OPINION PIECE

DO THE COVID-19 REGULATIONS PASS THE RATIONALITY AND CONSTITUTIONALITY TEST IN SOUTH AFRICA?[1]

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INTRODUCTION

The South African government's approach to addressing the threat of the Corona Virus Disease 2019 (Covid-19) pandemic has created many unanswered questions. The government's approach seems to be based on the approach that many countries around the world have adopted. But any approach by the government must fit within the legal framework of South Africa. With its 'risk-adjusted strategy' there are constant changes, but at the time of writing this paper, there appears to be little, if any, clarity on:

1. why the pandemic could not have been dealt with in terms of existing legislation other than the Disaster Management Act, 2002 (the DMA) which seems generally reserved for national disasters having to do not with pandemics but with climate-related and human-induced disasters;
2. why, even under the DMA, it was necessary to declare a national state of disaster (which has triggered what appears to be a myriad violations of constitutional rights, both by ministerial regulation and by the conduct of law enforcement officials) while the DMA does contemplate dealing with a disaster without declaring a national state of disaster;
3. whether there is any rational connection between some of government's regulations and law enforcement officials' conduct, on the one hand, and the purpose of government's intervention as clearly stated in the DMA;

These are the issues I shall discuss in this relatively brief analysis.

SOUTH AFRICAN CONTEXT

South Africa is a Constitutional State. The Constitution of the Republic of South Africa, 1996 (the Constitution) is the Supreme Law of the country. Law or conduct that is inconsistent with the Constitution is invalid. Not only is this truism stated in s 2 of the Constitution itself, but the highest court in South Africa – the Constitutional Court comprising 11 Justices

[1] This is a discussion paper from a legal perspective and not from a scientific or epidemiological perspective. Much effort has been made to present a paper that is free of factual errors, but at the time of writing this paper there are still many developments and "unknowns" around the virus. Therefore, any factual errors as may have escaped the writer will be corrected as soon as they are discovered.

but quorating with 8 – has also emphasised this truism in many decisions.

The national executive of government (namely, the President, the Deputy President and a cabinet of 28 Ministers[2]) has powers, accountability and responsibilities conferred on it by Chapter 5 of the Constitution. For example,

1. the President has the obligation to **"uphold, defend and respect the Constitution as the supreme law of the Republic"** [s 83(1)(b)] and, among others, the power to make **"any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive"** [s 84(2)(e)];
2. the Deputy President's job is to **"assist the President in the execution of the functions of government"** [s 91(5)]; and
3. members of cabinet are accountable **"collectively and individually to Parliament for the exercise of their powers and performance of the functions"** assigned to them by the President [s 92(1) & (2)].

Under current Covid-19 induced circumstances in South Africa, a body known as the National Command Council, apparently appointed by the South African President to lead the fight against Covid-19, appears to be making policy decisions and determining their implementation. The question that arises is in terms of what constitutional power government policy can be delegated by the President to a body that appears to have no legitimate legislative or constitutional existence. Where in the Constitution, or elsewhere, does the President source the power to delegate executive functions to the National Command Council comprising only some but not all the Ministers in his cabinet? Does s 84(2)(e) extend that far?

If cabinet Ministers are accountable **"collectively and individually to Parliament"**, how **effectively** can Parliament hold the cabinet **collectively** accountable when 8 cabinet Ministers, and the Deputy President, do not form part of a body that seems to be making government policy decisions?

A decision that is taken by the President must be in writing if taken in terms of legislation or if it has legal consequences [s 101(1)].

A written decision by the President must be counter-signed by another cabinet member if the decision concerns a function assigned to that other cabinet member [s 101(2)].

Have these requirements been met in the appointment by the President of the National Command Council? If so, what piece of legislation, or constitutional provision, did he cite as conferring upon him the power so to do?

These are all questions for a separate paper.

Back to context. Apart from magistrates courts and specialist courts, South Africa has a hierarchy of higher courts which determine a wide range of legal disputes that cover a vast landscape of disciplines of law. The Constitutional Court is the apex court, as already mentioned. Below that is the Supreme Court of Appeal which ordinarily sits in panels of 5 Justices in non-criminal appeals[3] and 3 in criminal appeals. Then follows the Full Bench of the High Court which ordinarily sits in panels of 3 Justices, followed in the hierarchy by the High Court comprising a single Judge.

All the higher courts have over the years made it clear that it is a principle of South African law

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[2] The Constitution does not prescribe how many Ministers the President may appoint.

[3] In *Langa CJ & Others v Hlophe* 2009 (4) SA 382 (SCA) a panel of 9 Justice sat because the Full Bench whose judgment was on appeal comprised a panel of 5 Justices. See *Hlophe v Constitutional Court of South Africa and Others* [2009] 2 All SA 72 (GSJ). Such is not the norm in South Africa.

that no one may perform a public function or exercise a public power except as mandated to do so by law.

