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Dear Minister Dlamini Zuma

POLICY BRIEF: CONSTITUTIONAL AND SOCIAL JUSTICE OBSERVATIONS REGARDING ALERT LEVEL 4 REGULATIONS ISSUED UNDER THE DISASTER MANAGEMENT ACT ON 29 APRIL 2020 IN RESPONSE TO THE CORONAVIRUS COVID-19 PANDEMIC

I. Introduction

In our previous submission as part of a group of social justice practitioners, academics and civil society activists, we indicated that “going forward we aim to assist the government in monitoring the implementation of the COVID-19 policies to ensure responsiveness to the day-to-day realities of the most vulnerable communities in all Municipal Wards to ensure implementation does not undermine the achievement of equality, human dignity and advancement of human rights and freedoms for all while forming a social accountability bulwark against corruption”. Although this submission is made by the Chair in Social Justice at Stellenbosch University, the input has been sourced from members of the newly formed **Social Justice and Coronavirus COVID-19 Policy and Relief Monitoring Alliance (SCOPRA)**. Key among these are Cat Walker, Maricia Froneman and members of the Thematic Working Group on Policy Tracking and the Rule of Law whose names are included in the first policy brief we sent to government on the Coronavirus COVID-19.

When you issued the latest Regulations in terms of the Disaster Management Act 57 of 2002 (DMA), indefinitely extending the lockdown imposed by government to contain the spread of the Coronavirus, I announced an intention to raise some questions. The questions are raised considering the fact that the DMA regulations limit certain human rights, as entrenched in chapter 2 of the Constitution of the Republic of South Africa, 1996 (Constitution), for the duration of the State of Disaster, which was declared by the President on 15 March 2020. The regulations further have implications for democratic governance, the rule of law and ultimately, sustainable peace.

First, I would like to convey our appreciation to you, President Ramaphosa and the government for attuned leadership characterised by policy agility and responsiveness to the global public health threat entailed in Coronavirus COVID-19 (COVID-19). We also appreciate efforts made to limit the social injustice implications of the disaster management Directions, Guidelines, Statements and By-Laws issued since March 18, mainly intending to restrict the movement of people and goods.

That commerce had virtually ground to a halt for many is indisputable, but the truth is some bore the brunt more than others. In this regard, the President's announcement of the Social Relief and Economic Support Package (SRESP), deserves resounding applause. We further realise that the relief offered to those in need would have been more substantial had it not been for the historical legacy of poverty and inequality from our unjust past, compounded by corruption, including state capture, missed opportunities for transformative constitutionalism and administrative ineptitude, incorporating wasteful expenditure by State-Owned Enterprises.

We further appreciate the constraints under which you and your colleagues had to make policy choices to contain the spread of COVID-19, prevent a deluge of hospitalisations beyond the capacity of our health system while protecting the public from predatory business practices. Central to those constraints are imperatives relating to protecting human lives while ensuring that livelihoods are not unduly destroyed. That on its own has implications, perhaps not immediate, for lives.

2. Government obligations in policy design

As a group, we have stepped in to act as a social accountability network, subjecting government's policy responses to COVID-19 to scrutiny mostly to assure constitutional fidelity with particular emphasis on the constitutional equality duty and related social justice responsibilities, adherence, as far as possible to the dictates of democratic governance and preserving the rule of law. We are mindful in this regard that the DMA, particularly section 27 thereof, permits a certain amount of deviation from aspects of democratic governance provided the deviations remain within the confines of section 36 of the Constitution.

It is worth noting though that the scope for deviations under the DMA is far more limited than under a state of emergency in terms of section 37 of the Constitution and the State of Emergency Act of 1997. Worth noting is that curtailment of rights and democratic governance under section 37 of the Constitution is strictly regulated by the Constitution and placed under the supervision of Parliament. It is further worth noting that certain rights are non-derogable even under a state of emergency and that such rights include the right to equality, right to human dignity, right to life, right to freedom and security of the person, children's rights and rights of arrested and detained persons.

We further wish to bring to your attention that the comments are based on our belief that you, the President and your government colleagues are committed to the culture of justification that we embraced as a nation by adopting the Constitution, which places the rule of law, incorporating an accountable state, at the core of our constitutional democracy. The supremacy of accountability you may recall was highlighted by Justice Mogoeng Mogoeng in ***the EFF v Speaker of the National Assembly democracy and others [2016] ZACC 11***. Our actions seek not to presume malice where policy choices are questioned but shared former President Nelson Mandela's understanding that that "Even the most benevolent of governments are made up of people with all the propensities for human failings".

We further assume that you and your colleagues consider yourselves bound by previous cabinet decisions and, in this regard, have wondered if the Disaster Management Regulations issued on 29 April 2020, were duly subjected to the Social and Economic Impact Assessment Systems (SEIAS) test as required by SEIAS, adopted by the Cabinet on 01 October 2015. If not, compliance with SEIAS could have yielded a difference given that you and your colleagues are obliged to use SEIAS, in policy design:

"To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.

To anticipate implementation risks and encourage measures to mitigate them."

