SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

10 March 2021

TO:	Speaker of the National Assembly & Shadow Minister of Cooperative Governance and Traditional Affairs
ATTENTION:	T Modise MP & C Brink MP Members of Parliament
DELIVERED:	By email: speaker@parliament.gov.za & cilliersb@da.org.za

To whom it may concern,

COMMENT: PROPOSAL TO SUBMIT A DISASTER MANAGEMENT AMENDMENT BILL, 2021

Sakeliga welcomes the opportunity to comment on the proposal to submit a Disaster Management Amendment Bill, 2021, in Parliament. Sakeliga represents almost 12 000 members, from various enterprises. Sakeliga was at the forefront of advocacy, on behalf of the business community, for a more proportional response by government to the 2020-2021 COVID-19 pandemic instead of the highly disputed and legally challenged draconian lockdown adopted under the Disaster Management Act. As such Sakeliga is well-placed to submit this comment.

We also provide various addenda that provide supporting arguments for the main comment below, and urge you to consider both the comment and the addenda together.

Should the opportunity arise, Sakeliga wishes to present oral comment on the proposal.

1. Introduction

On 18 February 2021, the National Assembly published the notice of introduction for the Disaster Management Amendment Bill, 2021 – a private member's bill – for comment. Sakeliga welcomes the opportunity to comment, and does so in this submission.

Sakeliga is an independent business community that promotes a healthy business environment that is only attainable through a free-market economy and a public order based on constitutionalism. The vast majority of Sakeliga's nearly 12 000 members are involved in enterprises. During the lockdown that started in March 2020 and continues to this day, Sakeliga took a leading role advocating for the interests of South Africa's business owners whose livelihoods were threatened, and in many cases destroyed, by government's chosen response.

1.1 Recent concerns

One cannot deny the devastating effects of COVID-19. However, in itself, government's chosen means of managing the pandemic has also had detrimental effects on health, lives and livelihoods.

For instance, the movement restrictions implemented during the lockdown evidently severely affected the testing for tuberculosis, another dangerous and significant public health concern. The National Institute for Communicable Diseases reported that tuberculosis testing severely declined in April 2020:

> *"The incidence of tuberculosis (TB) in South Africa is especially high. Critical to the control and management of TB is universal testing of all individuals with indicator symptoms. This approach has been severely impacted by the COVID-19 pandemic, primarily because of lockdown restrictions."*[1]

This statement above is significant. Statistics South Africa (in the latest 2017 data) indicates the significance of tuberculosis,

> *"Although tuberculosis is the leading cause of death in South Africa, year-on-year it continues to decline, whilst diabetes mellitus, the second leading cause of the death, is on the rise.*[2] *In 2017, TB was reported as a cause (underlying, contributing, etc.) of death in 43 725 death notifications and as the specific underlying cause on 28 678 notifications.*[3]

Similarly, HIV testing, according to other reports, was also affected. Moreover, the economic effects are also concerning. Stats SA shows that nearly 1,4 million fewer employed persons in Q4 2020 compared to Q4 2019.[4]

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[1] https://www.nicd.ac.za/wp-content/uploads/2020/09/COVID-19-Special-Public-Health-Surveillance-Bulletin-_Issue-4.pdf

[2] http://www.statssa.gov.za/publications/P03093/P030932017.pdf

[3] IBID

[4] http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf

Recently, the *Daily Maverick*[5] also reported on statements made by Professor Priya Soma-Pillay on an increase in maternal deaths during the 2020 COVID-19 lockdown. We quote from the article:

> *"Professor Priya Soma-Pillay said there had been a 30% increase in maternal deaths during lockdown in South Africa compared with the same period (from April to September) in 2019. Soma-Pillay is the Head of Department of Obstetrics and Gynecology at the University of Pretoria, Steve Biko Academic Hospital and University of Pretoria Research Centre for Maternal, Foetal, Newborn and Child Health Care Strategies."*

In reply, in the same article,[6] the National Department of Health reportedly admitted that maternal care was disrupted. Reference was made to the disruption of transport services, especially during the most severe phase of the lockdown. We quote statements attributed to National Department of Health spokesperson Popo Maja from the same article:[7]

> *"The main reason was lack of transport to health facilities for women who did not think they have an emergency situation," […] "Several messages were sent to pregnant women about the need to continue visits to facilities for routine follow-ups. Services were classified as essential, thus health facilities continued to render these services even during lockdown."*

The "lack of transport" likely was a direct consequence of complex economic disruptions of services owing to the lockdown regulations. Maternal emergencies are often unexpected and unanticipated. The regulations did allow transport for "essential" reasons in some instances, yet government apparently failed to consider the impact on the supply and availability of transport services.

The regulations dramatically reduced the number of possible commuters. Therewith, it likely also reduced the ability of operators to run operations in a financially feasible manner. All passenger revenues are essential in covering operating costs, such as fuel. Less revenue meant fewer feasible services. The end was a reduced supply of transport services, with foreseeable consequences.

