COVID 19 AND THE CONSTITUTION

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Globally and in South Africa the pandemic crisis of 2020 continues to test the solidity of the foundations of many aspects of 21st Century society. This is particularly evident in the economy, communications and culture, but it also raises many legal questions, especially concerning the extent of the powers of the state and the government in exceptional circumstances.

The South African government received praise, for instance from the World Health Organization, for the manner in which it had responded to the crisis, and it would be churlish to deny that South Africans generally have much to be grateful for, given the relatively positive results that may be ascribed to some of the drastic measures taken by the government to curb the spread of the virus.

On a different level, however, one cannot but be astounded by the severity of the effects of the anti-virus measures. Disruption was the order of the day in, among many other instances, the operation of virtually all organs of state, ranging from Parliament, the courts and the public service, to public education, police services and the military. No doubt it can be expected that this pandemic will, as other plagues and epidemics in the past, eventually peter out – until the next one occurs.

Against this background the question must be asked what we can learn from our experiences of 2020. Confronted by the sudden and severe crisis, the government had at least two responses to choose from: declare a state of emergency within the clear confines of the Constitution and the State of Emergency Act of 1997 (SEA), or take another route, much less clearly defined, namely engaging the Disaster Management Act of 2002 (DMA), and then improvising on it. The choice taken was the latter.

South Africa was not alone in following a statutory rather than a constitutional route in order to justify incursion on various constitutionally protected fundamental rights (freedom of movement, religion, assembly, trade, etc.). One implication of the government's choice was that, constitutionally, fundamental rights could only be *limited* in terms of the disaster management measures 'to the extent that the limitation is reasonable and justifiable in an open and democratic society'. In the event of the declaration of a state of emergency, some fundamental rights may be *derogated from* (in effect suspended). Intriguing technical debates on the distinction between limitation and derogation aside, the route chosen by the government reveals much about its political mentality.

It is highly unlikely that, when Parliament adopted the DMA, the kind of situation brought about by the current pandemic was contemplated. The purpose of the Act is in the first place to provide for 'an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery'. The Act defines a 'disaster' as 'a progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause death, injury or disease'. The urgent need to combat the virus may be said to fit this definition of a disaster, but the provision in the Act for mechanisms to deal with disasters clearly did not suit the government.

The Act does not address the possibility or implications of the limitation of fundamental rights following the declaration of a state of disaster by the Minister of Co-operative Government and Traditional Authorities (CoGTA), nor for specific parliamentary oversight, or parliamentary approval of such declaration or its further extension. The Constitution and the SEA require a state of emergency to be declared by the President, then to be subjected to the approval of the House of Assembly. A state of disaster may however be declared to last three months with no need for parliamentary approval, nor for its subsequent (unrestricted) monthly extension.

The DMA contains detailed arrangements for the establishment of an Intergovernmental Committee on Disaster Management, a National Disaster Management Advisory Forum and a National Disaster Management Centre. The government deliberately chose not to use these mechanisms, but to effectively replace them – without any statutory foundation – with the ominously named 'National Coronavirus Command Council' (NCCC), and to forthwith classify its proceedings 'secret'.

In response to an enquiry from a firm of attorneys, the director-general of the Presidency wrote that the NCCC was 'a coordinating body, just as other Cabinet structures are coordinating bodies, established to facilitate the work of the relevant Cabinet members and Cabinet as [a] whole, and given authority by Cabinet to do just that'. No explanation for the name of this novel institution (called 'nebulous' in the Gauteng High Court) was given. The name resonates with that of the National Revolutionary Command Council established in Sudan in 1969 following a *coup d'état* and the Iraqi Revolutionary Command Council which governed Iraq between 1968 and 2003. Closer to home, it evokes the foundational doctrine of the ANC, the 'National Democratic Revolution' (NDR).

Almost from the outset, the disaster management arrangements inspired a raft of court applications concerned with the legality of various aspects of the government's measures, however with little forensic success. A full bench of the High Court of the Western Cape was for example persuaded in June by the government's argument that, despite Minister Dlamini-Zuma conceding that 'the language she and the President used in referring to decisions of Cabinet concerning government's response to Covid-19 reflected the NCCC as the decision-making body and not Cabinet', the NCCC had not usurped the powers of the National Disaster Management Centre and was established merely as a committee of Cabinet, eventually comprising all members of the Cabinet. In another matter, the Democratic Alliance approached the Constitutional Court to grant direct access in order to argue the constitutionality of aspects of the government's actions, but in July the application was dismissed, leaving the party the choice to pursue the matter through the full hierarchy of courts to obtain an – inevitably belated – final determination on constitutionality from the Constitutional Court.

Looking at the matter from the perspective of the law only, may obscure some other important considerations. What, for instance, does it tell us about the health of South African constitutionalism if it is so easy for a government to covertly create extra-constitutional and extra-legislative institutions with the effective power to dictate incursions on fundamental rights? Should such incursions really be deemed justified in an open and democratic society? What is the significance of the language and symbolism emanating from a 'cabinet committee' consisting of the full Cabinet, styled a 'command council'? What does it imply when the president describes the crisis and its economic consequences in terms of 'war' and 'post-war', and when some

ministers communicate decisions taken by the NCCC dressed in faux-military garb? Is there truth in the rumours that the possibility of governing the country 'post-covid' by 'command councils' was seriously debated in the ranks of the ANC, and if so, were those debates inspired by delusions of the grandeur of the NDR? Does the ANC plan ever to transform itself from a superannuated revolutionary liberation movement to a democratic political party?

President Ramaphosa owes South Africans clear answers to these questions.

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