We do hasten to note that SEIAS itself is inadequate as it places emphasis only on the economy despite the fact that life in a functional democracy transcends economic freedom, security and wellbeing and includes a functional social life, incorporating mental wellbeing, healthy social interaction and the pursuit of happiness. Above all government's impact assessments must assess the likely impact on the achievement of constitutional obligations, chief of which are the equality duty and the advancement of human rights. At the core of the constitutional duty, according to the Constitutional Court in ***S v Makwanyane [1995] ZACC 3***, is upholding the right to human dignity, which is a major departure from our dark past where the human dignity of the black majority, women, persons with disabilities and others, was regularly trampled. Government policy design should also have due regard to advancing democratic governance (mentioned 25 times in the Constitution), the rule of law and peace. Regarding

peace, it is important to heed Aristotle's warning that "hunger is the parent of revolution and crime".

3. Selected socio-economic concerns

Our input, principally comprising questions, relating to compliance with legality, social justice, and the DMA , focus on the following areas:

1. Outdoor Exercise
2. Hot/Warm food takeaways
3. Childcare
4. Education
5. Food Relief
6. Books
7. Psycho Support Services
8. Prohibition of Certain Sales
9. Democratic Governance

Having asked questions principally about fidelity to the constitutional equality duty, the rule of law and promotion of peace, we have concluded that consideration needs to be given to relaxing some of the Regulations, Directions, Guidelines and By-laws, to improve alignment with the Constitution and social justice dictates. We further conclude that better compliance with the DMA in its entirety beyond section 27, is likely to enhance legality while engendering more responsiveness to the disaster entailed in COVID-19 and efficient use of limited public and private resources.

Kindly note that while the focus is protecting the most disadvantaged persons and communities from undue hardship during and in the aftermath of the COVID-19 pandemic, these observations are also aimed at fostering public trust and legitimacy, which are currently being increasingly eroded. In this regard, we are mindful that government has hitherto relied principally on voluntary compliance with the regulations and related restrictions because there is a great measure of trust and concomitant legitimacy. The key concern overall is that the restrictions adversely affect the most marginalised and disadvantaged groups and communities yet, in line with section 36 of the Constitution, there may be less intrusive ways of achieving the purposes sought to be achieved. We have included questions from the Social Justice Impact Assessment Matrix (SIAM), key questions government should have asked and must always ask in line with the constitutional equality duty (*Annexure A*). To help expand the suite of policy choices on the selected issues, we have attached a brief comparative analysis of approaches in comparable jurisdictions. (*Annexure B*)

4. Legality and legitimacy

The DMA provides for regulations to be made by the Minister. It is important to clarify upfront that Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996 states that any law or conduct inconsistent with the Constitution is invalid. This has been confirmed time and again by the courts right up to the Constitutional Court, which is the ultimate guardian of the Constitution.

Regulations, made in terms of the DMA, constitute subordinate legislation and regarded as “law” must pass the test of constitutionality. [*Larbi-Odam v MEC for Education, NW Province 1998 CC para 27*] The Regulations may not go further than what the DMA, which authorises them, allows for. Furthermore, to be lawful, the regulations themselves must pass the test of constitutionality. As the Bill of Rights is a cornerstone of democracy in South Africa, the regulations like all state action are constitutionally required to reflect democratic values and the advancement of human dignity, equality and freedom they must further comply with the state’s positive duty to advance human rights for all as section 7(2) provides “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” The regulations should, like all laws treat the preamble as the lodestar and with that comes the constitutional commitment to heal the divisions of the past and establish a society based on social justice.

Accepting that a state of disaster may only be declared in accordance with both the provisions of the Constitution and the DMA, the regulations made by the Minister must also comply with section 7(3) of the Constitution; which states that “The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

5. Limitation of rights

Section 36 of the Constitution provides in subsection (1) that the rights in the Bill of Rights may be limited only in terms of a law of general application. The DMA is, indeed, a law of general application, however, its limitations of any of the rights contained in the Bill of Rights is only constitutional to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The same applies to regulations issued under the DMA This subsection requires that all relevant factors must be taken into consideration. These factors include:

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

6. Duty to prioritise constitutional obligations

First and foremost all laws must comply with the Constitution, and in our cases, the emphasis is placed on the equality duty as enshrined in section 9 of the Constitution read with the

commitment to establishing a society based on democratic values, social justice and fundamental human rights, articulated in the preamble.

Further, section 237 of the Constitution prescribes that “[a]ll constitutional obligations must be performed diligently and without delay.” The rapid response of the South African Government appears to have adhered to this provision. In consideration of the declaration of a state of disaster and the resultant actions of government, the Minister must have taken into account the duty imposed by section 195 of the Constitution that her actions must be governed by the democratic values and principles enshrined in the Constitution. This includes the principles specifically provided in section 195(1)(a)-(g):

- a) A high standard of professional ethics must be promoted and maintained.
- b) Efficient, economic and effective use of resources must be promoted.
- c) Public administration must be development oriented.
- d) Services must be provided impartially, fairly, equitably and without bias.
- e) People's needs must be responded to, and the public must be encouraged to participate in policymaking.
- f) Public administration must be accountable.
- g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

Regardless of the need for public safety and the preservation of life amidst the COVID-19 disaster, the above principles apply to administration in every sphere of government.