Typically, and in order to avoid having to go through the cumbersome and time-consuming process of passing legislation (which in South Africa can take anything from 18 months to many years as there must be public consultations, vetting by state law advisors, possible haggling by opposition parties and lobbying by vested interests) some pieces of legislation confer a power to issue regulations on the Minister responsible for the portfolio to which the empowering legislation relates. So, instead of going through the cumbersome process of passing or amending legislation, a Minister can overnight issue regulations in terms of the empowering piece of legislation that is already in place.

So, for example, s 27(2) of the DMA confers on a Minister designated by the President to administer the DMA [in this case the Minister of Co-Operative and Traditional Affairs (COGTA)] the power to issue regulations and directives after consultation with the Minister in whose portfolio the subject of such regulation or directive falls; if it's a health issue, then after consultation with the Minister of Health; if trade and industry, then after consultation with that Minister; and so on. There is no need (as would be the case if legislation were to be passed) for public consultation, debate in both the National Assembly and the National Council of Provinces, and signature by the President, among other processes.

Whereas legislation comes into effect only after the President has signed it into law – and there are numerous political, social and economic factors that could delay the President's signature even after the legislation has been passed by both houses of Parliament – this is not a requirement for the coming into effect of ministerial regulations or directives.

Let us now consider how the conduct of the President, the regulations issued in terms of the DMA, and the conduct of law enforcement officers measure up to the law standard. I shall do this by answering the 3 questions listed in the introduction.

WHY THE DMA?

Let us first lay some foundation.

Within a month of the President's announcement of the declaration of the national state of disaster on live television, more than 50 sets of covid-19 related regulations, directives, notices and directions were published nationwide in South Africa. That number has risen exponentially. Even lawyers are struggling to keep up with it all.

The first of these was published on 15 March 2020 under Government Gazette 43096. By it, the COGTA Minister declared a national state of disaster in terms of s 27(1) of the DMA. Within three days, there followed a set of regulations under Government Gazette 43107 of 18 March 2020, and within a week thereafter a set of amendments of those regulations was issued on 25 March 2020 and 26 March 2020 introducing more restrictive measures in what is commonly known as a national lockdown. More restrictive amendments were published on 2 April 2020. Then followed more on 16 April and 20 April 2020.

In between all these, regulations, directions and notices have been issued by various Ministers, State-Owned Enterprises, and other organs of state.

On 29 April 2020, South Africans were hit with yet another 40-page set of what many perceive to be even more draconian regulations, repealing previous regulations without really repealing them. Regulation 2(3) of these regulations says in this regard:

> **"(3) Despite the repeal of the regulations referred to in subregulation (1), all directions issued in terms of those Regulations shall continue to apply unless, varied, amended or withdrawn**

by the Cabinet member responsible for such directions."

But is this consistent with s 27(5) of the DMA? Specifically, can regulations lawfully be extended by a Minister by invoking a direction issued pursuant to such regulations subject only to the Minister varying, amending or withdrawing such direction?

These regulations are promulgated in terms of s 27(2) of the DMA for the purposes listed in s 27(3). They owe their existence to the declaration of the state of disaster. Absent a state of disaster, one cannot continue to have applicable regulations, and directions issued in terms of those regulations.

But there appears to be another problem with this regulation 2(3). Section 27(5) tells us that the national state of disaster lapses 3 months after it has been declared, unless the designated Minister (COGTA and no other) either terminates the state of disaster or extends it before expiry of the 3 month period for one month at a time. There is no room in that section for the extension of the state of disaster by keeping in force directions and repealed regulations indefinitely at the discretion of any Minister subject only to such Minister varying or withdrawing such directions, without extending the national state of disaster itself.

So, right at the beginning of the 29 April 2020 regulations, one gets a sense of just how overreaching they seem to be. [Overreaching refers to a scenario where a functionary, including government, makes decisions or conducts himself in a manner that goes beyond the powers that the law bestows on them.]

The national lockdown severely restricts the movement of people and the purchase of goods and services. The result is severe disruption of business and service delivery and, with that, the economy has virtually come to a halt. About this there can be no sensible debate. This is **arguably** done under the over-broad provision in s 27(2)(n) of the DMA which confers on the COGTA Minister the power to issue regulations or directives authorising the taking of **"steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster"**.

The question that arises is whether this disruption meets the rationality and constitutionality test in terms of South African law.

Many people, myself included, will say some disruption of life as we know it is necessary in order to save lives. Very few will argue with the need to save lives. But the question is not whether or not it is necessary to subject the entire nation to such considerable disruption of people's economic and recreational lives, which in itself creates a significant moral dilemma; the more vexed question is whether such considerable disruption (even for the right and noble cause of saving lives) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account factors such as:

1. the nature of the rights being disrupted;
2. importance of the purpose for which the rights are being disrupted;
3. the nature and extent of such disruption;
4. the rational connection between the disruption and its purpose; and
5. whether there are less disruptive means to achieve the purpose of the disruption.

