021) chapter 23, 21, 25.

103 Regulations relating to the Surveillance and Control of Notifiable Medical Conditions GN 1434 of 15 December 2017, promulgated pursuant to section 90 of the NHA.

104 South African Constitution 1996, Section 37, operationalised by the State of Emergency Act 64 of 1997.

105 See P Kruger et al., 'Republic of South Africa: Legal Response to Covid-19' in J King & O Ferraz (eds.), *Oxford Compendium of National Legal Responses to Covid-19* (OUP Online 2021), paras. 14–15.

106 Van Niekerk in A du Plessis (ed.), supra note 102, 5.

107 ibid., 7.

108 Kruger et al., supra note 105, para. 20.

109 Section 9 DMA.

110 Sections 7–24 DMA.

111 See Kruger et al., supra note 105, para. 32.

dismissed by the Western Cape High Court[112] and the NCCC proceeded to drive the national pandemic response.

As implied by the composition of the NCCC and enabled by the top-down tone of the DMA's provisions pertaining to national states of disaster, the South African pandemic response was dominated by the national executive, with both the legislature and subnational spheres of government fading into subservient, supporting roles.[113] Over the next two years, most features of everyday South African life came to be influenced by regulations proclaimed by the Minister of COGTA under the NDA, acting on the advice of the NCCC.[114]

A nationwide stay-at-home 'lockdown', one of the most far-reaching and comprehensive in the world and militaristically enforced by the national police and defence forces,[115] was imposed from 29 March 2020. It was slightly relaxed from 1 May 2020, after which the country adopted a graded approach with risk-adjusted levels of restrictions (consisting of a mask mandate mixed with a combination of movement, economic activity and gathering restrictions, a curfew and restrictions on the sale of alcohol) varying in severity depending on the level of virus transmission and associated health system strain.[116] This would persist under monthly extensions of the national state of disaster after its initial lapsing on 15 June 2020, until it was finally lifted on 4 April 2022, after which the pandemic would be managed under the NHA's infectious disease regulations, which had by then been amended to enable future resort to the 'alert-level' system.[117] Various Bill-of-Rights-based challenges to the restrictions were dismissed by the courts during the intervening months.[118]

Municipalities were relegated to functioning as implementation assistants for a NCCC-conceived national disaster management response, in the content of which they had minimal say.[119] In terms of a detailed set of directives to local and provincial governments proclaimed by the national Minister of COGTA at the onset of the initial 'lockdown',[120] municipalities had to, inter alia, develop Covid-19 response plans and risk profiles; organise and ensure basic shelter for homeless persons; scale up potable water and sanitation services especially to informal settlements and other high-risk areas; raise awareness of and communicate the national Covid-19 response to communities; take 'extraordinary' measures to cleanse and sanitise public facilities and potential infection 'hotspots'; implement access control and social distancing regulations across public spaces and facilities; monitor gatherings and direct bylaw-enforcement agencies to assist the national police force with enforcing lockdown regulations.[121] These responsibilities represented a significant extension of municipal mandates and a reorientation of municipal priorities and budgets which, while facilitated by the regulations and (insufficient) emergency budgetary supplementations, caused major operational and financial strain, exacerbated by a near instantaneous reduction in rates and service revenue as the economic fallout of the lockdown rendered many households unable to pay municipal bills.[122]

112 *Esau v Minister of Cooperative Government and Traditional Affairs* [2020] ZAWCHC 56 (WCHC).

113 N Steytler & J De Visser, 'South Africa's Response to Covid-19: The Multilevel Government Dynamic' in R Chattopadhyay et al. (eds.), *Federalism and the Response to Covid-19: A Comparative Analysis* (Routledge 2022), 200, 205–206; SACN, supra note 100, 93.

114 The main set of regulations was issued in terms of section 27(2) DMA as R480 in GG 43258 of 29 April 2020, and amended on several subsequent occasions. See Kruger et al., supra note 105, paras. 57–90.

115 See J Harris, 'Confronting Legacies and Charting a New Course? The Politics of Coronavirus Response in South Africa' in SL Greer et al. (eds.), *Coronavirus Politics: The Comparative Politics and Policy of COVID-19* (University of Michigan Press 2021), 580, 582; D Simon et al., 'Cities Coping with Covid-19: Comparative Perspectives' (2021) 25(1–2) *City* 129, 148; Steytler & De Visser, supra note 113, 201–202.