Research conducted by various members of the team tasked with Rule of Law and Policy Tracking, focused on the comparison with other jurisdictions’ treatment and management during lockdown due to COVID-19, of outdoor exercise; the sale of hot/warm food (takeaways); childcare; education; food relief; books; psychological support services and the sale of alcohol and prohibition of the sale of certain items.

By comparison, other jurisdictions’ management of the seven issues mentioned appears far more aligned to their unique demography. South Africa is a people of vast backgrounds, not to mention the legacy of generational oppression of many groups and the dire consequences these continue to bear more than a quarter of a century into a constitutional democracy founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.

An analysis Regulations for the current Level 4 of lockdown in South Africa, taking into serious, yet objective, account the constitutional obligations referred to earlier, it is further difficult to accept that some of the regulations are lawful in the absence of proper reasons to justify them.

7. Key observations on the selected socio-economic issues

The key question asked in respect of each is: Was the decision preceded by a SEIAS impact analysis? For such purpose did government procure and use socially disaggregated data for predictive modelling of the likely impact of each set of regulations dealing with or impacting on that issue? We further ask: Was consideration given to the equality implications of the burden and related privileges or disadvantages imposed by the regulations regarding people in the townships and villages and among domestic workers and others like them? Where predicted burdens and disadvantages are skewed, is that consistent with the limitation of rights in terms of section 36 of the Constitution and if not, what compensatory measures have been incorporated to mitigate the resultant unfair discrimination while advancing equality?

1) Outdoor exercise

Allowing outdoor exercise is a great improvement particularly for the physical and mental health of those in shacks and other confined spaces with no gym equipment.

However, limiting the time to 06:00 am to 09:00 am fails to consider many factors regarding the diversity of lives. Some, mostly women, must take care of children and other family members in the morning and are only able to take a walk later in the day. Many people in the lower social classes are also likely to be frontline workers, and as such will work from early and only able to exercise late.

The restriction of exercise is also not proportionate to the risk it is attempting to avert. If we agree that exercise is important for physical wellbeing, mental health and human dignity, why limit the opportunity to 6-9. Physical distancing applies in general and must also be observed during exercising. For this reason, the rationale for restricting exercise to 3 hours appears non-existent. The less invasive means, physical distancing and not in organised groups, achieves the aim of reducing or preventing transmission. The restriction of exercise to 06:00 am to 09:00 am also forces people to be out and about at the same time – those going to work / those exercising / those going to school when it opens.

A further concern for women, especially when schools starts, is the fact that women (who make up the bulk of teachers) will be denied the opportunity to exercise during the week as they will be busy with school in the morning.

Other countries either have no restricted time while others have either longer periods or multiple windows of opportunity for exercise. It is also likely to cause confusion in that disadvantaged people without cars who were able to walk to shops anytime during Level 5 may find themselves being stopped by regulation enforcers and accused of walking outside the prescribed time.

2) Hot/Warm Food Takeaways

Allowing the buying and selling of warm food is a great improvement. However, in restricting commerce to deliveries presupposes a community that is primarily involved in e-commerce and where people have access to telephones and data. Data procured by the Thuma Foundation shows that e-commerce is not normative in places such as Khayamandi in Stellenbosch, Emanzimeleni in KwaZulu Natal and Dlamini in Soweto. Most of the people in these areas do not have computers, smartphones, wifi and data. In rural areas, there is a further complicating factor that there are no established delivery systems and no internet connectivity. Then there are the Gogo Dlamini's that sell *Amagwinya* (Fatcakes). None of them is integrated into e-commerce. To say this is an opportunity to develop such systems is cold comfort. What happens until then. China has been able to impose e-commerce as its digitalisation of commerce had been part of its sustainable development strategy since the Millennium Development Goals (MDGs), consolidated during the Sustainable development Goals (SDGs).

Rwanda, an African country like South Africa, allows takeaways, which is responsive to the reality of its people. So do Australia, New Zealand, Canada, Belgium and the United Kingdom.

3) **Childcare**

Allowing children to move between parents is a good thing. However, confining the exchange to parents seems to fly in the face of childcare arrangements in the townships and other communities that continue to have broken families as a result of apartheid laws that sought to destroy the family support structure. Children are also likely to move between parents and grandparents. In some cases, the children are left with relatives or neighbours.

The closure of Early Childhood Development Centres (ESCDCs), though necessary and admirable, has exacerbated childcare challenges imposing a higher burden on mothers, some of which are expected to go to work as essential services providers or in the newly allowed operations. Some countries are providing child-care services for their essential services workers. The United Kingdom is an example in this regard. In Canada, ECDs are also encouraged to stay open, in consideration of the gender dimensions and mental health implications of childcare challenges.

Preliminary COVID-19 data further suggests a low transmission rate between children and between children and adults which may be the basis for regulated, and possibly state-provided, childcare for front line and other workers who need it.

4) **Education**

It is encouraging to note that all efforts are being made to ensure that the physical closure of schools and universities does not exacerbate existing inequalities on the

ground of race, social class, and spatial disparities. Worthy of applause in this regard is the decision of the Minister for Higher education to provide digital devices and data to National Student Financial Aid Scheme (NSFAS) students

However, the challenge is much broader than students of families with a combined income that is under R350K. Students that fall within the missing middle are struggling without such devices and data. Learners in basic education are also impacted by efforts to bridge the gap through online learning.