The impact of such public health disruptions and job losses are likely also severe in the long run for public wellbeing, especially when one considers the effect of losses on income on public health. Our recommendation remains that government, by means of independent and credible experts, survey these impacts and report to the public.

Any costing of such effects, to our knowledge, was not undertaken by government and the relevant ministers and reported to the public. Consequently, the long-term fallout of these foreseeable consequences remains uncertain but is likely to be negative for public health – not just in the short run but also the long run.

A further danger is that such complex effects of coercive economic disruptions remain hidden and unreported in background data without attempts to realistically quantify the fallout of lockdown in an honest and responsible manner. A DMA amendment should rectify such concerns.

We posit the following public health questions and matters that need to be brought into the open:

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[5] https://www.dailymaverick.co.za/article/2021-03-08-increase-of-30-in-maternal-deaths-reported-during-covid-19-lockdown/

[6] Ibid

[7] Iibd

- What happened to oncological care during the lockdown? How many screenings for cancer were disrupted? To what effect on public health over the medium to long term?
- What happened to rates cardiac and cerebrovascular emergencies and fatalities during the lockdown? How many patients were, similar to maternal emergencies, unable to access care for heart attacks and strokes?
- What happened to the overall mental health of South Africans and conditions such as depression and even suicide?

In essence, a response to a disaster must balance various considerations in highly complex settings. The extent to which a proper balance was struck during the COVID-19 lockdown is not clear, even when just considering underlying medical realities.

Consideration of responses to disasters becomes even more important where mitigation measures become embedded over longer periods. Evidently, the Disaster Management Act does not install effective mechanisms by which the cost and effects of policy measures are evaluated transparently for its effect on the general public wellbeing, especially for enduring measures, disruptions, and restrictions.

Moreover, the discretionary powers it bestows to public officials are severe and overly unilateral, and arguably, not as was intended in the initial conceptualisations of the Act and the Constitution.

The Act provides little mechanisms whereby public officials are forced to consider the short term and long term social and economic cost of interventions they unilaterally impose outside regular legislative processes.

The Act also places little onus on officials and government to reasonably demonstrate in an overt manner the effectiveness of measures as well as to give indications on the cost of measures. Such considerations are even more urgent and needed in conditions where officials act with a deal of unilateral authority to place severe restrictions on the public. The burden of proof for the necessity of measures and restrictions, in our view, is not strict enough.

Moreover, the Act appears to perversely socialise and absolve the cost of public policy blunders by, in essence, disclaiming officials from accountability from harm ensuing from unreasonable, irrational, counterproductive, or excessive responses. Even the normal recourse of democratic upending of officials is suspended in such times.

Officials, practically speaking, can act with very wide discretion, even impunity, and the public has very little means to effectively and speedily challenge prescripts, especially where the courts defer questions of policy back to the same officials that instated them in the first place.

1.2 Proposed spirit of a Disaster Management Amendment Bill

Sakeliga therefore suggests the spirit in which the Disaster Management Amendment Bill is to be introduced as follows: To employ disaster management measures with as little disruption to society, as possible.

The Amendment Bill, furthermore, should install effective measures to hold public officials to account and liable for counterproductive policy responses to disasters and to properly cost and continually re-evaluate the mitigation measures employed where measures obtain a degree of permanence.

The Act should install enhanced safeguards and oversight in instances where a state of disaster is renewed for three months or longer. Such safeguards must strengthen public participation as well as install processes to costs the impact of mitigation measures. It should also reduce the unilateral authority of the Minister of Cooperative Governance and Traditional Affairs, and take steps to reinstate participatory democracy.

In cases of proven negligence in policymaking, the bill should overtly enforce a form of personal accountability on officials. It should also install effective mechanisms of public and parliamentary oversight and effective participation in measures flowing from the Act. The bill must also ensure expedient mechanisms that enable the public to effectively and speedily challenge measures that are demonstrably inappropriate and cause more harm than intended.

In the formulation of this comment, we have also considered the various efforts at litigation against the measures issued in terms of the Disaster Management Act (DMA) during the COVID-19 lockdown. These cases shed light on the legislative gaps that ought to be filled, for which the Amendment Bill will be a good opportunity.

2. Proposals

2.1 Judicial oversight and authority

In crisis situations of whatever description courts tend to adopt a deferential attitude, apparently to allow government to respond effectively to the crisis without being second-guessed by the judiciary. While this sentiment is admirable, we submit that the courts must adopt the principle of *fīat jūstitia ruat cælum* (let justice be done, though the heavens fall).

This is, in any event, the constitutional position in South Africa. Section 165(2) of the Constitution provides that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially without fear, favour or prejudice".

The courts must, as a general rule, have no regard for the consequences of their judgments. Only the correct application of the law, and proper regard to the text and spirit of the Constitution and of constitutionalism, must guide their conduct.