This is what is known in South Africa as the **"justification analysis"** coming by way of s 36(1) of the Constitution. It is triggered only after it has been determined by the court seized with the matter, that a constitutional right has been limited or infringed or disrupted.

The Constitutional Court (the apex court in South Africa) has said in numerous decisions[4] that this list of considerations in the **justification analysis** is not exhaustive as, ultimately, the question is whether the disruption of rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Constitutional Court has also stressed that the **justification analysis** need not be dealt with on the basis of a check-list approach.

It is not open to sensible debate that the national lockdown in South Africa limits many constitutional rights. These include (1) the right of citizens to move freely within their suburbs, gated communities or townships (s 21 of the Constitution); (2) the right to human dignity (s10); (3) the right to life (s 11); (4) the right to freedom and security (s 12); (5) the right to freedom of religion, not even in limited numbers (s 15); (6) the right to freedom of expression, which is expressly criminalised by regulation 11(5) of the Consolidated Covid-19 Regulations (s 16); (7) the right to freedom of assembly, except for funerals of up to 50 mourners (s 17); (8) political rights (s 19); (9) the right to freedom of trade, occupation and profession (s 22); (10) the right to fair labour practices, like picketing (s 23); (11) the right of access to courts (s 34).

The only question is whether these limitations and disruptions are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Let us now consider that question in the course of answering the question: why the DMA?

Lawfulness / Constitutionality of Covid-19 Interventions

The starting point is the provision under which the Minister of COGTA declared a national state of disaster in relation to the Covid-19 virus. She did so on 15 March 2020 in terms of s 27(1) of the DMA.
That section says a national state of disaster may be declared if

(1) existing legislation or other contingency arrangements do not cater adequately for dealing with the disaster effectively or
(2) there are special circumstances that warrant the declaration of a national state of disaster.

The immediate question that then arises is whether there exists other legislation that caters adequately for a pandemic. If there is, then the declaration of national state of disaster under the DMA may be unlawful, unless there are **"special circumstances"** that nevertheless warrant the declaration. But if the existing legislation caters even for the special circumstances identified as a basis for the declaration, then the declaration – and the regulations promulgated pursuant thereto – may be unlawful.

There exists a piece of legislation known as the International Health Regulations Act, 28 of 1974 (the IHRA). But does it cater adequately for dealing with Covid-19?

The IHRA lists a whole range of infectious diseases that are subject to its regulations. The primary diseases are yellow fever, the plague, cholera and smallpox. But there is a list of 32 other infectious diseases published in GN 500 in GG 24713 of 11 April 2003 by then Health Minister Tshabalala-Msimang for purposes of the Supplementary Regulations under the IHRA.

Covid-19 is not among the infectious diseases listed in the schedule to the Supplementary Regulations. But that was 2003. Covid-19 was not then known although other forms of the coronavirus were.

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[4] *See, for example, Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393 (CC) at paras [60] & [61]

Nevertheless, the Supplementary Regulations list some 32 other infectious diseases about which the following is said:

> **"Depending on the travel destination, travellers may be exposed to a number of infectious diseases; exposure depends on the presence of infectious agents in the area to be visited. The risk of becoming infected will vary according to the purpose of the trip and the itinerary within the area, the standards of accommodation, hygiene and sanitation, as well as the behaviour of the traveller. In some instances, disease can be prevented by vaccination, but there are some infectious diseases, including some of the most important and most dangerous, for which no vaccines exist.**
> **General precautions can greatly reduce the risk of exposure to infectious agents and should always be taken for visits to any destination where there is a significant risk of exposure. These precautions should be taken regardless of whether any vaccinations or medication have been administered."**

These 32 infectious diseases have been chosen for inclusion in the Supplementary Regulations on the following criteria:

- diseases that have a sufficiently high global or regional prevalence to constitute a significant risk for travellers;
- diseases that are severe and life-threatening, even though the risk of exposure may be low for most travellers;
- diseases for which the perceived risk may be much greater than the real risk, and which may therefore cause anxiety to travellers;
- diseases that involve a public health risk due to transmission of infection to others by the infected traveller.

The list of 32 is, expressly, not intended as a closed list. The focus appears to be on infectious diseases involving potential health risks for travellers. The Covid-19 fits that mould.

One of the infectious diseases selected for inclusion on the basis of these criteria is Influenza.

Some may argue, by reference not only to these criteria but also to cause, symptoms, mode of transmission, geographic spread, prophylaxis (prevention and treatment) and precautions recommended by the World Health Organisation in these IHRA Supplementary Regulations, that Influenza may be a good reference point on what interventions are appropriate in order to "flatten the curve" of Covid-19 infections, both from a clinical and economic point of view.