There is an urgent need to extend online services to all families for education, e-commerce, e-governance and other purposes that communities have been leapfrogged into. The Chinese experience may be instructive in this regard.

5) Books

The opening up of the sale of educational books is a commendable move. However, all books should be available for sale. It is difficult to determine what book is educational. For research purposes, there are no set books. The vastness of literature is all explored. It also does not make commercial sense for stores to open for some and not all books. It may not be commercially viable. It is difficult to reconcile the government's authority to curtail the sale of books under section 27(g) of the DMA when viewed in comparison with the provisions of section 27(i), which specifically authorises curtailment.

It is also worth noting that most of the countries in the selected case studies do not curtail sales but rather focus on regulating the movement of people.

6) Prohibition of certain sales

The opening up certain dimensions of commerce is commendable. However, some of the restrictions need reconsideration from a system-thinking perspective. Certain things go together. If you cannot trade in one, it is useless to have the freedom to trade in another aspect. For example, masks can be bought but sewing machines and material cannot. Cold and raw food can be bought but pots cannot. Consideration should rather be given to regulating how many people can be at a shop at any given time than a blanket ban. It is also difficult to reconcile the ban on the sale of anything with the DMA. Section 27(i) of the DMA only gives government authority to suspend or limit or prohibit the sale, dispensing or transportation of alcohol in disaster-stricken areas.

With the rest, the authority as articulated in section 27(g) is only to regulate the movement of persons and goods. From an interpretation of statutes perspective, we are inclined to conclude that if the DMA wanted to authorise the curtailment of the sale of things other than alcohol, section 27(g) would have used the same wording as

section 27(f). Women are also struggling with makeup, which is among prohibited sales. To many women, makeup has the same status as a tie has to men. It is worth noting that very few of the countries in the case studies in Annexure B, have the extensive sale prohibitions as listed in the Disaster Management Regulations in both levels 5 and 4. A related concern is that contrary to the DMA and SEIAS, predictive modelling has only been limited to the spread of the Coronavirus while the likely impact of chosen policies on socio-economic life, remains unexplored.

7) **Food Relief**

Food relief has hitherto posed the greatest risk of the spread of COVID-19 as queue snakes abound with hungry people looking for meals and grocery hampers or food parcels. There is no regulation on the provision of food and related household supplies relief as the regulations seem to presuppose that movement of goods and persons principally relates to commerce. There is not even regulation on how food should be prepared, packaged, and delivered by relief agencies except Directions on what the packages should contain and principles they should comply with. It is unclear as to why this matter is not regulated given it is one of the major areas of social intercourse during a disaster.

The DMA anticipates an integrated approach to this. Adherence to the DMA would limit the ad hoc and hazardous nature of relief delivery while enhancing a demand centric as opposed to a supply-driven paradigm. It would also enhance monitoring the match between identified needs and combined delivery between government and civil society. Ideally, this should be part of a Disaster Management Plan envisaged in section 38, which plan should transcend the containment of COVID-19.

A report received from one province shows that delivery is neither based on a response plan nor influenced by the Poverty Map prepared by Stats Sa with 2011 or other disaggregated data sources that provide information on the state of socio-economic up to the level of the 4392 Municipal wards in every province. Private relief apparently relies on non-governmental organisation (NGO) preferences while government responds to individual requests via SMS, calls and other media. A colleague from a non-profit organisation (NPO) that has been inundated with COVID-19 Social Relief complaints responded to the first draft of this policy brief with the following observations:

“The coordinated approach anticipated by the DMA doesn't exist. There is no aligned delivery strategy between the local, provincial and national structures. The number of food parcels to be distributed to the communities are decided upon without any disaggregated data and proper needs analysis. The proposal to establish a relief need and response dashboard is therefore very critical and hopefully will be prioritized because as things stand right now, we are sitting on a time bomb if the situation is not dealt with”

Equally concerning, is the fact that the delivery reports do not show any match between red spots at ward level and instead provide a global city by city account on planned and effected delivery of food and related relief. This has a high risk leaving too many persons and communities behind while over-servicing some areas and persons. It is also a fertile bedrock for corruption and clientelism.

The DMA makes provision for a more systematised approach, incorporating Disaster Management Centres that promote an integrated and coordinated approach with special emphasis on prevention and mitigation. Regarding COVID-19, prevention and mitigation, we believe, would incorporate both its spread and the socio-economic impact risks of the regulations seeking to contain it. The DMA also provides for accredited volunteers, which is much better than random issuing of certificates to whoever claims they want to deliver food and related household relief. Consideration should be given to leveraging that provision to designate those who provide food and other relief as volunteers and regulate them and the delivery systems accordingly.

Consideration should also be given to establishing a Relief Need and Response Dashboard to monitor responsiveness and equitable distribution of food and other COVID-19 resources while fostering the kind of transparency that will swiftly expose and minimise corruption and clientelism while ensuring no one is left behind.

8) Psycho support and other services

The regulations mention of social workers and counselling services. However, this does not go far enough to deal with other non-medical yet essential mental health and domestic violence response services. The DMA provision for volunteers could be leveraged for acknowledging and regulating the response to these socio-psychological support needs that transcend counselling.

