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More eyes on COVID-19: A legal perspective

The unforeseen social impacts of regulatory interventions

It is important to consider the social injustice impact of the COVID-19 responses since the first of them were promulgated on 18 March 2019. It is clear that some of the *Disaster Management Act* regulations constituted unfair discrimination by unnecessarily and unfairly imposing restrictions that inflicted a disproportionately higher burden on poor and historically disadvantaged groups and communities. Examples in this regard were restrictions on public transport, warm cooked food, limiting most commerce to e-commerce, and restricting childcare to parents, and even then subject to a court order if parents live apart. Subordinate instruments such as directions, guidelines and municipal bylaws have elicited similar and sometimes more serious concerns regarding impacts on social life, in particular family functionality.

For me, reality struck when the father of one of our students died. None of his medical colleagues could attend the funeral. This was because the COVID-19 regulations do not only restrict the permissible number of funeral attendees, it also specifies who can obtain a permit to attend a funeral across municipal districts. Even the pastor had to conduct the funeral service via Zoom because he was in a different municipal district from the one in which the funeral took place. Regulation 35 of the *Disaster Management Act* only permits nuclear family members and parents to travel across districts for a funeral. Even a mother- and father-in-law are not included among those who may obtain a funeral travel permit.

But nothing had prepared me for the moment the COVID-19 regulations struck in my own family. This happened when someone I have always regarded as my brother-in-law suddenly passed on. He was the husband of a cousin I grew up regarding as my sister, as my father raised her after her own father died. I realised that I could not legally obtain a permit to travel across provinces. Firstly, flights are only allowed for business while road travel would require a permit, which cannot be obtained for funerals of cousins or their spouses.

In advising government, it is imperative therefore to include a social science lens on the process of conceptualising and drafting the COVID-19 regulations and subordinate instruments. Quite frankly a social science lens is imperative for all policy designs in responding to a pandemic. It is my considered view that the experts consulted on the COVID-19 pandemic should transcend doctors and scientists. This is in recognition of the fact that society is a system, and as in all systems, things are interconnected. By government's own admission, COVID-19 is not only a public health threat, but also a threat to society and the economy. The paradigm that therefore limits the threat of COVID-19, and the responding regulations, to concerns about public health and the economy is therefore myopic.

Children's rights have been particularly disrupted by the restrictions on social intercourse. The implications are particularly dire for single parents and others in the lower social classes who cannot afford paid childcare. The challenge is compounded by the closure of early child development centres. The impact on education has hardly been mentioned by the President, yet it is one of the most devastating consequences of the COVID-19 curbing regulations and related instruments.

It is worth noting that the government's own impact assessment tool, the Social and Economic Impact Assessment Systems (SEIAS), is informed by the same policy design paradigm. SEIAS prescribes the assessment of the likely social and economic impact of any policy or law before Cabinet approves it. It does not appear that SEIAS is consistently applied before regulations and subordinate instruments are approved.

There is also the broader equality duty and related social justice commitment that all state action must comply with in the light of section 9 of the Constitution read with sections 1, 7(2), 195, 237 and the Preamble. These collectively enjoin government to advance equality and other human rights in the pursuit of a society based on democratic governance, social justice and human rights. To do so, government needs expertise and instruments such as the 9-Dimensional Social Justice Impact Assessment Matrix, which requires the leveraging of data analytics to assess the likely disparate impact of any planned policy or law. Experts should help the crafting of an alternative achievement of the purpose without the predicted unfair discrimination or human rights violation or to design a compensation strategy to be implemented concurrently with the disruptive regulation or related instrument.

It seems to me that the drafters of the *Disaster Management Act*, the anchor legislation for the COVID-19 regulations and subordinate instruments, also regarded a social science lens as essential, regardless of the nature of the disaster at hand. Section 5(1)(e) of the *Disaster Management Act* includes academics among the civil society groupings, including experts who should form part of the Disaster Management Advisory Forum.

While the *Disaster Management Act* does not specifically mention lawyers, by default, lawyers are involved because legislative drafting is principally undertaken by State Law Advisors. But this is a problem because State Law Advisors are too close to the executive to see things laterally. There is also the reality that state employees tend to do as they are told and advise as expected. There is not sufficient independence, in other words, to speak truth to power. For this reason, it is important that lawyers from outside be also involved in advising. There may also be inadequate expertise in areas such as impact assessment, including social justice and human rights impact prediction.

Anecdotal information suggests that the opinions of outside experts, including lawyers, are sought now and then by individual Ministers and the presidency. Herein lies one of the challenges of the COVID-19 regulations and subordinate instruments – the problem of incoherence and impact unconsciousness. For example, when the



regulations allowed shopping for essential items from supermarkets, public transport was only restricted to essential services.

Also, the impact of closing early child development centres and schools on child nutrition was never detected until the problem of hunger for children became real. The same applies to the implications of poverty and inequality on digital inclusion as education was migrated to online platforms. The impact will be felt in historically disadvantaged communities long after COVID-19.

Even that restriction to essential services was flawed because the operation of taxis and lift hailing services was restricted to the early hours of the morning and evening. Such unintended consequences could have been limited if the multisectoral experts operated under one

roof. In this arrangement, the likely systemic impact of any planned regulatory intervention could be assessed from multiple angles before adopted.

There is no gainsaying the fact that the COVID-19 regulatory approach taken to date has saved lives. Yet the paucity of an impact consciousness has likely exacerbated poverty, inequality, mental health challenges, family dysfunctionality and societal vulnerabilities.

It is my considered view that a Multidisciplinary COVID-19 Advisory Forum could help and needs to be established urgently. That structure should include lawyers, educators, sociologists, psychologists, social workers, statisticians, economists, development experts and others. Having pandemic experts and doctors has clearly not been enough.