We therefore propose that a provision be inserted into the DMA that directs the courts to not be deferential when considering the DMA or any regulation adopted in terms of the DMA. The full weight

of legal and constitutional analysis and scrutiny must be applied in every matter concerning the DMA where constitutional rights have been or are to be impacted. Such a provision could be worded to reflect the following:

> "Application and interpretation of Act
>
> […]
>
> 2. (4) When the application of a provision of this Act or of any rule, regulation, directive, notice, or any other instrument adopted in terms of this Act is challenged in a court of law, such court may not defer to executive or legislative judgment or expertise or in any other way fail to measure the validity, lawfulness, and/or appropriateness of the application of any such provision or instrument against the text and spirit of the Bill of Rights and the Constitution."

2.2 Section 36(1) of the Constitution and the limitation of rights

In *De Beer*, *Esau*, *FITA*,[8] and presumably other cases during the lockdown, the superior courts failed to subject the impugned regulations, which they admitted in fact limited constitutional rights, to the requisite limitations analysis required by section 36(1) of the Constitution. Instead, the far weaker standard of rationality, itself incorporated into section 36(1)(d) anyway, was utilised.[9] It is furthermore clear that government also did not consider the principles of section 36(1) when it crafted the regulations in terms of the DMA, something the High Court astutely noted in *De Beer*.[10]

We therefore propose that a section 63A be inserted into the DMA to reflect the following:

> "Limitation of rights
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> 63A. (1) No organ of state or other functionary contemplated in this Act may apply any provision of this Act, or formulate and/or adopt any rule, regulation, directive, notice, or other instrument in terms of this Act, in such a way or to such a likely effect that it limits, infringes, violates, or otherwise affects any right in the Bill of Rights detrimentally, without justifying such a limitation in terms of section 36(1) of the Constitution.
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> (2) Where any provision of this Act is applied, or any rule, regulation, directive, notice, or other instrument is formulated and/or adopted in terms of this Act, in such a way or to such a likely

[8] *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP); *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* 2020 (11) BCLR 1371 (WCC); *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* 2020 (6) SA 513 (GP).
[9] Van Staden M. "Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa". (2020). 20 *African Human Rights Law Journal*. 501.
[10] *De Beer* at para 7.18.

effect that it limits, infringes, violates, or otherwise detrimentally affects any right in the Bill of Rights, a court of law must measure the justifiability of that application of that provision and/or instrument against section 36(1) of the Constitution."

Proposed clause 63A(2) is not an innovation in South African constitutional law. Indeed, section 36(2) of the Constitution provides that, "Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights". The courts can only get away with omitting to apply section 36(1) when the parties before them do not argue on the strength of section 36(1). We submit that whether the parties to the case argue based on section 36(1) or not, the courts must apply section 36(1) when constitutional rights are limited.

Proposed clause 63A(1) is only an innovation to the extent that it is assumed that section 36(1) is only a judicial tool and not a standard to which the executive or legislative authorities too must adhere. It is submitted that section 36(1) applies to all organs of state, branches, and spheres of government.

2.3 Narrow versus generous constructions of rights-limiting provisions

The High Court in the *Esau* matter concluded that the regulation-making power, and its purpose, must be construed generously and not narrowly.[11] We submit that this is mistaken, at least insofar as it relates to those measures that do, or potentially could, impact detrimentally on the constitutional rights (whatever they may be) of legal subjects.

We submit that the very purpose of the legal enterprise is to limit government's ability to interfere in the affairs of legal subjects. Were it not so, there would be no need for legislation or regulations, other than a general constitutional power stating that government may do as it wills or is democratically commanded. The very fact that legislation called the Disaster Management Act exists, we submit, means government's free hand to respond to so-called disasters is limited. It is thus that the legislation must itself be interpreted and construed in line with this overall meta-purpose. The courts ought to have understood this – as the Constitutional Court did in *Pheko v Ekuruleni Metropolitan Municipality*[12] – but because it appears to escape them, we propose the below amendments.

The following changes throughout the DMA are recommended to bring the legislation in line with the *Pheko* judgment, which the High Court in both *Esau* and *FITA* departed from unjustifiably.

Section 27(2)(d) of the DMA should be amended to reflect the following:

"27. (2)(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is strictly necessary for the preservation of life;"

[11] *Esau* at paras 245, 253.
[12] *Pheko & Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) paras 36-37.

Section 27(2)(n) of the DMA should be amended to reflect the following:

> "27. (2)(n) other steps that may be strictly necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or"

Section 27(3) of the DMA should be amended to reflect the following:

> "27. (3) The powers referred to in subsection (2) may be exercised only to the extent that this is strictly necessary when a constitutional right is or will be limited, and reasonably necessary in all other cases, for the purpose of-"

Section 41(2)(d) of the DMA should be amended to reflect the following:

> "41. (2)(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is strictly necessary for the preservation of life;"

Section 41(2)(o) of the DMA should be amended to reflect the following:

> "41. (2)(o) other steps that may be strictly necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster."