The beauty of the DMA is that such volunteers are supposed to be accredited and registered transparently thus protecting communities from criminal imposters. The DMA even considers the possibility of some uniform. This would be akin to election monitors under the Electoral Act 73 of 1998. In this regard, we also believe volunteers such as those in our alliance are critical for monitoring adherence to the rule of law thus reporting on and preventing brutality and related excesses by the security forces while ensuring that relief is received by all in need and that none of is corruptly abused on delivered based on political clientelism.

9) Democratic governance and disaster management structures

It has been comforting to note a return to consultative governance in the process of finalising the regulations for the indefinite extension of the lockdown and conversion

of restriction from Alert Level 5 to Level 4. This involved a small window of opportunity for public comment on the draft regulations. It must be said though that the consultation period was too limited for well thought out input into the policy design.

Another troubling matter regarding democratic governance is the structural arrangements that are driving the policy responses to COVID-19 and social and economic relief dispensation that seeks to mitigate the socio-economic impact of the restrictive policy responses. In government statements, reference keeps being made to a National Command Council (NCC). We have gone over the DMA several times and find no mention of such body. Our reading is that the DMA leaves governance to the normal democratic structures being the Executive headed by the President, Parliament, the Courts and Institutions Supporting Constitutional Democracy. In this regard, matters relating to regulating public conduct, which in this case includes movement of goods and services, and the allocation of state resources remains with the constitutional structures of government.

Section 4 of the DMA enjoins the President to establish an Intergovernmental Committee on Disaster Management. The committee, which is in terms of section 4(3) accountable to Cabinet must advise and make recommendations to the Cabinet, comprises the following:

- 1) Relevant Cabinet members;
- 2) Relevant MEC from each of the 9 provinces; and
- 3) Members of Municipal Councils.

Section 5 of the DMA further provides for the establishment of a National Disaster Management Advisory Forum (NDMAF), comprising role players designated by the Minister, who may include the following:

- I. Organised business
- II. The Chamber of Mines
- III. Organised Labour;
- IV. The Insurance Industry;
- V. Organised Agriculture; Traditional Leaders; Religious and Welfare Organisations; Medical, Paramedical; and hospital Organisation;
- VI. Organisations Representing Disaster Management Professions in South Africa;
- VII. Other relevant non-governmental and International Organisations;
- VIII. Statutory Bodies Regulating Safety Standards in Particular Industries;
- IX. Institutions of Higher Learning; and
- X. Institutions that can Provide Scientific and technological Disaster Support;
- XI. Experts in Disaster Management Designated by the Minister; and
- XII. Persons Co-opted by the Forum for Specific Period or Discussion.

The Head of the Disaster Management Centre, which must be established in terms of section 8(1), is designated by the DMA as the head of the NDMAF.

These structures are meant to be permanent, always ready to manage a disaster. There seems to be no mention of these structures in the public discourse. Instead, the Command Council whose legal genesis is unclear keeps being mentioned. Of further concern, is that public pronouncements about it seem to imply that it is a decision-making mechanism. Urgent clarity is needed regarding the nature, mandate and legal basis for this structure. Further clarity needs to be provided on the role of the Disaster Management structures set up in terms of the DMA as such structures should be doing the predictive modelling on the likely impact of COVID-19 in each Municipal Ward. They should also do the same data analytics to predict the likely socio-economic impact of each planned phase of the COVID-19 lockdown on each ward and the diverse groups in such wards.

It would help if government may take the people into its confidence regarding the mandate, composition, and legal basis of the NCC and how it relates to the DMA structures. Otherwise an impression is created that only section 27 of the DMA is being leveraged and used in a state of emergency style in response to COVID-19 and that the elaborate disaster management architecture provided by the DMA in its entirety is ignored to the country's detriment.

8. Conclusion

Government has made a commendable effort and strides in responding to the challenge of COVID-19 and mitigating the impact on the economy, poverty and inequality of the policies that have been introduced to contain it. Business, civil society and the international community have also played a meaningful and commendable role, particularly in mitigating the unintended consequences of COVID-19 containment regulations on hunger, poverty and inequality.

However, a few of the regulations need reconsideration and possible amendments to improve compliance with the Constitution, SEIAS and the equality duty in the Constitution. This need not wait for level 3, particularly as phase 1 is nondefinite phase save for the fact that the state of emergency must, in terms of the DMA end by 17 June 2020, subject to monthly extensions thereafter. Such improvements could also enhance the legitimacy of the restrictions thus improving voluntary compliance, the rule of law and public peace. Key among areas needing improvement are regulations impacting on childcare, education, mental health, food relief, prohibition certain sales and restriction of hot cooked food sale to deliveries.

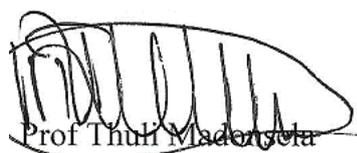
Some of these regulations have leapfrogged unprepared communities into e-commerce and thus pushing them further behind regarding equal enjoyment of their rights in terms of section 27, of the Constitution, among others. Anecdotal evidence further indicates that the burden on women, older persons and persons with disabilities is also disproportionate. This violates the constitutional equality duty, while unduly undermining government's own sustainable

development objectives in line with the National Development Plan (NDP), Agenda 2063 and the SDGs.