116 On the extent of restrictions under various alert levels and iterations of the regulations see Kruger et al., supra note 105.

117 Regulations relating to the Surveillance and Control of Notifiable Medical Conditions: Amendment GN 1882 of 15 March 2022.

118 See *Minister of Cooperative Governance and Traditional Affairs v De Beer* [2021] 3 All SA 723 (SCA) and other cases discussed by J Brown, 'Lawfare under Lockdown: Challenges to South Africa's Covid Regulations, March to August 2020' (2021) 37(2) *South African Journal on Human Rights* 302.

119 Steytler & De Visser, supra note 113, 205.

120 R 33 in Government Gazette 43147 of 25 March 2020.

121 For discussion see Steytler & De Visser, supra note 113, 202–206.

122 See SACN *State of City Finances* (2020), 4–8, 12–13, 38; SACN, supra note 100, 91; Steytler & De Visser, supra note 113, 204–205.

The timing of the pandemic fortuitously coincided with the advent of the annual municipal IDP and budget cycle, meaning that, apart from the initial shock to municipal systems and budgets, cities could almost immediately provide for the pandemic in their financial and strategic planning.[123]

Cape Town was the country's initial Covid epicentre, with the first wave of the pandemic exerting a particularly heavy toll in the city's informal settlements, which had long been identified as a pressure point in its socio-economic fabric.[124] The city has in the past received acclaim for mainstreaming resilience in its integrated development planning and had recently been governed through a major drought-induced water crisis, an experience which arguably strengthened its institutional capacity and readiness for a cross-sectoral pandemic response.[125] Its 2020/2021 IDP almost nonchalantly treats the pandemic simply as an added stressor in the city's quests for resilience, development and attracting investment, and focuses mostly on planning to absorb the negative economic consequences of the lockdown by 'operating under austerity conditions'.[126]

While this stance was partly enabled by the overarching focus on resilience that permeates the IDP, politics also arguably contributed. Cape Town is the flagship political project of the Democratic Alliance (DA), the country's centre-right national opposition party, which has governed it with a comfortable majority for nearly two decades. Generally critical of the national government ruled by the African National Congress (ANC), the DA expressed strong opposition to 'lockdown' as a pandemic response from the outset. Accordingly, the Cape Town Metropolitan Council only half-heartedly enforced restrictions in terms of DMA regulations and would consistently lobby for their relaxation over the next two years.[127]

While Cape Town's mild recalcitrance was perhaps a welcome reminder of urban autonomy and political pluralism in what otherwise felt like an authoritarian climate, there was also a less palatable side to its 'business as usual' approach to pandemic governance. Long at loggerheads with human rights organisations over its treatment of homeless and informally housed people, the city disregarded a national prohibition on evictions during the lockdown period.[128] Two judgments of the Western Cape High Court censured city officials for carrying out evictions and demolitions in informal settlements, in contravention of disaster management regulations and contrary to the spirit and purport of the 1996 Constitution.[129] Meanwhile, the city's rounding up and forcible confinement of homeless persons in a tented camp on the urban outskirts was condemned in a report by the South African Human Rights Commission, following which the camp was closed down.[130]

There was far more explicit and elaborate alignment with the national Covid-19 response in the IDP of the City of Johannesburg, where the ANC, which had recently re-established control over the Metropolitan Council, was keen to re-assert itself over the city's strategic plan. The June 2020 update to the IDP contained a chapter on the pandemic, which detailed measures undertaken in compliance with the national disaster management regulations, added minimisation of the pandemic's impact as a strategic priority for the city and conducted a detailed preliminary SWOT analysis based on its initial experience with the pandemic. This analysis expressed appreciation for the 'central coordination' of the national pandemic response as enabling a rapid, evidence-based response to the virus and celebrated the city's ability to dedicate existing local government assets and capacity towards the national mitigation effort.[131]

123 Steytler & De Visser, supra note 113, 204–205.

124 Simon et al., supra note 115, 148–149.

125 See P De Lille & C Kesson, *View from City Hall: Reflections on Governing Cape Town* (Jonathan Ball 2017), 98–109.

126 See City of Cape Town, *Integrated Development Plan 2021/2* (2021), 3, 19–20, 26–27, 31, 42.

127 See Harris, supra note 115, 589–591; Steytler & De Visser, supra note 113, 204, 207.

128 In terms of amended regulation 11CA of GG 43232 of 16 April 2020. See discussion by F Dube and A Du Plessis, 'Unlawful Occupiers, Eviction and the National State of Disaster: Considering South Africa's Emergency Legislation and Jurisprudence During COVID-19' (2021) 65(S2) *Journal of African Law* 335, 335–336.