Section 41(3) of the DMA should be amended to reflect the following:

> "41. (3) The powers referred to in subsection (2) may be exercised only to the extent that this is strictly necessary when a constitutional right is or will be limited, and reasonably necessary in all other cases, for the purpose of-"

Section 55(2)(d) of the DMA should be amended to reflect the following:

> "55. (2)(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is strictly necessary for the preservation of life;"

Section 55(2)(n) of the DMA should be amended to reflect the following:

> "55. (2)(n) other steps that may be strictly necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster."

Section 55(3) of the DMA should be amended to reflect the following:

"55. (3) The powers referred to in subsection (2) may be exercised only to the extent that this is strictly necessary when a constitutional right is or will be limited, and reasonably necessary in all other cases, for the purpose of-"

Section 59(1)(a) of the DMA should be amended to reflect the following:

"59. (1) The Minister may make regulations not inconsistent with this Act-

(a) concerning any matter that-

(i) may or must be prescribed in terms of a provision of this Act; or

(ii) to the extent that it is not prescribed in terms of a provision of this Act, is strictly necessary to prescribe for the effective carrying out of the objects of this Act; and"

This last amendment is proposed in light of the High Court in *Esau* errantly pointing to the general power bestowed in section 59(1)(a)(ii) as overriding the circumscribed power found in section 27(3). This was a judicial error made in contravention of the trite *lex specialis* rule of interpretation and construction (i.e., that specific legal norms, like section 27(3), must be applied over general legal norms, like section 59(1)(a)(ii)), which we hope can be avoided in the future.

"Strict necessity" in the above proposals must be conceptualised as the notion that a regulation will not be valid unless it can be shown that there is no reasonable doubt as to the necessity of the regulation to combat the disaster or preserve life. Stated differently, government must show, beyond a reasonable doubt, that no other means to combat the disaster or preserve life, that have a less detrimental impact on constitutional rights, are available to it.

This will, importantly, introduce a criminal-law standard into the determination of the appropriateness of disaster management measures. We submit that this is necessary because these regulations invariably limit the rights of persons who have not been shown to be guilty of any crime. If a criminally accused is afforded the right to be presumed innocent, and that this innocence can only be rebutted if guilt is proven beyond reasonable doubt, then we submit the victims of government disaster regulations must be afforded the same benefit of law.

2.4 Ministerial and official discretion

The DMA's generous grant of ministerial and official discretion has proven problematic in light of how such discretions are exercised. As has been argued elsewhere:

> "Giving ministers or government agents the discretion to determine the extent of freedom is the antithesis of freedom under law. The law itself, not a delegated discretion, must set out

the limitations on constitutional rights. This is why laws of general application are not only required by the nature of the rule of law (as ensconced in section 1(c)), but also explicitly by section 36 of the Constitution. It is regrettable, therefore, that the DMA, in practice if not textually, has allowed ministers to shoot from the hip, as it were, in deciding when and how to deprive South Africans of their constitutional freedoms. This, it is submitted, is more akin to the rule of man, as opposed to the rule of law.

[…]

Reading and understanding the lockdown regulations themselves also leads to perplexion. Indeed, the regulations are spread over a messy, tangled web of *Government Gazettes*. If jurists such as the present author have struggled to make heads or tails of this concoction, it is fairly evident that lay South Africans have to rely exclusively on accurate press reporting to ensure that they are compliant with the state's order of the day. The regulations were changed multiple times in a short period.

[…]

It should be uncontroversial to regard this as a wholesale undermining of the rule of law imperative that the law must be certain, predictable, and accessible to those who are expected to comply with it. Absolute certainty, it is conceded, is impossible, but on the continuum from absolute certainty to total chaos, the South African government has strayed unacceptably close to the latter.

The rule of law standard ensconced in section 1(c), as previously observed, is not subject to limitation or derogation, as it is outside of the Bill of Rights and is declared, explicitly, to be supreme. It is regrettable that this supremacy has not been observed."[13]

We therefore propose the following provisions be inserted into the DMA to reflect the following:[14]

"XX. No rule, regulation, directive, notice, or other instrument adopted in terms of this Act may, once published, be amended, varied, or otherwise changed within thirty days of such publication: Provided, where the change is directed at, and in substance does, lessen the detrimental impact on constitutional rights of that instrument or any other instrument related to disaster management, such a change may be made within thirty days of publication."

"XX. Disaster management rules, regulations, directives, notices, or other instruments adopted in terms of this Act, when dealing directly or indirectly with the same disaster, must be published together in a single document, text, or file, that is readily and easily available to

[13] Van Staden 506-507. Citations omitted.
[14] The appropriate place in the DMA for these provisions to appear is left to the discretion of the drafters of the Amendment Bill.

the general public. Once an amendment, variation, or other change is made to such instrument or instruments, the complete, updated instrument or instruments must be published together as soon as practicably possible in a way that is readily and easily available to the general public."

"XX. Any official communication by any member of the executive government or official of any organ of state in any sphere of government that is aimed at, and/or in substance does, explain, elucidates, and/or clarifies the meaning, scope, implication, and/or application of any disaster management rules, regulations, directives, notices, or other instruments adopted in terms of this Act, or any other instrument or instruments related to disaster management, shall be admissible as evidence in any a court of law or any other appropriate tribunal or forum. "Official communication" in this provision must be construed broadly."