A key component of the way forward lies in better awareness of and conscious compliance with constitutional duties, particularly the equality duty, the dictates of democratic governance and adherence to the DMA beyond simply leveraging the emergency authority in section 27. This includes having an updated Disaster Management Framework and using it to respond more efficiently and responsively to the challenges presented by COVID-19, compounded by pre-existing socio-economic challenges at the core of which are extreme levels of poverty and inequality.

I hope the above offers some useful insights.

Best wishes



Prof Thuli Madonsela

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ANNEXURE I: 9-DIMENSIONAL SOCIAL JUSTICE IMPACT ASSESSMENT MATRIX (SIAM)¹

1. *What is the purpose of the planned or existing policy/decision/law and is it congruent with constitutional objectives and values concerning the achievement of substantive equality or social justice and advancing human rights for all?*
2. *Who or what group is the targeted or main beneficiary of the policy/decision/law?*
3. *Does the policy/decision/law differentiate or treat everyone on a one-size-fits-all basis?*
4. *What data has been relied on and is it sufficiently disaggregated in terms of the constitutional grounds of prohibited discrimination, including overlaying grounds and has the data been integrity assured?*
5. *Does the policy/decision/law confer disproportionate advantage to any group identified in terms of one or more of the 17 grounds in the Constitution (16 listed plus any analogous ground) or does it disproportionately withhold advantage or privilege to any group identified in terms of the constitutional grounds?*
6. *Does the policy/decision/law advance or reduce historical disadvantage with a view to advancing equality, including equal enjoyment of and all human rights and freedoms as envisaged in section 9 (2) read with section 7(2) of the Constitution?²*
7. *If the policy/decision/law disproportionately advantages and disadvantages a group or groups identified in terms of constitutional grounds, how important is it and can its purpose be achieved through less intrusive means?*
8. *If the purpose can't be achieved through alternative means, what compensation measures have been built in to offset the disproportionate disadvantage to one or more groups or combination thereof?³*
9. *Have all affected groups been consulted or involved in the policy design and afforded opportunities to influence the design and possible rethinking of potentially unduly harmful impact.*

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² The presumption here is that poverty is an inequality issue and that an equality impact assessment will invariably include social class disadvantage mitigation or exacerbation.

³ The design of SIAM has considered the unfair discrimination test outlined by the Constitutional Court in *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) Haussman, R. 2020. The Macro-Economic Implications of COVID-19 in our partner countries. Harvard Kennedy School.

ANNEXURE 2: WORLDWIDE POLICY RESPONSES TO COVID-19 IN VARIOUS KEY AREAS 2 MAY 2020

ITALY

1. Outdoor exercise

The initial decree ordering the lockdown of Italy on 9 March 2020 permitted outdoor exercise as one of the few valid reasons one could be outside of one's home (the others being pharmacy and grocery store visits and essential work). This was later amended on 20 March to prohibit outdoor exercise, due to abuse of the privilege. These measures were initially intended to remain in force until 1 April 2020, but were extended by the government until 15 April, and then again until 4 May. From this date, Phase 2 of the lockdown measures will be implemented. One of the key differences between Phase 1 and Phase 2 is the reintroduction of outdoor exercise, which will be permitted from 4 May onwards.

2. Hot/Warm food – takeaways

Home deliveries are permitted, and this includes cooked food from restaurants and pizzerias, as well as groceries from the supermarket - restaurants remain closed to the public, and it is not permitted to collect any food from a restaurant yourself.

3. Childcare

N/A. This is especially a concern for many families, as schools will remain closed until September.

4. Education

Schools and universities were closed nationwide from 4 March 2020, but some (particularly in the northern region) were closed for several weeks beforehand already. The Prime Minister has announced that he expects schools to be able to reopen in September. The majority of schools and universities have moved their programs online.

Schools and universities were the first institutions to be closed in this pandemic and will be the last to be reopened.

5. Food relief

€400m set aside by the Italian government for the issue of 'shopping vouchers' to poor families, most notably those in the South, where 30% of the nation's informal workers reside. Sicily is especially vulnerable at this time. The Italian Mafia has also been active in distributing food parcels in the South, and this action has been condemned by the government, which is appealing to nationals to be aware that these gifts are not free.

6. *Books*
Bookstores and libraries closed along with the national lockdown in March. However, these are two of the first institutions to reopen under the relaxed lockdown measures to be implemented on 18 May.
7. *Psychology support services*
The Italian government started a nationwide psychological support program. Working with regional associations and institutions, psychologists and psychoanalysts are providing free emergency help to anyone who needs it during the lockdown. Patients can speak on the phone or get in contact online.
8. *Tobacco / Alcohol sales*
Fully permitted under lockdown provisions. Some tobacco stores / news kiosks, as with grocery stores, have shorter opening times.

BELGIUM

1. *Outdoor exercise*
Solo outdoor exercise permitted (eg: running, cycling etc.) respecting 1.5m distance with others.
2. *Hot/Warm food - takeaways*
Restaurants remain open for takeaway only, and delivery services (UberEats, Deliveroo, Glovo etc.) remain available.
3. *Childcare*
N/A
4. *Education*
Universities closed until the new academic year (September). High school and below are closed until late May.
5. *Food relief*
N/A
6. *Books*
N/A
7. *Psychology support services*
There have been reports about some initiatives, but nothing official or from government authorities.

