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Dear President Ramaphosa,

STATEMENT AND POLICY BRIEF BY THE SOCIAL JUSTICE THINK-TANK: COVID-19 POLICY AND RULE OF LAW INDEX: *DE BEER V MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (COGTA)*

1 INTRODUCTION

We are social justice practitioners and activists from civil society and the academic community that meet as the Social Justice and COVID-19 Policy and Relief Monitoring Alliance (SCOPRA) convened by the Law Trust Chair in Social Justice at Stellenbosch University to analyse, discuss and recommend action in response to the North Gauteng High Court Division's judgment in the ***De Beer v Minister of Cooperative Governance and Traditional Affairs,*** case (*De Beer Judgment*)

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The purpose of this Statement and Policy Brief is to share with you our key conclusions on the De Beer judgment and recommendations regarding steps that government should ideally take in response and to improve congruence between government's policy and regulatory responses to the COVID-19 pandemic. We are mindful of the fact that government has already appealed against the judgment. This we believe, is a correct response given the implications of the judgment on all action that has already been taken pursuant to the regulations. We also note the need for specificity in the judgment regarding which regulations lack congruence with the Constitution and the law and why thus justifying a declaration of invalidity.

As previously clarified, we recently constituted ourselves as SCOPRA to operate as a social accountability network dedicated to tracking all COVID-19 policies and relief measures. We seek to assess all policy, regulatory and relief decisions to ensure compliance with the equality duty and related social justice commitments to foster social justice, the rule of law, sustainable democracy and peace. This is in line with UN Sustainable Development Goals (SDGs) particularly, Goal 10 (Equality), Goal 1 (Poverty), Goal 16 (Rule of Law and Peace) and Goal 17 (International Cooperation). The SCOPRA expert roundtable is part of broader conversations that are taking place under the Social Justice Chair and related M-Plan for Social Justice, which was endorsed by Government in August 2019. The initiative seeks to enlist civil society's active role in the midwifery of the social democracy envisaged in the South African Constitution.

The purpose of the dialogue was to discuss the *De Beer* judgment with regard to social justice and the rule of law and to distil certain principles for greater understanding of the Disaster Management Act of 2002, its strengths and its shortcomings. We believe that guidance regarding the way forward can be provided when two questions are asked, namely what has happened and what should have happened?

While being mindful of the fact that you and other decision-makers are confronted with competing challenges compounded by the fact that the COVID-19 Coronavirus presents a novel situation that no country was specifically prepared for, it is still important to hold decision-makers accountable. This is particularly so as ours is a democracy founded on democratic values,

accountability and openness and the rule of law. How we make decisions now, and the decisions that are made now, can have a lasting effect and may outlive the pandemic.

We are also mindful that many of the impugned lockdown regulations are no longer a problem as the country is under the less restrictive Alert Level 3 and that further liberalisation of the movement of goods and persons has occurred after the Level 3 regulations were released on 28 May 2020. It is worth noting that Government has indicated that the country or parts of it may vacillate between different alert levels in response to changes in infection rates. We acknowledge with deep gratitude and applause that the needle has shifted since our very first conversation of this nature in April of this year. We have since sent two policy briefs to government and a letter, raising concerns that have come from this platform of experts and our interaction with the people. It is further heart-warming to note that the government is listening, as can be seen from the latest pronouncements of the president during this past week.

We nevertheless believe that the pandemic will be with us for a considerable amount of time and the regulatory interventions to it have so serious an impact on human rights, the rule of law and ultimately peace that their alignment with the Constitution is an imperative to be ignored at the peril of the constitutional democracy and social cohesion project ushered in by our Constitution. It, accordingly, remains our considered view that future regulations and subordinate regulatory instruments need to be subjected to a constitutional and related social justice predictive impact analysis *before* approval. The same applies to remaining regulations and subordinate regulatory instruments that were the basis for the De Beer judgment.

In our first Statement and Policy Brief to the President, we presented an instrument referred to as the Nine (9) Dimensional Social Justice Impact Assessment Matrix (SIAM), with the hope that forthwith SIAM would be used to test all planned regulations, directions, guidelines, and related COVID-19 regulatory instruments before implementation. SIAM is motivated by the view that Government has a duty to ensure, before passing any rule, policy or law, that it asks itself what is the purpose of the policy, law or decision and if that is consistent with constitutional objectives and values concerning the achievement of substantive equality or social justice and advancing human rights for all. Ultimately, SIAM seeks to answer the constitutional call of transformative

constitutionalism focusing on advancing equality and eliminating poverty in pursuit of constitutional and universal social justice and related human rights advancement commitments.