"XX. In the event of an inconsistency between the text of a provision of this Act or a rule, regulation, directive, notice, or other instrument adopted in terms of this Act, and a communication, whether official or unofficial, by any member of the executive government or official of any organ of state in any sphere of government, the text must be adhered to. No member of the executive government or official of any organ of state in any sphere of government may take any action or make any decision that detrimentally affects the rights or interests of any person or persons who so in good faith adheres to such text in contravention of the contemplated communication."

2.5 Social disruption principle

Although this proposal repeats much of what has already been said, we regard this redundancy as necessary. The appropriate place in the DMA for this provision to appear is left to the discretion of the drafters of the Amendment Bill:

"XX. Any measure taken in terms of this Act, or any rule, regulation, directive, notice, or other instrument adopted in terms of this Act, in response to, or to deal with, a disaster, must cause as little disruption to the rights, interests, and/or duties of those to whom it will or will likely apply, as is demonstrably possible."

2.6 Accountability of officials

One of the first regulations adopted during the March 2020 lockdown was to exempt public officials from liability for damage caused during their implementation and enforcement of lockdown measures. We regard this as problematic, given that one of the founding values of the South African constitutional order is accountability.[15] As such, we propose a provision reflecting the following, the location of which in the DMA is left up to the drafters of the Amendment Bill:

[15] Section 1(d) of the Constitution.

"XX. Notwithstanding any provision in any other law or rule, regulation, directive, notice, or other instrument to the contrary, a member of the executive government or official of any organ of state in any sphere of government shall be civilly and/or criminally liable, whatever the case may be, for any negligence or recklessness in the performance of their duties during a disaster; and this includes any such member or official applying any provision of this Act or any provision of an instrument adopted in terms of this Act in a negligent or reckless manner."

2.7 Public and parliamentary oversight

During the COVID-19 lockdown, it became fairly evident that Parliament's oversight of the disaster management measures and the public's participation in the formulation of those measures was inadequate. Colluding with select "stakeholders" unknown to the public is insufficient to satisfy the requirement of public engagement with the measures that most directly affect the public. Furthermore, Parliament's lax approach to holding the executive to account has also been most worrying. We do not know of one example where Parliament determined that the executive had gone too far and directed a change in the response to COVID-19. There has been total deference.

We therefore propose that unit must be established within every disaster management centre, in the national, provincial, and local spheres, to constantly solicit and then consider public participation and comments about the nature, scope, and period of the disaster management measures that are adopted in response to any disaster. How to formulate the structure of this unit is left to the drafters of the Amendment Bill.

Parliament must be required to establish an *ad hoc* oversight committee for every disaster, the chairperson of which must be a member of the official opposition within the municipality, province, or of South Africa, within which the disaster has been declared.[16] This does not deny the majority party its majority vote within the committee, but does go some way to hindering the party that (necessarily) supports the government's disaster measures from watering down its oversight of the disaster response. How to formulate this in the DMA is left to the discretion of the drafters of the Amendment Bill.

2.8 Socio-economic impact assessments

While COVID-19 will always be remembered as a destructive virus that killed many people, the devastation that was wreaked on the global and national economies by overzealous government responses will be remembered equally well. One of causes of the devastation of the lockdowns was

[16] These committees will be composed of members of the national Parliament, not of the municipal council or provincial legislature. As such, if Party A is the official national opposition, and Party B the national government, then a representative of Party A, from the national Parliament, must chair the committee if a disaster has been declared in a municipality controlled by Party B. Party B would chair the committee in a jurisdiction controlled by Party A.

precisely this overzealousness – governments, in panic, almost immediately went into hard lockdowns without in any substantive way considering the impact that this might have. The "decisiveness" of the South African government has been lauded, but we are not sure that reacting immediately to something without aforethought and consideration of cost is necessarily something to praise.

We however recognise that certain disasters are of such a nature and severity that government cannot always first conduct studies and assessments before taking action. We therefore recommend that the drafters of the Amendment Bill include a provision reflecting the following, the location of which in the DMA will be left to their discretion:

> XX. No rule, regulation, directive, notice, or other instrument adopted in terms of this Act may be in force for longer than thirty days without the disaster management centre having jurisdiction, in consultation with the Socio-Economic Impact Assessment System Unit of the Department of Planning, Monitoring, and Evaluation, having conducted and published for public comment an impact assessment that accurately records and documents the perceived, broadly construed, costs and benefits of the measure, as well as potential unforeseeable costs, on any social and/or economic affairs, as well as the constitutional rights, of those to whom it applies.

3. Conclusion

Sakeliga's proposals might at first glance appear radical, but these represent nothing more than bringing government conduct in line with the promise of constitutionalism, the Constitution, and the Rule of Law. It is precisely during a crisis situation, when popular feeling might favour a government unburdened by legal controls, that strict insistence for adherence to principles of limited State power are imperative.