8. *Tobacco / Alcohol sales*
Fully permitted under general lockdown provisions.

COLOMBIA

General Note: Lockdown regulations around mobility have been controversial, since there is a gendered split in movement. Women are allowed to go out on the even days, men are allowed to go out on the odd days.

1. *Outdoor exercise*
Solo outdoor exercise permitted between 6 and 10 a.m. every day. The government has advised wearing hair up, using face mask and cap, wearing long sleeve shirts and pants and washing every piece of clothing upon arrival at home.
2. *Hot/Warm food - takeaways*
Home deliveries are permitted, and this includes cooked food from restaurants as well as groceries from the supermarket - restaurants remain closed to the public, and it is not permitted to collect any food from a restaurant yourself.
3. *Childcare*
N/A
4. *Education*
Universities are offering courses online and some (very few) are providing internet and PCs to students that do not have access. Rural areas vary – some have stopped university entirely, while others are still ongoing through in-person classes because there are no cases reported in the area.
5. *Food relief*
Foundations, fundraisers and artist-promoted virtual events are providing help to those who sign up through these aid sources.
6. *Books*
N/A
7. *Psychology support services*
None by the State. Some insurance companies have sent guidelines to users. Some private firms offer help online for free.
8. *Alcohol / tobacco sales*
Fully permitted under the general lockdown provisions.

UNITED KINGDOM

1. *Outdoor exercise*
Everyone is allowed to go out for exercise once a day.
2. *Hot/Warm food - takeaways*
Takeaways are permitted.
3. *Childcare*
Schools and childcare are closed for most children but remain open for children of keyworkers and vulnerable children. This has not been applied consistently especially for vulnerable children (e.g. children at risk of abuse).
4. *Education*
All schools are closed except as above and online learning is being provided but is heavily dependent on online access and parental input. The BBC has just begun a comprehensive 14-week rollout as a standalone resource on radio and TV, which is very important for those without online access.
5. *Food relief*
Children who are eligible for free meals at schools are being provided with food vouchers to substitute.
6. *Books*
I am not aware of any specific provision. All libraries are closed but some have been able to put resources online.
7. *Psychology support services.*
There is some online provision by NGOs and NHS providers – I cannot give a comprehensive account.
8. *Alcohol / tobacco sales*
Fully permitted under the general lockdown provisions.

NEW ZEALAND

1. *Outdoor exercise*
At the start of lockdown New Zealand's Government's messages about outdoor activities were mixed.

"As long as you are not unwell you can leave your house to go for a walk or exercise and enjoy nature. Police will be monitoring all the time"

At Alert Level 3 they said people must enjoy outdoor activities within walking distance from their homes. This led to a problem in New Zealand because not everyone is lucky enough to live within walking distance from the beach, recreational park or a bush reserve.

2. *Hot/warm food - takeaways*

At Alert Level 4 restaurants were closed. Now at Alert Level 3 Minister of Primary Industries Manato Ahu Maria said ordering of online takeaways is allowed and contactless pickups are allowed. Food markets remain close since it is not pandemic friendly. New Zealand used a report from Michelle Danyluk from the University of Florida to support these decisions.

3. *Childcare*

At Alert Level 3 Schools and Childcare Centres reopen. In childcare centres sandpits must be closed and parents must stay in their cars when dropping children. Outside play equipment is allowed in early childhood centres but not in schools.

4. *Education*

The schools are allowed to open on April 29 but each school board must decide whether its school can open safely and in practice several hundreds of small rural schools are expected to stay closed.

5. *Books*

N/A

6. *Food relief*

The Salvation Army provides food relief in New Zealand. In New Zealand food security remains a problem since 10% did not have sufficient nutritious food.

7. *Psychology support services*

The New Zealand Psychological Society provided assistance and created an online service to assist people with regard to psychological help. The service is only available online.

8. *Alcohol / tobacco sales*

Fully permitted under the general lockdown provisions.

AUSTRALIA

1. *Outdoor exercise*

Permitted, under social distancing restrictions.

2. *Hot/warm food - takeaways*

Permitted for takeaways and deliveries.

3. *Childcare*
Schools and childcare centres remain open.
4. *Education*
Schools remain open. As tertiary education is one of Australia's primary exports, they expect to suffer great financial losses due to many international students not attending campus. Online learning has been expanded for these students.
5. *Books*
N/A
6. *Food relief*
The Salvation Army provides food relief in New Zealand. In New Zealand food security remains a problem since 10% did not have sufficient nutritious food.
7. *Psychology support services*
The New Zealand Psychological Society provided assistance and created an online service to assist people with regard to psychological help.
The service is only available online.
8. *Alcohol / tobacco sales*
Fully permitted under the general lockdown provisions.

SWEDEN

1. *Outdoor exercise*
Exercise and sports activities can continue, but precautionary measures should be taken in order to minimise the risk for transmission of COVID-19. Outdoor exercise is preferable.
2. *Hot/warm food - takeaways*
Take-outs can be handled as usual, as long as it does not lead to crowding or close contact between people.
3. *Childcare*
N/A
4. *Education*
It was recommended by the government that colleges (gymnasium) universities, and other institutions of higher education or adult learning to provide distance education

rather than classes on their premises. This recommendation was issued 18th March 2020.

The Public Health Agency of Sweden has decided that, for the time being, it is important that public transport continues to operate and that those who are healthy can get to school. Schools can try to minimise activities when many people gather.

5. *Books*
N/A
6. *Food relief*
Sweden has good food security and the current COVID-19 outbreak has not impacted Swedish food production to any great extent.
7. *Psychology support services*
N/A
8. *Alcohol / tobacco sales*
Fully permitted under the general lockdown provisions.

CANADA

1. *Outdoor exercise*
With physical distancing, people can now enjoy the outdoors including parks and beaches.
2. *Hot/Warm food - takeaway*
Fully permitted.
3. *Childcare*
Child Benefit will be temporarily increased within the coming months, delivering relief to families affected by the novel coronavirus. The added top-up to the Canadian Child Benefit will be \$300 per child.

The City of Toronto is opening two additional licensed childcare centres to provide care for the children of essential workers who are on the front lines of the coronavirus pandemic. These two centres are in addition to four centres that opened on March 31. The centres are located in existing city-run licensed childcare facilities and are staffed by City of Toronto childcare workers. It is unclear whether these measures have also been taken in other cities or regions.

4. *Education*

Schools across Canada gradually began shutting their doors in mid-March. Ontario and Quebec expect them to remain closed until well into May. In British Columbia and Alberta, schools have been closed until further notice. New Brunswick has entirely cancelled the remainder of the school year.

Universities, colleges, and International Study Centres have moved to online learning for the remainder of the Spring 2020 semester. New Brunswick, however, reopened campus for post-secondary school students on 24 April 2020.

5. *Books*
N/A

6. *Food relief*
Food Banks Canada, and other organisations aimed at supporting food security, are currently accepting donations to support food banks' coronavirus response efforts across Canada. This effort has primarily been driven by the charitable sector.

7. *Psychology support services*
Hundreds of registered psychologists signed on to an initiative of the Canadian Psychological Association to provide psychological services, via tele-health, to health care providers working at the front lines of the COVID-19 crisis. Once it was made clear how popular this was, it began to be expanded to the greater population. It is unclear what stage this project is currently at.

8. *Alcohol / tobacco sales*
Fully permitted. The region of Ontario classified liquor stores as essential services permitted to stay open, a decision which was controversial but supported by various researchers who claimed that alcohol dependency - both physiological and psychological, is an issue in society, and if supply is cut off, it can be potentially catastrophic.

RWANDA

1. *Outdoor exercise*
Sports activities including morning runs on streets are prohibited.

2. *Hot/Warm food - takeaway*
Restaurants may sell takeaway.

3. *Childcare*
N/A

4. *Education*

Schools closed until September.

5. *Books*
N/A
6. *Food relief*
Rwanda has formulated a social protective plan for the delivery of free food to at least 20 000 households in the capital Kigali. The door-to-door delivery is meant to mitigate the impact of a lockdown implemented on March 21 by the government, aimed at limiting the spread of the COVID-19 pandemic.
7. *Psychology support services*
N/A
8. *Alcohol / tobacco sales*
Unknown.

NAMIBIA

1. *Outdoor exercise*
Permitted, provided it is done alone or in a group of maximum 3 persons.
2. *Hot/Warm food - takeaway*
Restaurants, cafes and coffee shops may remain open. Provided that they only provide take away services.
3. *Childcare*
N/A
4. *Education*
Initially, there was a government order to the effect that all schools and higher education institutions in Namibia must remain closed during the period starting 28 March 2020 and ending 17 April 2020. This period was then extended, and the government announced that schools would be likely to reopen in June or August.
5. *Books*
N/A
6. *Food relief*
N/A
7. *Psychology support services*
N/A

8. *Alcohol / tobacco sales*
Sale of alcohol forbidden. Tobacco - unknown.

UNITED ARAB EMIRATES - Cat

1. *Outdoor exercise*
Residents can leave home from 6am to 10pm from Friday for essential journeys, and can spend up to 2 hours a day exercising outside.
2. *Hot/Warm Food - takeaway*
No takeaway collection, but restaurants allowed to operate on a home delivery basis.
3. *Childcare*
Nurseries were closed nationwide. This has raised concerns for parents who cannot afford to work and care for children simultaneously. It is unknown whether this has been addressed.
4. *Education*
Schools and universities were closed on March 3rd for a period of four weeks. This period was extended, and it is not clear when it will be lifted. All schools and universities have been instructed to commence e-learning.
5. *Books*
N/A
6. *Food relief*
Unknown.
7. *Psychology support services*
None by government, but several private initiatives aimed at assisting with mental health conditions during UAE.
8. *Alcohol / tobacco sales*
In general, tourists can use their passports to buy the alcohol. Residents, however, need an alcohol license, a plastic red card issued by Dubai police that requires annual renewal. Only non-Muslims 21 and older can apply for a license — though bartenders across the city never check for them before pouring drinks. Maritime and Mercantile International, a subsidiary of the government-owned Emirates airline known as MMI, and African & Eastern partnered to create the website offering home delivery for alcohol during lockdown.