The IHRA Supplementary Regulations say the following about Influenza:

1. Cause – Influenza viruses of types A, B and C; type A occurs in two subtypes (H1 N1 and H3 N2). Type A viruses cause most of the widespread influenza epidemics; type B viruses generally cause regional outbreaks, and type C viruses are of minor significance for humans.
2. Transmission – Airborne transmission of influenza viruses occurs particularly in crowded enclosed spaces. Transmission also occurs by direct contact with droplets disseminated by unprotected coughs and sneezes and contamination of the hands.
3. Nature of the disease – Acute respiratory infection of varying severity, ranging from asymptomatic infection to fatal disease. Initial symptoms include fever with rapid onset, sore throat, cough and chills, often accompanied by headache, coryza, myalgia and prostration. Influenza may be complicated by viral or more often bacterial pneumonia. Illness tends to be most severe in the elderly and in young children. Death resulting from influenza occurs mainly in the elderly and in individuals with pre-existing chronic diseases.

4. Geographical distribution – Worldwide. In temperate regions, influenza is a seasonal disease occurring in winter: it affects the northern hemisphere from November to March and the southern hemisphere from April to September. In tropical areas there is no clear seasonal pattern, and influenza may occur at any time of the year.
5. Prophylaxis (prevention and treatment) – Vaccination before the start of the influenza season. However, vaccine for visitors to the opposite hemisphere is unlikely to be obtainable before arrival at the travel destination.
   For travellers in the highest risk groups for severe and complicated influenza who have not been or cannot be vaccinated, the prophylactic use of antiviral drugs such as zanamivir and oseltamivir is indicated in countries where they are available. Amantidine and Rimantidine may also be considered.
6. Precautions – Whenever possible, avoid crowded enclosed spaces and close contact with people suffering from acute respiratory infections.

There appears to be much in these 6 respects that Covid-19 has in common with Influenza, except that there appears to be no known vaccine yet for Covid-19. But this would seem not to be a significant exclusionary factor since the IHRA Supplementary Regulations acknowledge that among the representative 32 travellers' infectious diseases "**there are some infectious diseases, including some of the most important and most dangerous, for which no vaccines exist**", and that the precautions prescribed in the Supplementary Regulations should be taken "**regardless of whether any vaccinations or medication have been administered**".

So, why did the South African government opt for interventions under the DMA and not under the IHRA? Interventions under the IHRA seem far less disruptive of people's lives and constitutional rights, especially those who are – from what the World Health Organisation has put out and from what the Supplementary Regulations tell us – in the lower risk or less vulnerable categories. From what we are reliably told by the World Health Organisation and subordinate legislation, the elderly, the young children and individuals with pre-existing chronic diseases are categories of persons that are most at risk of a flu virus. So, why target the entire population?

The IHRA Supplementary Regulations, in broad terms, prescribe the following interventions:

1. Health measures applicable between ports and/or airports of departure and arrival
2. Measures concerning the international transport of cargo, goods, baggage and mail
3. Special provisions relating to each of the primary 4 infectious diseases
4. Special provisions relating to each of the 32 representative infectious diseases involving potential health risks for travellers.

None of these interventions envisage the wholesale suspension of, or interference with, constitutional rights that is currently the feature of some of the regulations promulgated under the DMA in South Africa.

The South African government has offered no clear explanation that would shed light on how it arrived at a rational connection between, for example, the right to freedom of trade, occupation and profession (s 22), on the one hand, and the spread of Covid-19 on the other. Some service providers to government have been told that they will not be paid, for services rendered before declaration of the national state of disaster, until the national lockdown has been lifted. This makes the economic situation worse as many small businesses may go out of business because of lack of payment for services already rendered on top of their normal business having slowed down or halted completely. What rational connection does

such a callous decree have to "flattening the curve" of Covid-19 infections?

Although the latest regulations of 29 April 2020 have now banned the sale of tobacco products, the question remains unanswered: what rational connection was there between allowing the sale, dispensing and transportation of cigarettes (a known carcinogen and about which the World Health Organisation has recently cautioned that smoking may increase one's risk of getting a severe case of Covid-19) on the one hand, and the protection of the public from Covid-19 infections on the other, while persisting in a total ban on the sale, dispensing and transportation of liquor in the hospitality industry (except for the export market)?

According to the US Centres for Disease Control and Prevention (the CDC), even those people who do not smoke are at significant health risk around cigarette smoke. There is no risk-free exposure to second-hand smoke. The CDC says since 1964, 2.5 million adults who were non-smokers died because they breathed second-hand smoke.[5] So, what rationality was there for the South African authorities allowing the sale, dispensing and transportation of cigarettes while at the same time claiming to be implementing measures aimed at "flattening the curve" of Covid-19 infections, a disease which we are told attacks the lungs and to which the World Health Organisation says smokers are particularly vulnerable?

Assuming that the IHRA is the existing legislation that is capable of dealing adequately with the threat of Covid-19, the remaining question is whether there are nonetheless **"special circumstances"** that warrant a declaration of national state of disaster under the DMA.

There is no question, from worldwide infection and death statistics that Covid-19 has spread rapidly around the world over these past 4 to 5 months since it was first identified. But does that constitute **"special circumstances"** of the kind envisaged in s 27(1) of the DMA?

According to the South African Health department's website, influenza kills between 6,000 and 11,000 South Africans every year. According to Professor Shabhir Madhi, former Head of South Africa's National Institute for Communicable Diseases (the NICD), government's decision to implement a national lockdown was based on what he terms **"back-of-envelope calculations"** of a Covid-19 model which projected between 87,000 and 350,000 deaths.

When the national state of disaster was announced early in March 2020, some 3 months after the Covid-19 was first identified, there was no officially reported Covid-19 related death in South Africa. When the national lockdown was announced, there was one. As at 29 April 2020, there were 103 official Covid-19 related deaths. That is a far cry from 87,000 even at this relatively early stage, even though it could be argued that the lockdown may have helped reduce the projected death toll. But we shall never know what the toll would have been but for the lockdown intervention.

From this, it would seem reasonable to expect that many could come to the conclusion that the projected number of deaths as a basis for the national lockdown (and the stringent regulations that came with it) may be irrational. They could thus not constitute the **"special circumstances"** for declaring a national state of disaster.

It could be said **"special circumstances"** arise from the fact that various other countries

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[5] Centers for Disease Control and Prevention (2020). Health Effects of Second Hand Smoke. Retrieved from: https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/index.htm

had gone into lockdown, that there is potential pressure from the World Health Organisation and that the rate of infections may outstrip the health system's ability to deal with people who may need hospitalisation.

Yes, these may be valid considerations. But because the National Command Council (the legality of whose provenance is in doubt) seems to make its decisions without transparency – thus making it difficult to judge whether it has consulted sufficiently widely, and only comes out to report on decisions it has already made – there is really no clarity on what **"special circumstances"** have been considered and which justify the declaration of the national state of disaster.

But why the DMA? Section 2 of the DMA defines the parameters within which the DMA applies. Section 2(1)(b), mirroring s 27(1) in a different context, tells us that the DMA **does not apply** to disasters that **"can be dealt with effectively in terms of other national legislation aimed at reducing the risk, and addressing the consequences, of occurrences of that nature"**.

It is worth noting that the provision refers to **"occurrences of that nature"**. If one considers (1) the criteria used by the legislature for purposes of selecting infectious diseases for inclusion in the list of 32 in the IHRA Supplementary Regulations, (2) cause, (3) symptoms, (4) mode of transmission, (5) geographic spread, (6) prophylaxis (prevention and treatment) and (7) precautions recommended by the World Health Organisation in the IHRA Supplementary Regulations, it is reasonable to posit that Influenza may be an **"occurrence of the nature"** envisaged in s 2(1)(b) of the DMA.

It could therefore be argued that all the designated Minister (COGTA) needed to do, in the absence of clear **"special circumstances"** for declaring a national state of disaster, was

- identify that other national legislation by notice in the government gazette [s2(1)(b)(ii)]; and
- in consultation with the Minister of Health, issue guidelines on interventions to reduce the risk and address consequences of the coronavirus, guided by the IHRA Supplementary Regulations [s 2(2)].

That done, there would have been no need to declare a national state of disaster under the DMA and issue substantially invasive regulations.

Alternatively, assuming that the DMA does apply, and is the appropriate national legislation to dealing with the Covd-19, the whole thing could, quite lawfully and prudently, have been dealt with in terms of s 26(2)(a) of the DMA which confers on the "national executive" (probably the head of the National Disaster Management Centre) the power to

> **"deal with a national disaster in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27(1)"**

This could have been achieved without the stringent and considerably invasive measures that have come with the issuing of regulations following the declaration of a national state of disaster.

But on a careful reading of the definitions provisions of the DMA, together with the other 64 sections, it seems fairly clear that the DMA was never designed to deal with the outbreak of pandemics. That seems to be the forte of the International Health Regulations Act, 1974 as the name itself suggests. Covid-19 is an international health issue. The DMA, by its provisions, seems to have been enacted to deal with climate-induced disasters (like hurricanes, floods, heatwaves, earthquakes, tornadoes, and the like) and other human-induced disasters (like veld fires, unleashing of

biological toxins into the atmosphere, and such like).