129 See *Community of Hangberg v City of Cape Town* [2020] ZAWCHC 66; *South African Human Rights Commission v City of Cape Town* (2021) 2 SA 565 (WCC) and discussions by Dube & Du Plessis, supra note 128, 337–344; Harris, supra note 115, 583.

130 See discussion by Kruger et al., supra note 105, para. 56; Simon et al., supra note 115, 150.

131 City of Johannesburg *Integrated Development Plan 2020/21* (2020), 31–34, 69, 98–99.

For instance, Johannesburg was able to dedicate a number of city-owned buildings to serve as homeless shelters, quarantine and isolation facilities, could place its primary health care clinics at the disposal of the national Health Department's testing and treatment (and, later, vaccination) efforts and used its fresh produce market to distribute some 35,000 kilograms of food parcels as food relief in vulnerable communities during the initial lockdown.[132] On the downside, the city was critical of its own supply chain systems (which it regarded as hindering timely procurement of protective equipment and medical supplies), acknowledged the challenges posed by poor living conditions in its informal settlements and expressed concern at dysfunctional intergovernmental communication systems, especially in a context of constantly changing national regulations.[133] It also noted that its primary health clinics fulfilled a number of functions that, strictly speaking, were the legal responsibility of the provincial health department.[134]

On 21 May 2021, Johannesburg launched a new 5-year IDP, which reiterated its commitment to supporting the national response to Covid-19 and also planned for 'post-pandemic reconstruction'.[135] Stating that the pandemic 'made it clear that our city must prepare for future events of equal or greater magnitude',[136] the IDP for the first time contained an assessment of the state of 'public health' in Johannesburg, committed to extending the city's primary health care infrastructure in serving the national vaccination programme and contained a far more detailed section on disaster risk reduction than had been the case in previous IDPs.[137] The city further conducted an evaluation of its various departments' performance during the pandemic response, from which it concluded that its 'policy and regulatory environment served as a constraint during the lockdown, especially when situations changed rapidly'[138] and expressed commitment to strengthening intergovernmental relations, leveraging partnerships with the private sector and civil society and reviewing its supply chain management, employment and human resource policies in light of lessons learnt.[139]

4. REFLECTIONS AND CONCLUSION

Through its intensity, volatility and duration, the Covid-19 pandemic has tested the agility and fitness for purpose of available legal frameworks for urban governance. It is important that lessons learnt from this experience translate into legal reforms that enhance the overall resilience of urban governance systems. This is especially because, as the climate crisis intensifies, city authorities will increasingly be forced to govern adaptively, in a context of radical and continued turbulence and uncertainty.[140]

This article has described how two sets of urban municipal governments, functioning under different constitutional systems and in different socio-economic contexts, have responded not only to the epidemiological and social realities of the Covid-19 pandemic but also to a rapidly and radically altered institutional landscape. The commonalities and differences in their experiences reveal certain fault lines that may well be present in other jurisdictions as well.

As alluded to previously, adherence to rule of law in times of crisis ensures stability and predictability amidst flux, while ensuring that crucial societal goals, such as upholding human rights, do not fall by the wayside. Over and above this, law must be sufficiently adaptable to enable dynamic and context-responsive governance.

It is remarkable that neither the Dutch nor the South African national executive saw fit to declare a national state of emergency in the wake of the Covid-19 pandemic, even though such

132 ibid., 70–71, 253.

133 ibid., 70, 141.

134 ibid., 253.

135 City of Johannesburg, *Integrated Development Plan 2021–2026* (2021), 2, 7, 74–75, 161–162, 188–189.

136 ibid., 8.

137 ibid., 29–31, 164, 186–188, 235–236.

138 ibid., 239.

139 ibid., 235–240.