Our experience over the last year in South Africa paints a very clear picture of why this is necessary. During the current state of disaster government's measures specifically destroyed countless jobs, businesses, and livelihoods, even evidently disrupted important public health initiatives. The measures placed an economy that must support nearly 60 million souls at severe risk.

An amended DMA must strengthen the constitutional dispensation, ensure proper oversight, and ensure that unilateral measures of state officials only apply in those circumstances strictly necessary to mitigate a disaster.

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Addendum 1: Common law constitutionalism[17]

Introduction

Constitutionalism refers not only to the written Constitution, but to the constitutional order in which the Constitution finds itself. The constitutional order includes various principles and customs that the Constitution itself does not explicitly express.

One may consider, for example, the principle that the legal rules expressed in legislation must be clear and unambiguous. The Constitution itself contains no such requirement, but it is commonly recognised that no unclear legal rule may be enforced upon legal subjects and that such a rule is *ab initio* void for vagueness. This rule is absolute and supreme, as no proper court of law will enforce that which either the court itself or the legal subject concerned cannot understand.

These rules and principles are usually borne out of a society's *jus commune* -- its common law. In South Africa, therefore, English and Roman-Dutch constitutional principles, and perhaps in the future some principles of African customary law, make up the constitutional order, alongside the written Constitution.

This addendum considers some of these important principles of the constitutional order that do not necessarily find explicit recognition in the Constitution.

Constitutionalism

Written constitutionalism

A constitution, properly understood, is a special type of law that, unlike other laws, addresses itself to the government of a society, and lays out what that government may, and crucially, what it may not do. The core idea of constitutionalism is that *everything which government is not explicitly allowed to do, is forbidden*. Constitutions are one of those things a society cannot afford to get wrong, because they are not transient. All future governments – not always of the same political party – will interpret them differently and according to their own ideological frameworks.

The Constitution of South Africa is not meant to be completely inflexible or completely flexible. Section 74 provides that section 1 of the Constitution may be amended with a 75% majority vote of the National Assembly and the support of six provinces in the National Council of Provinces, and the remainder of the Constitution may be amended with a two-thirds majority of the National Assembly and the support of six provinces in the National Council. The remainder of the section sets out various other procedures and considerations.

[17] This addendum has been adapted, albeit not exclusively, in large part from Sakeliga's submission on the policy of expropriation without compensation, prepared by Prof Koos Malan.

But if the Constitution is to be amended, the process must not simply amount to Parliament going through the constitutional procedure and adopting the amendment. There must be a drawn-out, years-long public consultation process to determine whether a national consensus exists. The Constitution sets out how an amendment must be processed, but a government cannot act without a mandate.

One must also bear in mind the nature of the Bill of Rights. Chapter 2 of the Constitution does not 'create' rights, but merely protects pre-existing rights. Indeed, section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Sir Thomas More once aptly noted:

> "Some men think the Earth is round, others think it flat. But if it is flat, will the King's command, or an Act of Parliament, make it round? And if it is round, will the King's command, or an Act of Parliament, flatten it?"

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[18] But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If the Bill of Rights is thus amended, the basic essence of the right in question must remain. If protection for human rights is removed from the Constitution, South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not protect them. This is not a situation South Africans would want to find themselves in. By implying that government can 'extinguish' a right by simply removing it from the Constitution, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

Any constitution is meant for the ages. As respected constitutional scholars Herman Schwartz and Richard A Epstein have noted, "Constitutions are written to supply a long term institutional framework, which by design imposes some limitations on the power of any given [parliamentary] majority to implement its will".[19] The Constitution of the United States — a standard-setter for constitutionalism — has endured for 230 years and been amended only 27 times. South Africa's Constitution has been amended 17 times in 23 years, with most amendments being technical or procedural.

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[18] See https://dictionary.cambridge.org/dictionary/english/enshrine.

[19] Epstein RA. "Drafting a constitution: A friendly warning to South Africa". (1993). 8 *American University Journal of International Law and Policy*. 567.

Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.

If our Constitution should lose its basic character as a shield for the South African people against undue government overreach within the period of only one political party's rule, there can be no doubt that tyranny is the rule and freedom has again slipped through our grasp.

Unwritten constitutionalism

Constitutionalism presupposes the pursuit of justice on a grand scale, that is, for the whole of the polity, and more specifically for all individuals and communities within the polity. In this way, constitutionalism is inextricably associated with the pursuit of justice, but this normative commitment – the commitment to justice – is only one side of the constitutional idea. The second element of constitutionalism relates to power: power that has to serve as a rampart that supports the normative – the justice element. Hence the normative element has to be complemented by a real element, which consists in the structures for the suitable allocation and checks on political power, thus to ensure that power is not abused; to ensure that it is exercised for the benefit of the whole instead of degenerating into privateering for the sake of only a segment – either a minority or a majority. The structural element is essential to constitutionalism. Precisely for that reason questions around governmental power – its allocation, exercise, limitation and control – are and have always been essential for constitutionalism.