Nevertheless, assuming that the DMA, and the regulations promulgated under it, is the only reasonable intervention by which to deal with the Covid-19 adequately, let us now consider the rationality of the measures adopted by government following declaration of the national state of disaster.

RATIONALITY TEST

In short, the questions that are usually posed in a rationality test are these:

> **"Is there a rational connection between the intervention, on the one hand, and the empowering provisions in terms of which it was taken, on the other?"**

This is the question usually posed when the intervention in question is pursued in terms of some or other piece of legislation or prescript. Thus, the inquiry is whether the intervention will give effect to the purpose of the empowering legislation or prescript. In this case, that legislation is the DMA. As regards the conduct of officials deployed to enforce the intervention, the test will be whether such conduct gives effect to the regulations.

Where there is no empowering provision for the intervention, the intervention will be unlawful and may be set aside on application to the high court. It is now settled law that no person may exercise a public power or perform a public function beyond that conferred upon him or her by law.[6]

Another question in a rationality test is this:

> **"Is there a rational connection between the intervention, on the one hand, and the purpose for which it was taken, on the other?"**

In the context of the Covid-19 interventions, this question is a variation of the third question, namely,

> **"Is there a rational connection between the intervention, on the one hand, and the reasons given for it by the decision-maker, on the other?"**

The fourth question is this:

> **"Is there a rational connection between the intervention, on the one hand, and the information that is before the decision-maker, on the other?"**

Now that we have defined the rationality test, let's test the rationality of some of the regulations. There are too many of them and so I shall for our purposes take just one multi-faceted example.

Sections 27(2) and (3) of the DMA are central to the exercise of powers by the designated Minister to "flatten the curve" of Covid-19 infections. It is therefore important, for ease of reference and convenience, to reproduce these provisions in full

> "**(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning-**

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6 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para [58]; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at para [34]; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [49]; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para [80]

(a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
(b) the release of personnel of a national organ of state for the rendering of emergency services;
(c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
(g) the control and occupancy of premises in the disaster-stricken or threatened area;
(h) the provision, control or use of temporary emergency accommodation;
(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
(k) the dissemination of information required for dealing with the disaster;
(l) emergency procurement procedures;
(m) the facilitation of response and post-disaster recovery and rehabilitation;
(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
(o) steps to facilitate international assistance.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of-
(a) assisting and protecting the public;
(b) providing relief to the public;
(c) protecting property;
(d) preventing or combating disruption; or
(e) dealing with the destructive and other effects of the disaster."

The crucial point is that s 27(2) of the DMA confers on the designated Minister (if she has declared a national state of disaster) the power to issue regulations in relation to, among other things:

- suspension or limitation of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area [except, under regulation 26(3)] for export purposes). This impacts on s 22 of the Constitution (freedom of trade) for those small traders with export market;
- the dissemination of information required for dealing with the disaster;
- steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.

But, seemingly lost in all the excitement that comes with the promulgation of these regulations (perhaps with good intention) is **the purpose** for which the DMA confers that power on the designated Minister. That is where s 27(3) of the DMA becomes important. After all, the exercise by the designated Minister of her powers under s 27(2) are **"subject to"** the purposes in s 27(3) being achieved.

That phrase **"subject to"** has been judicially considered and given a clear meaning by the courts in South Africa over many years. It brooks no controversy. It means, in this context, **"except as curtailed by s 27(3), the Minister may issue regulations dealing with the numerous matters listed under s 27(2)"**.

That means the power in s 27(2) is limited by purposes in s 27(3) that the power is intended to achieve.

So, let us then test the rationality of just three of the regulatory interventions under s 27(2) by testing whether each is **rationally related or connected** to the purpose in s 27(3).

(1) The prohibition or limitation of the sale, distribution, dispensing or transportation of liquor is in terms of s 27(2)(i) of the DMA confined only to **"disaster-stricken or threatened area"**. Yet regulation 26 of the 29 April 2020 Regulations prohibits the sale, dispensing and distribution of liquor everywhere. So, this regulation goes farther than the empowering DMA permits, assuming that there are areas that are not **"disaster-stricken or threatened"**.

But, assuming there are no areas that are not **"disaster-stricken or threatened"**, regulation 26 prohibits and limits only the transportation of liquor within South Africa; it is open season for the export market.

At least two questions arise in this respect. First, does this not amount to unfair discrimination against small traders who have no export market? Second, since **"disaster-stricken or threatened area"** is not defined in the DMA or in the latest Regulations, what satisfaction do the authorities have that liquor is not transported to such **"disaster-stricken or threatened"** areas around the world? If the transportation of liquor in South Africa is bad for restricting Covid-19 infections, surely it must also be bad for restricting Covid-19 infections anywhere else in the disaster-stricken or threatened world?