This framework and other dimensions of the Social Justice M-Plan are adaptable and transferable to other jurisdictions, particularly in the African continent. In responding to the Coronavirus Covid-19, the rest of the world may need a model for advancing equality and fostering human solidarity to ensure that no one is left behind. In this regard, the SIAM instrument and government's own Social and Economic Impact Assessment Systems (SEIAS) offer useful impact assessment lenses in the design of COVID-19 regulations and any other policies, laws or plans.

With this in mind, we analysed and discussed the case during the dialogue. What follows is a summary of the facts, the issues in front of the court, and the rules, ending off with our own analysis and conclusions.

2 SUMMARY OF THE DE BEER v MINISTER OF COGTA JUDGMENT

2 1 The Application

De Beer v Minister of COGTA is a judgment of the North Gauteng Division of the High Court following an application from an ordinary Citizen Mr De Beer and two non-profit organisations, Liberty Fighters Network and Hola Bon Renaissance Foundation, that came before Davis J, on 28 May 2020.

The application, which was dealt with in motion proceedings, requested the court to declare invalid the declaration of a National State of Disaster in terms of the Disaster Management Act 57 of 2002 by the Minister of COGTA. The applicants further sought to have regulations issued pursuant to such declaration of a National State of Disaster equally invalid

2 2 Specific relief sought by the applicants was that:

a) the National State of Disaster be declared unconstitutional, unlawful and invalid;

b) all the regulations promulgated by the Minister be declared unconstitutional, unlawful and invalid;

c) all gatherings be declared lawful alternatively be allowed subject to certain conditions; and

d) all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilising masks, gloves and hand sanitizers. This relief was, however, only sought as an alternative and made subject to consultation with the Essential Services Committee contemplated in section 70 of the Labour Relations Act 66 of 1995.

2 3 Principles applied by the Court

a) Exercise of public power must comply with the Constitution, which is the supreme law

b) Supremacy of the Constitution

c) Public power can only be exercised validly if exercised in accordance with the rule of law, which incorporates legality while rationality at the core of legality

d) Rationality entails a direct link between a decision and the purpose for which it is taken

e) Public power and related authority can only be legitimately exercised for the purpose for which it is conferred and in this regard, an argument that the end justifies the means is incongruent with the rule of law and the underlying principle of legality.

f) Where a decision results in a limitation of rights, such limitation should be justifiable in an open and democratic society based on equality, human dignity, human rights and freedoms and accordingly, an argument that the means justify the ends is incongruent with government's constitutional responsibilities

g) Courts must declare conduct that is inconsistent with the Constitution invalid

h) In performing their function, courts should do so in a matter that is just and equitable taking into account, among others, the doctrine of separation of powers and the impact of declaring operational legislation invalid.

i) To deviate from a similar decision by the same or a higher court, a matter should be sufficiently distinct from the one a previous decision was based on (In this case the *Mohamed v The President* judgment in the same High Court had found no irrationality in regulations prohibiting religious gatherings)

2 4 The Court's Observations

a) Allegation that the National State of Disaster was not necessary and should have not been declared, not substantiated.

b) Allegation that regulations issued in pursuit of a National State of Disaster that has no basis in law are consequently invalid, not substantiated.

c) Argument that the declaration of a National State of Disaster was unnecessary as the International Health Regulations Act, 28 of 1974 constitutes adequate existing legislation, not substantiated.

d) Argument that the regulations issued in terms of section 27(2) of the DMA are unlawful on account of a fatal procedural flaw relating to failure to refer the said regulations to the National Council of Provinces (NCOP) in terms of section 146(6) of the Constitution, not upheld. The court found that only normal regulations issued in terms of section 59(4) of the DMA require an NCOP referral.

e) Argument that the lockdown regulations are in breach of the Public Gatherings Act of 1993, not upheld.