140 S Davoudi, 'Resilience, Uncertainty, and Adaptive Planning' in E Peker & A Ataöv (eds.) *Governance of Climate Responsive Cities* (Springer 2021), 9–19; Ticlau et al., supra note 5, 173–174.

an option was constitutionally available to them. This initially sent reassuring signals that the states were not prepared to suspend ordinary governance processes and fundamental rights to the extent associated with states of emergency. However, it appears from the discussion in Section 3 above that gaps and shortcomings in the implementation of the 'ordinary' law led both states to repurpose existing legal frames or create new ones, to the point that their overall responses to the pandemic closely resembled states of emergency but arguably lacked the associated strict temporal boundaries, procedural rigour and heightened accountability.

There is arguably little point in keeping on standby a legal framework for emergency governance so severe that few crises could warrant its invocation, only to be left scrambling for more palatable frameworks in the event of an actual crisis. Instead, the challenge is to infuse the ordinary law with sufficient adaptability to enable agile, context-specific, and decisive crisis responses while retaining the fundamental benefits of adherence to the rule of law. Our discussion has shown that the Dutch and South African pandemic responses only partially met this challenge.

First, as discussed in Section 2 above, adaptive law must enable the simultaneous pursuit of multiple societal goals. An important implication of this is that the achievement of crucial goals, such as protecting the public health and respecting fundamental rights, must be mainstreamed across different legal frameworks.[141]

For instance, Covid-19 drove home the reality that there are public health consequences to nearly every emergency and that there accordingly needs to be easy articulation between 'everyday' public health institutions, competencies and functions, on the one hand, and local government's 'ordinary' public order- and place-management functions, on the other.[142] This is arguably illustrated by the experience in the Netherlands, where the fact that Amsterdam and Rotterdam already operated an extensive public health machinery and were well versed in contextually wielding public order powers served them well, especially in the ambivalent early days of the pandemic.[143] By way of contrast, this was not the case in South Africa, where the DMA contained no public health provisions and where municipalities' minimal ordinary involvement in public health decision-making patently limited their ability to respond to the pandemic.

Furthermore, while both the South African and Dutch legal systems amply provide for the 'everyday' protection of human rights, this did not adequately spill over into the 'crisis-focused' frameworks adopted in response to Covid-19, where human rights often seemed to constitute an afterthought.[144] If crises are to be managed in terms of 'ordinary' law in the future, response tools and frameworks need to be anchored in rights-based accountability and must provide for the rights-conscious balancing of competing interests.

Secondly, the discussion in Section 3 illustrates how the need for decisive and effective leadership in the event of a crisis can undermine the related requirements that adaptive law ought to be polycentric and guard against over-concentration of power, while locating appropriate decision-making power with agencies located closest to problems. Despite the thorough decentralisation and strong built-in intergovernmental communication channels of the Dutch system, and notwithstanding the constitutional entrenchment of functional autonomy over many aspects of everyday urban governance in South Africa, both systems saw decision-making authority unceremoniously and almost completely centralised.[145]

In the South African case, others have argued that prior weaknesses in intergovernmental relations and communication might have rendered a more decentralised response unworkable.[146] Meanwhile, the Cape Town example illustrates that inter-sphere political divisions can reduce the

141 See EB Abbott, 'Law, Federalism, the Constitution and Control of Pandemic Flu' (2008) 9 *Asian-Pacific Law & Policy Journal* 187, 195, 199–201; Pieterse, supra note 14, 194.

142 Abbott, supra note 141, 194–195; World Health Organisation and UN Habitat, *Global Report on Urban Health* (2016), 147.

143 See Cavalcanti & Terstegg, supra note 32, 1709.

144 UN Habitat, supra note 2, 151. Also argued in relation to South Africa by Brown, supra note 118.

145 See Cavalcanti & Terstegg, supra note 32, 1709–1710; Janssen & van der Voort, supra note 55, 4; Steytler & De Visser, supra note 113, 205–206. This was, indeed, a global trend. UN Habitat, supra note 2, 127.

146 Steytler & De Visser, supra note 113, 200.

overall effectiveness and rights-compliance of a response in decentralised systems.[147] However, the knee-jerk centralisation of power also occurred in the Netherlands where, by contrast, the prior existence of functional communication channels between central government and urban authorities has been termed a strength of the overall response.[148]

While the pandemic may well initially have called for a coordinated, uniform and unambiguous response,[149] resort to top-down, centralised systems of governance not only undermined the cities' local credibility and trust but also sidelined their expertise and deprived them of an important opportunity to strengthen their capacity for managing similar crises in future.[150] In particular, since it is local government that needed to maintain compliance with restrictions in the long run and that needs to steer cities through Covid-19's aftermath and normalisation,[151] this is lamentable.

Thirdly, when it comes to the adaptability of decision-making processes and implementation tools, our discussion echoes UN Habitat's conclusion from a broader study of urban responses to Covid-19, that cities with 'pre-existing institutions, structures and mechanisms for addressing crises' generally fared better than those without.[152] This is again borne out by the fact that Amsterdam and Rotterdam's prior experience with exercising public health powers as a matter of course enabled them to implement early Covid-19 response measures without stretching their capacity.[153] Meanwhile, South Africa's 'ordinary' legislated IDP-updating cycle enabled both Johannesburg and Cape Town to absorb their additional responsibilities, review the ability of their systems to cope and request appropriate assistance without disrupting the rhythm of their governance or budgetary cycles.[154]

Fourthly, the inherently participatory and reflective nature of the legally mandated IDP-adoption and updating process in South Africa also attests to the importance of built-in feedback loops and opportunities for learning in adaptive legal processes. In this respect, the South African cities perhaps fared better than their Dutch counterparts, where the legislative process followed did not allow for amendments based on performance management, risk assessment or public participation, and eschewed input from mayors on whether emergency measures were appropriate for their local contexts.[155]

Finally, when it comes to the public accountability and dialogue inherent to adaptive law, both systems arguably fell short, at least in the initial stages of the pandemic when the 'ordinary' legislated public participation processes at local government level were suspended. Matters were not helped by the centralisation of decision-making processes, which relocated decisions with local impact to national level, beyond the purview of legally established participatory institutions and processes. Perhaps as a result, neither system provided for public deliberation over the appropriateness of adopted restrictions or allowed for a cost-benefit analysis of alternative measures. There was also general a lack of transparency on how, and based on what data, decisions regarding public health measures were reached.

Overall, while the eventual resort in both South Africa and the Netherlands to a hierarchical, national-executive-driven pandemic response might have rendered responses more uniform and efficient than they might otherwise have been, our discussion shows that this has come at the price of several key features of adaptive urban governance. To enhance urban resilience, regulatory and institutional frameworks need to be recalibrated for an anticipated crisis-prone future. Legal systems need to identify and address those fault-lines in local governance

147 Also concluded by UN Habitat, supra note 2, 134.

148 Cavalcanti & Terstegg, supra note 32, 1709.

149 J He & Y Zhang, 'Urban Epidemic Governance: An Event System Analysis of the Outbreak and Control of Covid-19 in Wuhan, China' (2023) 60(9) *Urban Studies* 1707, 1701.

150 Nathan, supra note 4, 1349, 1358.

151 Abbott, supra note 141, 191–192; Simon et al., supra note 115, 150; UN Habitat, supra note 2, 132.

152 UN Habitat, supra note 2, 125, 142. See also Abbott, supra note 141, 185, 189, 193.

153 Cavalcanti & Terstegg, supra note 32.

154 On these and other advantages of IDPs as governance tools in South African municipalities see generally van der Berg, supra note 101.

155 L Bergkamp, 'State Liability for Failure to Control the COVID-19 Pandemic: International and Dutch Law' (2020) 11(2) *European Journal of Risk Regulation* 343, 349.

(pertaining, for instance, to the fragmentation of functions) that might spur a decision to unduly centralise power in times of crisis. Moreover, to minimise the need for resort to 'exceptional' frameworks of emergency governance in the first place, disaster management needs to be mainstreamed in local government's ordinary operating procedures and in 'everyday' built environment governance policies and processes.[156] Legal systems need to devise transparent, agile, risk-responsive, and reflective governance tools to enable context-specific and decisive crisis responses that are employed as a matter of course rather than exception.[157]

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COMPETING INTERESTS

The authors have no competing interests to declare.

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156 See also Faling et al., supra note 101, 246; UN Habitat, supra note 2, 3.

157 See also Matyas, supra note 15, 456–457.