In the present context the following two prerequisites, both relating to the real element of constitutionalism, are crucial. The first is citizenship and the second is the notion of the dispersal of power and (mutual) checks and balances.

- Citizenship in the real sense of the word is not viable without the protection of personal property rights, that is, the property rights of individuals and juristic persons; and
- Constitutionalism is founded on the basis of the dispersal of power among the largest possible number of centres of power, more specifically not only the three centres of state power, but the widest range of loci of private, civil and economic power (here in after referred to as institutions of civil society). These loci of power must be strong enough to counterbalance governmental power and strong enough to counterbalance each other, thus to ensure that no locus of power grows so strong that it gains absolute power that would allow it to abuse its power to the detriment of any segment of the populace. Once any locus of power, and specifically the state, is so strong that it can act in an unconstrained fashion, it becomes absolutist. That rings the death knell of constitutionalism. Institutions of civil society constitute loci of power capable of discharging their check and balance function only when they have their own property, which allows to them act autonomously.

Citizenship

It is important to clarify the meaning of citizenship. That requires, amongst other things, that citizenship be distinguished from the concepts of subject and consumer. The latter two should not be confused with that of citizenship; in reality they stand in opposition to the idea of citizenship.

From the point of view of constitutionalism, it would be most inappropriate to view the populace – also the South African populace – as a collection of subjects. Subjects denote a relationship of subordination, inequality and dependence of the populace vis-à-vis government. It is an inappropriate, essentially monarchical concept, which is incompatible with the very notion of republicanism which is the idea on which the South African constitution claims to be premised.

Viewed through the prism of constitutionalism it would be equally inapt to conceive of the South African populace as collection of consumers. A consumer is by definition in a commercial relationship in which the identity of buyer, tenant, borrower, or whatever other commercial identity stands at the centre.

In contrast to the above, in pursuance of the very notion of constitutionalism, the appropriate public identity of members of the populace should be that of citizens.

Citizenship, unlike the identities of consumer and subject, primarily denotes the ability to participate independently and on an equal footing with all other citizens in the joint endeavour to govern the polity in the public good and to the benefit of the citizenship body as a whole, through a process of even-handed rational public discourse and compromising decision-making.

Independent participation of all citizens in the continuous enterprise of government for the public good, is impossible, however, if the people are economically reliant, especially solely reliant on another person or entity, more specifically if people are reliant on the state. When the populace is dependent on the state for their livelihood, they are not citizens anymore. Then they are but subordinate subjects and state-dependent consumers.

Dispersal of power and civil society

The notion of the dispersal of power and attendant checks and balances lies at the very core of the constitutional idea. This is particularly also true for South Africa priding itself of a constitutional dispensation that purports to subscribe to the idea of constitutionalism. It is important to emphasise that the dispersal of power is not limited to the traditional idea of the trias politica – the threefold separation of power between the legislature, executive and the judiciary. Trias politica, though important, provide but the basic rudiments for a full-fledged system of power dispersal. Dispersal of power goes much broader than trias politica. It includes a rich plethora of power centres of civil society, commercial enterprises and other economic endeavours, cultural and religious endeavours, educational institutions, religious institutions, charity organisations and many more non-governmental

organisations and many more institutions of civil society. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.

The mentioned plethora of institutions of civil society fulfils two important roles.

In the first place they provide the best rampart against absolutism. They act as a counterbalance against absolutism of an excessively powerful, centralised government. Bills of Rights, that seek to protect the rights of individuals against actual and threatened governmental violations of rights, is more often than not of no practical value. Individuals lack the required muscle to take on a powerful rights-infringing government. Moreover, even if an individual does have the power to sue for the remedying of rights, the courts may rule in favour of government because they share the same ideological convictions. Even if a court does rule in favour of (an) individual/s, orders are not complied with and turn out to be judicial wishes rather than true binding orders. The South African experience of the past decades are swamped of such cases, where the executive and the state administration have proven to be unwilling and / or able to heed to words of the judiciary. Institutions of civil society are the only instruments with sufficient muscle to provide the required check on an infringing state and that can, at the same time, enlist the resources to fill the void left by a faltering state. Institutions of civil society in this way is the only genuine guarantee for the rights and interests of people and for sustaining constitutionalism.

Secondly, institutions of civil society also act as a mutual power balance and check on each other, thus avoiding and / or countering the abuses accompanied by economic monopoly practices in a way similar to how they keep a rights-infringing centralised government in check and/ or fill the gap left by a faltering state.

Conclusion

Citizenship and autonomous institutions of civil society also mutually imply one another:

- Citizenship – the capacity to participate in the governance of the polity – is reinforced and strengthened when people assemble and act through institutions of civil society, instead of acting individually on their own with much greater difficulty; and

- Institutions of civil society on the other hand cannot be viable without citizens joining these institutions and without them materially contributing towards such institutions, thus enabling these institutions to discharge their check and balance function.