(2) What is more, the sale and transportation of alcoholic beverages or liquor in the country is as much a source of income to many families in the hospitality industry in South Africa as it is to some families who export liquor to markets outside South Africa. It is also a form of trade to both locally-orientated and export-orientated businesses, a right that is entrenched in s 22 of the Constitution. So, is it not unfair discrimination to allow the transportation of liquor only for export purposes but not for local business purposes?

In what way, one may ask, does the **total ban** on the sale, dispensing and transportation of liquor achieve any of the purposes in s 27(3) of the DMA? In what way does the **total ban** on the sale, dispensing and transportation of alcoholic beverages (1) assist and protect the public from Covid-19 infections, (2) provide relief to the public, (3) protect property, (4) prevent or combat disruption, and (5) deal with disruptive effects of Covid-19 in a way that the now reversed **total lifting of a ban** on the sale, dispensing and transportation of cigarettes and other tobacco products does?

One may consider the argument that alcohol tends to diminish inhibitions and that some may engage in risky behaviour when intoxicated. But this does not apply to everyone who drinks alcoholic beverages, and it is not clear whether any official study has been done that confirms that most people who drink alcoholic beverages of any kind will behave in a manner that will aggravate the risk of infection.

The other possible argument is that alcohol related incidents have dropped. But s 27(3) of the DMA, which tells us of the purpose for the issuing of regulations, is not designed as a crime prevention measure. A total ban on the sale, dispensing and transportation of any alcoholic beverage with a view to reducing alcohol-related incidences of crime would not be rationally related to

the purpose of interventions under the DMA as clearly set out in s 27(3).

Although the argument is fair that the reduction of alcohol-related incidences has the effect of freeing up much needed space at hospitals that would otherwise have been filled by victims of alcohol-related incidents, that is not the purpose for which the DMA was enacted. Arguably, that argument could be shoe-horned into s 27(2)(n) which confers a power on the COGTA Minister to do pretty much anything she considers **"necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster"**. But creating space for more beds at hospitals by banning liquor sales is not only a stretch; it also trenches on the trade rights of many in the hospitality industry and may likely not pass the **"justification analysis"**.

Also, the argument that SARS needs the revenue that accrues to it from cigarette sales, dispensing and transportation is not rationally connected to the purpose of the interventions under the DMA.

Some people may argue that alcohol creates a greater risk than cigarettes? Firstly, a greater risk of what, one may ask. Secondly, there is no official study of which I'm aware that has proven that people who drink alcohol are by virtue of that fact alone more susceptible to contracting Covid-19 than people who smoke cigarettes.

So, what was the rational connection between the total lifting of the ban on the sale, dispensing and transportation of cigarettes and the total ban on the sale, dispensing and transportation of liquor, on the one hand, and the achievement of any of the purposes listed in s 27(3) of the DMA? How does the total ban on the transportation of liquor within South Africa protect the public from Covid-19, but allowing transportation of liquor for export purposes does too?

Barely 24 hours before announcement of the total lifting of the ban on the sale and transportation of cigarettes by the South African President, the World Health Organisation put out the following statement:

> **"smoking damages your lungs and other parts of your body, and may increase your risk of getting a severe case of covid-19"**.

So, in light of this statement one may ask, what rational connection was there between the unbanning of cigarette sales on the one hand, and the protection of the public from the destructive effects of Covid-19 on the other?

If the World Health Organisation – of which South Africa is a member state – is correct, how did the lifting of a total ban on the sale, dispensing and transportation of cigarettes assist in the prevention of an escalation, alleviation, containment or minimisation of the effects of Covid-19?

Although the designated Minister has now through her 29 April 2020 regulations reinstated the ban on the sale of cigarettes, the above questions remain relevant and unanswered because, if not pressed, the irrational decisions may continue on other aspects of the Covid-19 intervention.

(3) Consider this one, for example. Another aspect in relation to which s 27(2) confers a power on the designated Minister to issue regulations is the dissemination of information required for dealing with the disaster. This is a rational intervention, so that the public is kept informed of government's efforts and how to stay safe. However, there appears to be no constitutional or rational means that makes this provision mutate from being

an information dissemination provision to being one of censorship.

Regulation 14(a) & (c) of the 29 April 2020 Regulations now seems to make it a criminal offence for anyone to express any view on Covid-19, or the government's measures in dealing with it, that is at odds with the views put out by government or a government official or, indeed, the NCC. The only caveat is that there must be an **"intention to deceive"**.

But lawyers know that intention, or the absence of it, is usually established in court. Until then, the public will live in fear of arrest, prosecution and a possible criminal record just for expressing an opinion that the government does not like. Law enforcement officers out on the beat aren't known for their flare for evidentiary niceties and standards such as *dolus directus* and *dolus eventualis* to prove intention. So, this provision is likely to be much abused in practice, even by well-meaning law enforcement officers who may not know better.

One may ask, how is such censorship justifiable in a constitutional democracy that has the right to freedom of opinion entrenched in the Bill of Rights Chapter of the Constitution? The only aspects to which the right to freedom of expression does not extend are

- dissemination of propaganda for war,
- incitement of imminent violence, and
- advocating of hatred based on race, gender, ethnicity and religion, and which constitutes incitement to cause harm.

So, how does the expression of an opinion that differs from information put out by government or government official about Covid-19 – even if deliberately intended to deceive – justify censorship under the Constitution? Section 27(3)(k) of the DMA does not envisage such censorship. It says the power to issue regulations may be exercised only to the extent that it is necessary for purposes of **"the dissemination of information required for dealing with the disaster"**. Nothing in this section brooks censorship. And it is now settled law in a long line of cases, including Constitutional Court decisions, that where a provision is capable of two meanings, one constitutional and the other unconstitutional, a court must adopt the interpretation that saves the provision from unconstitutionality. So, why would a provision about the dissemination of information for dealing with Covid-19 be read as justifying censorship in an open and democratic society based on equality and freedom?

It may be argued that weeding out "fake news" about Covid-19 and government's efforts to "flatten the curve" is a justifiable limitation of the right to freedom of expression. This is a fair point.

But there is still limited information and repository of knowledge about this Covid-19. Even the South African President has said they are learning as they go along. So, what may be considered as "fake news" by a law enforcement officer on the beat just because it is an opinion that questions the efficacy of government's intervention, may well turn out to be correct in due course.

After all, the idea that a citizen who holds a different opinion to that held by government or by many in society must be prosecuted belongs in the Athens of 339 BC where Socrates, the philosopher, was prosecuted and sentenced to death effectively for his opinions, and in 16th Century Italy where Giordano Bruno, an Italian philosopher, was burnt alive at the stake for what was then considered "unorthodox views" about Catholic teachings, and for his belief in the Science of a much broader solar system than was then believed, which is now widely

accepted. None of this belongs in a constitutional state in the 21st Century.

It may be argued that the dissemination of "fake news" – such as that black people are immune to Covid-19 – are dangerous in the fight against the spread of Covid-19 and so must be prohibited by law. Quite. But, unless amended, the DMA is not that law. Section 27(2)(k) is not a censorship provision. In any event, no legislative provision can weed out human stupidity, and those who spread dangerous and harmful views often go to great lengths to protect their identity, making it hard to detect. In the final analysis, it is a slippery slope from a nanny state to a dictatorship.

These are some of the many questions that arise in respect of the government's measures to dealing with the Covid-19. There are many more that I have not discussed.

In the final analysis, it appears to me that the interventions of the South African authorities discussed above may have no rational connection

- to the empowering provisions in terms of which they have been taken;
- to the purpose for which they have been taken;
- to the reasons given by the authorities, the decision-maker;
- to the information that is before authorities, the decision-maker; and
- possibly to the Constitution.

CONCLUSION

In times of national crises, often it is the entrenched rights of citizens that are dispensed with in the form of invasive government interventions aimed, at least ostensibly, at weathering the temporary storm.

But in the final analysis, human nature tends to prevail over initial good intentions. A fleeting flirtation with new powers intended for addressing a temporary problem may end up taking on the form of an oath **"til death us do part"**. Income tax, lest we forget, was introduced as a temporary measure in a war effort. Who is to say that the temporary measures now adopted by government ostensibly to "flatten the curve" of Covid-19 infections – including censorship, restriction of movement and trade bans – will not also stay with us for many years beyond the Covid-19?

In South Africa there have been witness accounts of public officials verbally abusing people at a prayer meeting; forcing people to perform push-ups in public; a senior military man reportedly warning that law enforcement agencies will not tolerate insults on the President; people being chased by law enforcement officers for venturing out of their homes to shop for food; people within their fenced properties being ordered by the military to go inside their houses; a Minister in government ordering the arrest of a man for going shopping without a permit, and then later arguing that this was taken out of context; the military reportedly killing a man for allegedly breaking lockdown regulations. These were all done in the name of a temporary assault on the Covid-19 ostensibly in terms of regulations promulgated under the DMA. If we are not vigilant as citizens, there is a danger that these abuses may be with us for a long time to come.

Governments around the world have a moral and legal obligation to protect citizens from pandemic health hazards. The World Health Organisation has come up with universally accepted protocols for this. South Africa has incorporated these protocols as schedules in its own Act of Parliament known as the International Health Regulations Act, 28 of 1974. But the government has chosen to declare a national state of disaster in terms of a different piece of legislation, and regulations conferring far-reaching powers on law enforcement officers have been promulgated thereunder. It falls upon us all to ask the hard questions, beginning with:

1. Why this law? Why not the other law?

And

2. What is the rational connection between this measure and the stated purpose of the empowering law?