f) The DMA did not anticipate a public health disaster such as the COVID-19 pandemic and possibly envisaged natural disasters such as floods [para 4.14]

g) The COGTA Minister did not rely on the inadequacy of existing legislation, which is a requirement in terms of section 26(2), which authorises regulations under 27(2) to augment and not replace existing law and related arrangements

h) Several the lockdown regulations are irrational as the nexus between them and the purpose sought to be achieved is not discernible. Examples given included: prohibition of family visits and stipulation of exercise times and related freedom of movement restrictions (Regulation 33); restrictions on child care sharing to parents against the best interest of a child (Regulation 34) restriction of funeral permits to specified relatives, and prohibition of night vigils (Regulation 35);

prohibition of work and commerce and loss of livelihoods for "traders, fisheries, shore-foragers, construction workers, street vendors, waste pickers, hairdressers"; park and beach closers (Regulation 39(2)); and inequality of treatment between predominantly female hairdressers and predominantly male taxi owners; and criminalisation of lockdown regulations violations(Regulations 35(3) and 48(2).

i) Cautionary approach to "education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example as well as the closure of borders. (Regulations 36, 38, 39(2)(d) and(e) and 41) all appear to be rationally connected to the stated objectives."

j) In an overwhelming number of instances, the Minister failed to demonstrate that the limitation of mentioned rights was justified in the context of section 36 of the Constitution.

2 5 Conclusions

2 5 1 Declaration of National State of Disaster found rational

Alert Level 4 and 3 regulations have a substantial number of instances where they are not rationally connected to the objective of slowing down or limiting the spread of COVID-19.

In every instance where "means" are implemented by executive authority to obtain a specific outcome an evaluative exercise must be taken insofar as those "means" may encroach on a constitutional right, to determine whether such encroachment is justifiable. Without conducting such an inquiry, the enforcement of such means, even in a bona fide attempt to attain a legitimate end, would be arbitrary and unlawful.

Insofar as the "lockdown regulations" do not satisfy the "rationality test", their encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution.

Minister of COGTA to review and address deficiencies in regulations.

Deficiencies in the regulations need to be addressed by the Minister by the review and amendment thereof so as to not infringe on constitutional rights more than may be rationally justifiable.
Vacuum not to be allowed and tobacco and National COVID-19 Command Council (NCC) matters excluded.

2 5 2 The Court's Order

a) Regulations issued under the DMA for Alert levels 4 and 3 declared unconstitutional and accordingly invalid
b) Regulations 36, 38, 39 (2)(d) and(e) and 41 saved on account of being considered rational and accordingly constitutional, lawful and valid
c) Declaration suspended for 14 days during which Min COGTA must review
d) Minister ordered to review and review the regulations within 14 days
e) Tobacco Regulation excluded

2 6 Analysis

2 6 1 Summary of SCOPRA observations

The judgment touches the right notes regarding the proper context for the legitimate exercise of public power which is within the rule of law anchored in the supremacy of the Constitution. It aptly notes that an essential element of the rule of law is the principle of legality at the core of which is the need for a rational connection between the exercise of public power and the purpose for which that is done.

The judgment further correctly points out that government's duty is not limited to life and the economy but includes social cohesion, which in turn incorporates the duty to protect and advance human rights. The examples of incidences of irrationality and unreasonableness as noted mostly in the paragraph, show acuity of this balancing obligations as the judgment draws examples, from family life, economic freedom and freedom of movement relating to public intercourse. It also highlights that the best interests of the child require a paradigm of childcare that transcends custodial rights as declared by courts and focuses on the practicality of shared childcare in families. A similar sensitivity to the primacy of families and social life and cultural proclivities that hold the

fabric of societies is shown in the manner the judgment deals with funeral rites and family activities that precede funerals.

The judgment further highlights the duty of government to conduct and show that it has conducted a human rights impact assessment before a limitation of rights can be considered permissible in terms of section 36 of the constitution and accordingly valid. This is in line with the test previously recommended by this collective to government and the SIAM instrument recommended for use in addition to SEIAS for a predictive social justice impact assessment.

The Judgment further deals with the issue of criminalisation of ordinary people for matters arising from irrational and/or unreasonable restrictions on their lives be it in relation to economic freedoms, civil rights or social rights such as children's rights and the universal right to family life. The judge believes this major intrusion on rights cannot be arbitrarily imposed by the executive in an open and democratic society based on equality, human dignity, human rights, and freedoms as ours is.

2 6 2 Weaknesses in the judgment

The key weakness in the judgment is the absence of a clear conceptual framework for the review of the action of the Minister of COGTA. While it is true that section 33 rights are as much an issue of administrative law as they are issues of constitutional law and human rights, it would have helped for the judgment to separate issues of rationality and legality and where there is an overlap, provide a conceptual framing. It would also have helped to separate and deal more specifically with issues of democratic governance and just administrative action on the one hand and human rights issues on the other.

The second weakness in the judgment is the lack of specificity. Even when the judgment refers to human rights violations such as children's rights, equality and freedom of trade, it does not specify the exact rights violated and the source of those rights at both domestic and international law levels. Even the regulations that are said to be irrational, not enough specificity is provided to justify the finding of irrationality.

The weakest link in the judgment is the declaration of irrationality, unconstitutionality and invalidity of all but a handful of the regulations for Alert Levels 4 and 3 while the judgment itself concludes in paragraph 9 that a substantial number are flawed. It is not clear whether the reference to "a number" means the ones given as examples or to a larger indeterminate number. It appears the judgment implies more regulations are not flawed beyond the few singled out as rational and saved in paragraph 11.

The problem is exacerbated by the lack of specificity regarding why the saved ones are rational and the impaired ones are not. The casual observations made about the irrationality of the ones given as examples are not enough to build a solid case and, in some cases, the judge's argument itself might not pass a rationality test. An example in this regard is to say it is irrational to keep hair salons closed as there may be alternative ways to contain the spread of COVID-19 in such environments. This, as clarified in the judgment's introduction to the rationality principle, is not a matter of rationality. It is clear that physical distancing is essential to stop the spread of COVID-19. The matter at hand accordingly is one of reasonableness given that there may be less intrusive alternatives and that section 36 dictates that such alternatives be explored and an alternative that limits human rights be a matter of last resort.

The weakness entailed in the generalised approach in the judgment is exacerbated by the fact that the matter came before Davis J, on 28 May the same day Alert Level 3 regulations were issued. This raises a major question regarding whether the applicants ever asked Level 3 regulations to be also struck out and if the Minister of COGTA as a respondent was given an opportunity to respond to such development. If it is that this remedy was never asked for that on its own poses a fatal flaw to the judgment. So does failure to allow the Minister of COGTA to address this development before being judged as having acted unconstitutionally and unlawfully.

2 7 Conclusion and recommendations

It is fair and proper for Government to take the judgment on appeal as it has done. would ignore the kernels of wisdom in the De Beer judgment at its and our peril. The most critical take away from the judgment as we see it, is the need to operate within the limits of the law and the Constitution and only undertake permissible deviations.

One inexplicable deviation is the departure of the integrated system carefully elaborated in the DMA. The only understandable part is the elevation of coordination of this response to the national threat entailed to the nation to the president. But even so, this needs to be corrected by law or a presidential proclamation to delineate accountability and ensure transparency.

Government is accordingly advised to review its remaining regulations, directions, guidelines, bylaws and other regulator instruments in line with the judgment particularly regarding put people and human rights first and governing within the confines of the law and the Constitution. For us, we also believe future government action should put the equality duty and the rule of law incorporating proper governance at the centre.

The first entails always asking if the purpose of a law or policy is aligned with all constitutional obligations, particularly relating to human rights and social justice incorporating differentiated responsiveness where necessary, redress, and parity of representation. The second entails operating within existing laws that enable before introducing ad-hoc arrangements, which may subvert the rule of law.

We further recommend a move away from criminalisation as it is exacerbating the condemnation of poor people, with major implications for freedoms such as employment and travel. In this regard, consideration needs to be given to quashing all COVID-19 non-violent crimes and moving forward with a regime that is anchored in collaboration, peer education and mutual support in line with the constitutional principle of Ubuntu.

3 ADDITIONAL ISSUES THAT GOVERNMENT SHOULD PAY ATTENTION TO

3 1 The rule of law

The rule of law is one of the founding values of our Constitution. The concept itself has different interpretations, but the common thread through all the interpretations is the idea that the law imposes limits on the exercise of power by government and private interest.

Nelson Mandela stated that

> "Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace."

This means that the administrative conduct of government and authorities are subject to the scrutiny of independent organs, not necessarily due to distrust, but also due to the propensity of humans to make mistakes, to err.

Oversight is an essential element of good governance that we have sought to have built into our new constitutional order. In South Africa, this is done by the Courts, by chapter nine institutions and the like. But it is also the work of us, as civil society, as academics, to ask pertinent questions to the government to ensure that it does not act on the impulses of individuals and that there they account for their actions and decisions.

The World Justice Forum explains the environment that allows for the rule of law to prevail – an environment where there is governance by consent, where nobody is above the law and where the government never does anything that it is not authorised by law to do.

When we refer to the rule of law in this policy brief, we refer to the level of congruence between policy choices and the dictates of the rule of law. When we assess the government's compliance with the rule of law, we make use of the four principles of the rule of law used by the World Justice Forum:

1. Accountability, that states that the government, as well as private actors, are accountable under the law. This includes the concept of a participatory democracy

2. Just laws. This requires that laws must be clear, publicised, and stable; the rules must be applied evenly; fundamental rights must be protected.
3. Open government, referring to the idea that the processes by which the laws are enacted, administered, and enforced are accessible, fair and efficient.
4. Accessible justice, requiring impartial dispute resolution, and that justice is delivered timely by competent, ethical, and independent representatives.

3 2 Social justice and human rights

Our approach also includes an understanding of social justice that encompasses an environment where the humanity of everyone is embraced, where there is equal enjoyment of all rights and freedoms. Not just some rights. And not an environment where the poor are only said to be entitled to a basic level of socio-economic rights. In other words, an environment where everyone is entitled to every human right with a fair and just distribution of all opportunities, resources, privileges, benefits and burdens.

In this regard, it is important to note that, as we stand in relation with one another in society, we exercise and hold these rights in relation to others in society. We are interdependent. The exercise of a right of freedom of movement, for instance, stands in relation to another's right to health. Exercise of powers, also in the making of law, must have in mind this delicate balance. Where this balance will fall will be determined by government decisions and policy. Currently, this decision-making is framed by the Disaster Management Act.

3 3 The legislative framework of the Disaster Management Act

Drawing principles and lessons from the De Beers judgment for the rule of law requires an understanding of the legislative framework created by the Disaster Management Act.

The law and law-making do not operate in a vacuum, and neither do single provisions in legislation. The Disaster Management Act hailed a paradigm shift in disaster management, from just reacting to disasters once they happen, to understanding that disasters can be avoided, and that disaster risk management requires the integration and coordination of various role players into a system

of disaster risk reduction. This is pre-emptive, rather than just reactive. The Act at the time of promulgation was hailed internationally as a forward-thinking new generation of laws. But the implementation of the Act seems to be severely lacking.

The Act aims to ensure that disaster risk reduction becomes an institutional requirement for all sectors and spheres of government. To do this, a National Disaster Management Framework was developed, and a National Disaster Management Centre established, with decentralised disaster risk management structures in municipalities, metros, and provinces. It also designated responsibilities within each organ of the state.

The Act, therefore, foresees a decentralisation of powers, to avoid a situation where the power of the executive is concentrated in one person. We are concerned that poor implementation of this Act is leading to haphazard and confusing executive driven structures that run parallel to the Act.

This is further highlighted in the fact that the Act requires that the president establishes an Intergovernmental Committee on Disaster Management, and calls for all municipalities and organs of state to develop disaster risk management plans and report on these to the National Disaster Management Centre on an annual basis.

We are deeply concerned about the perceived absence of this committee in the management of Covid-19, and the implication that what seems to be poor implementation have on the rule of law, cooperative governance and the authority of the Disaster Management Act.

Each Disaster Management Centre is responsible for establishing a Disaster Management Advisory Forum which aims to bring together many stakeholders from within government, the private sector, NGOs, and academia. This advisory forum is also absent from the public management of the COVID crisis.

Disaster risk reduction requires integrated and multi-sectoral approaches, as laid out in the Act that went through a long participatory legislative deliberation process. The institutions created in the Act are essential to the proper functioning of the Act. The Act also places an extraordinary

amount of powers in the hands of a single Minister once a state of disaster is declared. The De Beers Judgment also expresses its concern in this regard.

The structures in the Act were meant to establish structures to ensure a bottom-up implementation, where various role players would slot in to play a role in the management of disasters. Currently, with sole reliance on section 27 of the Act, it has become a top-down enforcement of rules and regulations, with very little oversight built into the Act.

3 4 Legality

The focus on the rationality between means and ends means that the court did not sufficiently address the issue as to whether the DMA authorises the particular regulations and/or directives as part of the question of legality. This is a regrettable oversight, and the executive must think carefully about the specific authority in the DMA on which it relies to make a specific regulation and/or directive. The regulations and "may not go beyond that which expressly provided for in the enabling section of the DMA".

This principle is set out in *Affordable Medicine Trust v Minister of Health* para 49:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

The executive may exercise no power other than those conferred upon them by the law. Regulations and/or directives, each one individually, must, therefore, be authorised by a law. The law, in this case, is the DMA.

The list in section 27(2), in terms of which the regulations are made, sets out that the minister may: (1) make regulations concerning several aspects; or (2) 'authorise the issue of directions'.

As an example, the minister is authorised to regulate the movement of people and goods to or within a disaster-stricken area (s 27(2)(f)), and limit or suspend the sale of alcoholic beverages (s 27(2)(i)). The regulations that have been enacted to this effect, therefore, are in line with the enabling provision.

Notwithstanding the above, many of the regulations, such as those limiting trade in various goods (such as tobacco products) and closing down of certain businesses, are not expressly authorised in the section. Section 27(2)(n) does, however, contain a catch-all phrase, which enables the minister to take other steps to 'prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster'. This provision, should, however, be read restrictively. It seems unlikely that this section would, by way of example, provide authority for the ban on the sale of goods other than alcoholic beverages, such as tobacco products.

As the section expressly authorises the suspension on the sale of alcoholic beverages in section 27(2)(i), the trade of goods not expressly mentioned as susceptible to such a suspension may not be prohibited. If the act sought to authorise the prohibition on the sale of other goods it would have done so expressly, as in the case of alcoholic beverages. It is therefore highly questionable whether the suspension or limitation on the sale of goods other than alcoholic beverages is authorised. If this argument is accepted, any regulation that purports to prohibit the sale of goods other than alcoholic beverages are simply invalid by way of legality, and questions about rationality should not surface.

The same principle would apply to any other regulation that purports to limit or regulate persons, goods, or activities, not expressly authorised by section 27(2). It should, therefore, be determined whether, if at all, section 27(2) can provide authority for the regulation pertaining to the closing of businesses, the regulations regarding funerals, and regulations that prohibit visiting relatives that may require familial care.

The same reasoning would also apply to directives issued by the various ministers as made possible in terms of section 27(2). Those directives should also find authorisation in the specific

legislative provision. When promulgating the regulations or publishing the directives, the specific authorising provision should be mentioned in each case.

Similarly, directives that are issued in terms of section 27, may only be for disaster management purposes. For example, the directions issued by the Minister of Environment that requires the waste pickers to apply to submit IDs or passports and proof of work permits, asylum seeker permits or refugee status when applying for permits to continue working during lockdown will be outside the ambit of the Act, as the Act cannot be used to legalise workers.

The judgment did not go into the question whether the Minister is authorised to make a particular regulation. This is highly problematic and should be addressed as a matter of urgency by the executive.

3 5 Rationality

The basis of the Judgment was that of rationality. As stated by Davis J, "in every instance where the power to make a specific regulation is exercised, the result of that exercise, namely the regulations themself must be rationally related to the purpose for which the power was conferred. This is the so-called "rationality test". It answers the question: Is there a rational connection between the intervention and the purpose for which it was taken?".

The minimum standard for a rational connection between the specific regulation and the purpose for which it is not only intended but permitted, will be considered and if irrational, the limitation of a constitutional right will automatically be considered impermissible.

A fair amount of deference is usually given to the executive and the legislature in making laws (within the framework of the authorising legislation in the case of delegated legislation), so a rationality test is a fairly weak test. It does not ask whether a decision is reasonable or proportional. However, to do the assessment requires that the information on which the decision-maker based their decisions are known. This also speaks to the principle of open government. While the government is increasingly providing the information, also in court documents, there is a severe lack of communication of the information on which decisions are

based. This makes accountability difficult if not impossible. Decisions that might be rational might seem irrational in the absence of information.

This is also not good for building trust and faith in government, which is arguably crucial for successful management of the virus.

3 6 Does the regulation infringe a fundamental right?

Apart from testing regulations against the principle of legality, regulations can also be tested against specific provisions in the Bill of Rights. The impact of a regulation may well be that it encroaches on a human right. In such a case, the state will have to justify the infringement in terms of section 36, the limitations clause.

The court alludes to this, by stating that whenever means are implemented by the executive authority to obtain a specific outcome, "an evaluative exercise must be taken insofar as those 'means' may encroach on a constitutional right, to determine whether such encroachment is justifiable. Without conducting such an enquiry, the enforcement of such means, even in a bona fide attempt to attain a legitimate end, would be arbitrary and unlawful".

Although at the press conference on Monday 16 March, Minister of Justice Ronald Lamola read out the whole of section 36 of the Constitution, Davis J stated in his judgment that he had found no evidence that the Minister "had at any time considered the limitations occasioned by each of the regulations as they were promulgated on the constitutional rights of people. The DG's affidavit contains mere platitudes in a generalised fashion in this regard, but nothing of substance". Moreover, he found that, "little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of the rights was justifiable or not".

This principle has been confirmed by the Constitutional Court in that 'the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right'.

The state should do this before making laws, and not only once it is called to account in the courts. This means that before promulgating regulations which impact on individuals' rights, the Government should have conducted an evaluative exercise, to determine the impact and take appropriate steps to mitigate that impact. If it has not done so, it will not be able to place the appropriate evidence before the Court as to why it is considered reasonable in pursuit of a policy or is a justifiable limitation of a constitutional right.

In South Africa, Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation, and regulations in February 2007. The approval followed a study commissioned by the Presidency and the National Treasury in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy. Following the establishment of the Socio-Economic Impact Assessment System (SEIAS) by Cabinet, from 1 October 2015, any Cabinet Memoranda seeking approval for draft policies, bills, or regulations must include a socio-economic impact assessment compiled and approved by the SEIAS Unit. It is not clear if the COVID-regulations have gone through this process.

We want to reiterate that rights can be limited and that COVID rights often compete. My right of movement may be limited to ensure respect and fulfilment of the right to healthcare, or to another person's right to health. The right to privacy also comes into play, once we deal with having to give information to employers or tracing people. Where the balance falls is often a political choice but must always be justifiable in terms of the Constitution.

3 7 Impact assessment before the promulgation of the regulations

While the Judgment gives little or no concrete instructions on the nature of the evaluative exercise, its timing or its content, sufficient indication of the key components of such a duty are set out both here and in previous cases. Firstly, the evaluative exercise must take place *before* promulgation, so that the regulations can reflect the results of the exercise. Secondly, to constitute "sufficient information" to be placed before the Court, as established in the *NICRO* case, it needs to be based on evidence which is *properly recorded.*

The exercise should also demonstrate that consultations took place with relevant stakeholders, so far as possible given the urgency of the matter. To constitute evidence of reasonableness in terms of a policy limiting a constitutional right, the views of representatives of major stakeholders should have been aired. Where the government claims that there was no time to do so, it should demonstrate that as regulations are further modified and promulgated, these views are sought and taken into account.

Davis J's judgment gives even less guidance on the content of the duty. This might be because the challenge only focussed on civil and political rights. To the extent that the right to equality is dealt with, one must compare the differences in specific regulations, for example, as applied to hairdressers as compared with funeral arrangements[2] .

It is submitted that this focus on consistency is a narrow understanding of equality, which belies the commitment to substantive equality in section 9 of the Constitution. Instead, the duty to have regard to the impact on individuals' rights in the context of the COVID-19 pandemic should have a strong focus on the unequal impact of the regulations on those who are already disadvantaged in South African society.

The COVID-19 pandemic has exposed and exacerbated existing inequalities in South Africa, and in formulating and implementing lockdown regulations, and the subsequent easing of lockdown, the impact on the right to equality, understood in a substantive sense, should be at the centre of the evaluative exercise.

Most importantly, the evaluative exercise should take into account all aspects of the right to substantive equality, as elaborated by Fredman[4] and now included in the formulation of the right to equality for the Convention on the Rights of persons with disabilities. This includes taking into account (i) the need to redress disadvantage, (ii) to address stigma, stereotyping, prejudice and violence, (iii) to facilitate participation and (iv) to accommodate difference and bring about structural change.

More specifically the first dimension (redressing disadvantage) requires account to be taken of the living conditions of many people, which are not conducive to distancing and may not have

running water or other essential sanitation. Similarly, the government should take into account the effects on employment, particularly for informal workers, migrant workers, domestic workers and other precarious workers and self-employed people. It should be able to show what mitigating measures have been put in place, including, for example, furlough schemes, heightened welfare payments and the provision of extra shelter.

Secondly, the Government should take into account the effect on stigma, stereotyping and particularly violence, which has spiked during the crisis. Policies need to take account of these risks to women, LGBTI people, children and other protected groups, so that isolation does not trap women with their abusers, cut off from whatever services there used to be. Notice also needs to be taken of the need to refrain from causing and exacerbating stigma, for example, concerning the exclusion of migrants from debt relief and other supporting schemes.

Thirdly, the evaluative exercise should include participation from those affected. Only if we have full buy-in from every single member of society, can these measures work. Everyone needs information, and channels of communication.

Fourthly, account needs to be taken of the diversity of individual needs and the importance of accommodating difference. A blanket response risks ignoring the very different social situations of citizens in South Africa. Although it is impossible to consider everyone's needs, there must be an awareness of the major differences and an attempt to mitigate and reconcile them.

Account also needs to be taken of the need to put in place measures which address the underlying structures perpetuating inequality, most particularly, unequal access to health care. This cannot be done by a single Minister promulgating regulations in terms of a narrowly focussed Act, it requires a participatory process by all members of society, by accepting that COVID has changed the future. This change should be for the best of all members in society and must ensure that vulnerable people are not left behind.

The proactive duty to assess the impact of regulations should be relevant both for the question of whether there is a rational relationship of the regulations to the objectives and to the different question of whether there is a potential justification for limiting the right to equality.

So far as the question of rational relationship is concerned, the Minister should take into account all relevant considerations, and conversely, should also not take into account irrelevant considerations. Conducting a proper evaluative exercise before regulations are promulgated or amended would constitute evidence that the Minister has taken into account all relevant considerations. This process should be open, and the information on which decisions are based must be made available to the public, in line with the principle of open government.

4 CONCLUSIONS AND RECOMMENDATIONS

In crafting level 3 regulations, government had already been advised on the steps that were needed to systematise social impact conscious policy-making; to raise the consciousness of public policy-makers and other decision-makers regarding their constitutional responsibility to advance social justice and related achievement of equality and poverty eradication and to ensure that all public policy and other decision-makers, including lawmakers, are always mindful of the impact of their everyday decisions on poverty and inequality.

Moreover, the government must take into account its own SEIAS. While aspects of the judgment may be flawed, this judgment contained various kernels of wisdom, the key of which is the Government's duty to undertake a human rights impact assessment which includes an equality assessment *before* it implements any law or policy.

If the policy or law will limit human rights, it should be justifiable in an open and democratic society, that should be a reasonable limitation in terms of section 36. If there is an alternative way to do it, then the government should not intrude. The question should therefore be, how do we get there with as little intrusion on human rights as possible.

The second important point that emerged from this dialogue is the cost of not implementing legislation – the DMA has been in existence since 2002. It imposes certain structures that were not ready for COVID-19.

A related question that has been raised by this panel is, what is the justification for partial implementation of the DMA when it was invoked to regulate public conduct to contain the COVID-19 pandemic. The judgment specifies that DMA section 26 regulations are supposed to augment existing law. Government to date has not explained why it is deviating from the law? Why does it not have an advisory forum which is inclusive, consultative and potentially open and democratic as invested in section 5 of the DMA? Why do we not have an intergovernmental committee as required by section 4 of the DMA? What is the role of the Centre established in terms of Chapter 3?

Regarding the fact that this process is championed by the Minister of COGTA, as required by the DMA, a suggestion has been made that this process should have been led, rightly, by the president. Why is the government not using its own power to transfer the management of this Act from COGTA to the Presidency?

We have also learnt about the importance of understanding the pre-constitutional culture and the current culture. Under apartheid, there was no culture of justification. With the introduction of the new Constitution, the government can only exercise power given to it and secondly, only within the confines of the Constitution and the law. Included in the confines of power is that power can only be exercised for the purpose for which it has been given. There has been an argument that some of these regulations achieve something good for the public but there is no clear connection between what is being done and the containment of COVID-19.

Lastly, what has emerged from the analysis of the judgment, is that the government must understand that its response to COVID-19 is not only about the response to the economy, but also to health and social cohesion that includes the advancement and preservation of all human rights for all.

You must agree, as long as there is injustice somewhere, there cannot be sustainable peace.

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Wishing you the best as you continue to pursue the difficult task of saving lives, preserving economic activity while ensuring social cohesion and equal enjoyment of all human rights and freedoms.

Best wishes

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