Conduct by government, whether executive, legislative, or judicial, must respect and promote citizenship and civil society, not undermine or attack them.

Addendum 2: Section 1 of the Constitution[20]

Introduction

Section 1 of the Constitution, along with section 74 (the constitutional amendment provision), is the most entrenched provision in the Constitution. It may only be changed with an affirmative vote of 75% of the National Assembly, a generally elusive parliamentary majority for any single political party. This is for good reason. Section 1, said to be "the Constitution of the Constitution", provides not only the fundamental values upon which South African society is thought to be based, but on which the Constitution, itself a value-laden law, is also based. All constitutional interpretation, construction, and practice must happen with the values enshrined in section 1 foremost in mind.

It is our view that government has not paid enough, if any, mind to section 1. When government does contemplate constitutional values, it usually references the Preamble, a part of the Constitution that is without enforceable effect, or various rights in the Bill of Rights. Rarely, if ever, is section 1, the most important part of the Constitution, considered.

This is problematic, because section 1's values are actionable and substantive: They must be adhered and given effect to, otherwise the offending entity is trafficking in unconstitutional territory. We have regrettably seen this play out since the Constitution's enactment.

Section 1(a): Human rights and freedoms

Section 1(a) provides that South Africa is based *inter alia* on the "advancement of human rights and freedoms". Regrettably, government has treated section 1(a) as if this clause is absent.

A recent example of this, among many, is the National Sport and Recreation Amendment Bill, 2020, which effectively proposes to nationalise the civilian sporting industry and regulate various aspects of that industry. How can it be that South Africa is truly based on the advancement of human rights and freedoms if government is reducing the scope of freedom in such personal and intimate affairs like sporting and recreation?

The same is particularly true of interventions like the Constitution Eighteenth Amendment Bill. This intervention will deprive South Africans of their hard-won (and incredibly necessary) property rights, which are a prerequisite for the exercise of freedom and the attainment of prosperity.

Finally, it is worth noting that had this provision been given the due respect and recognition it demands, South Africa's unemployment rate would not be nearly as high as it is today. The Bill of Rights, particularly sections 9 and 23, have been interpreted in such a way that government has been

[20] This addendum was adapted in large part, albeit not exclusively, from the submission of the Free Market Foundation on the 2020 annual review of the Constitution. The sole author of that submission is one of the co-authors of this submission.

empowered to disregard the human rights and freedoms of the jobless in favour of those with trade union membership. Section 1(a) read with section 22 of the Constitution as a matter of course must have the consequence that jobseekers are not disallowed from seeking employment on such terms that they deem beneficial to themselves.

But legislation such as the National Minimum Wage Act[21] stands in evident conflict with these provisions, by regimenting labour relations in accordance with academic and politically convenient narratives rather than the best interests of the poorest among us. We submit that section 1(a), and also section 1(c) discussed below, must permeate any legislation and regulations promulgated by government, and in this respect, it is evident that this has not happened. Had if happened, legislation like the National Minimum Wage Act would never have been enacted.

Section 1(b): Non-racialism

It is well-known by now that government has engaged in racialist rhetoric and public policy since the dawn of constitutional democracy in South Africa. It has found ways in the Constitution of justifying this conduct but has paid no mind to the fact that those justifications are borne out of provisions in the Constitution that must be read as compliant with section 1, and particularly section 1(b), which prohibits racialism. Thus, even if one can, upon a very strained reading, regard section 9 as allowing, or even obligating, government to engage in racial policymaking, the presence of section 1(b) makes such an enterprise constitutionally impossible.

In other words, those provisions in the Constitution which seem to justify racialist policy measures, legally cannot do so, because section 1(b) of the Constitution proscribes it entirely. Government appears to be ignorant of this fact.

Section 1(c): The Rule of Law

The Rule of Law is often touted by government and opposition officials without any regard being paid to its substance. It is used as filler-text in political speeches and press statements. When it comes to the actual content of the Rule of Law, government has in many ways not complied with any such requirements.

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note.

[21] National Minimum Wage Act (9 of 2018).

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'
>
> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law".[22]

The Rule of Law thus:

- Permeates the entire Constitution;
- Prohibits unlimited arbitrary or discretionary powers;
- Requires equality before the law;
- Excludes arbitrariness and unreasonableness; and
- Excludes unpredictability.

The Good Law Project's Principles of Good Law report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation".[23]

[22] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
[23] Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.

The report also identifies four threats to the Rule of Law,[24] the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal".[25]

What is profound in Von Hayek's quote is that he points out that the Rule of Law is not the same as a rule of the law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in Van der Walt, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered an intellectual pioneer of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[26]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[27] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[28]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

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[24] Good Law Project 29.
[25] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.
[26] Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.
[27] Dicey 184.
[28] Dicey 198.

A common example of arbitrary discretion is when a statute or regulation empowers an official to decide “in the public interest”. What is and what is not “in the public interest” is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The “public interest”, however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e., they must do what the legislation substantively requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement.