The Rule of Law in a State of Disaster: Evaluating Standards for the Promulgation, Administration and Enforcement of Emergency Regulations in South Africa

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Abstract

This paper applies the rule of law test to emergency regulations adopted to combat a national disaster in South Africa. A declaration of a national state of disaster, such as a pandemic, triggers emergency powers which enable the executive to mitigate the disaster, assist and protect the public, provide relief, and protect property. However, emergency powers provide a pretext for the executive to limit constitutional rights and to curtail the enjoyment of freedoms. These unprecedented powers also pose a risk of arbitrary exercise of public power, which can only be prevented if the promulgation, administration and enforcement of emergency regulations conform to the principles of legality, rationality and proportionality. These principles are understood as tenets of the rule of law in South Africa. They require a strong commitment to respect, protect and promote human rights at a time when they are most vulnerable to violation by the State. Given the role of the judiciary in the maintenance of the rule of law, and the litigation against the emergency regulations adopted in response to the outbreak of the COVID-19 pandemic, this paper also discusses the ensuing case law to illustrate the practical application of the rule of law test to a national disaster.

Keywords  Legality · Rationality · Proportionality · Lockdown · COVID-19 · Human rights · South Africa

1 Introduction

During a national disaster, such as the COVID-19 pandemic, the people of South Africa have a reasonable expectation—flowing from the Constitution of the Republic of South Africa, 1996 (Constitution)—for the government to adopt emergency...
regulations and issue directives in a less restrictive manner which complies with the rule of law, respects human rights and upholds constitutional values.\(^1\) Since the Constitution does not provide for derogation of the rule of law during a national disaster, it follows that the executive has powers to invoke emergency powers only to the extent that such powers are necessary to overcome the national disaster. Section 27(3) of the *Disaster Management Act* 57 of 2002 (the Disaster Management Act) provides the reasons for which the executive may declare a national state of disaster, i.e., to mitigate the disaster by assisting and protecting the public; providing relief; protecting property; and preventing and combating corruption. A declaration of a national state of disaster for the purposes set out in section 27 enables the executive to promulgate regulations that could severely limit constitutional rights and curtail the enjoyment of freedoms. Such regulations are constitutionally competent if their promulgation, administration and enforcement satisfy the principles of legality, rationality and proportionality. These principles collectively constitute the rule of law test.

This paper applies the rule of law test to section 27(3) of the Disaster Management Act to illustrate the constitutional standards for the promulgation, administration and enforcement of emergency regulations during a national disaster. The first part after this introduction lays out some of the basic features of the rule of law, as understood in South African jurisprudence, to give the discussion a contextual exposition of the rule of law and to extract a working definition of the meaning of the rule of law during a national disaster. The second part addresses the question why upholding the rule of law matters during a national disaster. The argument starts from the position that when the government adopts emergency regulations that suspend and limit constitutional rights and freedoms, there are severe human rights implications, particularly when battalions of the South African National Defence Force enforce compliance with the emergency regulations, as was the case under Alert Level 5 of the COVID-19 lockdown. The third part examines the standards for the promulgation, administration and enforcement of emergency regulations during a national disaster. These standards entail compliance with three core elements of the rule of law test, namely, the principles of legality, rationality and proportionality. The fourth part examines the contribution of the judiciary to upholding the rule of law during a national disaster. This part is crucial because the rule of law depends on the judiciary, which must examine the constitutionality of impugned emergency regulations against the rule of law test.

\(^1\) Section 23(6) of the Disaster Management Act defines a national disaster as a disastrous event which affects more than one province or which affects one province but cannot be effectively dealt with by the province. In March 2020, the Head of the National Disaster Management Centre declared the first national disaster in South Africa by publishing a notice in the Government Gazette classifying the outbreak of the COVID-19 pandemic as a national disaster—see GN 312 in GG 43096 of 15 March 2020. The notice was followed by a notice by the Minister of Cooperative Governance and Traditional Affairs (the Minister) declaring a national state of disaster—see GN 313 in GG 43096 of 15 March 2020.
2 Overview of the Rule of Law and its Conceptualisation in South Africa

The rule of law refers to fundamental principles through which to limit discretion by public office-bearers so that they act within the confines of lawful authority. In a narrow sense, the rule of law requires laws to be of general application, apply prospectively, and be clear and certain. The government must publicise its laws so that citizens know what is permissible and what is not. However, classical conceptions of the rule of law, such as Dicey’s focus on the procedural permissibility of government conduct in enacting legislation, ignore the substantive content of the laws. From a traditional viewpoint, no government should act inconsistently with its constitution and other laws. This conception commands obedience to the law (by both the government and citizens), regardless of the nature of the laws in place, making the rule of law “an empty vessel into which any law could be poured”. As such, classical understandings of the rule of law fail to account for the impact of procedurally-enacted laws on human rights, democracy, access to justice and accountability. Given the shortcomings of the classical conceptualisation of the rule of law, the following standards and norms of the rule of law have been developed:

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

These contemporary conceptions of the rule of law require accountability to prevent public office-bearers from acting arbitrarily, corruptly and oppressively. This understanding aligns with Thompson’s argument that the rule of law is for the good of citizens because it imposes practical control over governments and restrains the arbitrary use of public power. Restraints on power, in turn, protect human rights.

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2 Dicey (1959), pp. 202–203. The fundamental principles devised by Dicey include:

(a) Supremacy of the law over the influence of arbitrary power.
(b) Equality of citizens before the law.
(c) Jurisdiction of ordinary courts over all citizens.
3 Agrast, Botero and Ponce (2011), p. 1.
4 Agrast, Botero and Ponce (2011), p. 9 attribute this view to Chaskalson JP. Bellamy (2003), p. 118 holds an identical view and says that the rule of law seems to be no more than “just political rhetoric, which is often invoked by politicians in power to coerce members of society to obey their decisions in the interests of holding law and order”.
5 Agrast, Botero and Ponce (2011), p. 9.
6 International Commission of Jurists (1988), p. 144.
7 Thompson (1975), p. 261.
The protection of rights and freedoms enables citizens to investigate the govern-
ments and inquiry into the affairs and conduct of public officer-bearers.8

The conceptualisation of the rule of law in South Africa proceeds from the pre-
mise that South Africa is a constitutional democracy9 founded on, inter alia, the
rule of law.10 As a founding constitutional value, the rule of law is a core feature
of constitutional adjudication. It is often invoked as an antithesis of the arbitrary
exercise of public power and as an antidote against the unaccountable exercise of
public authority.11 As such, the exercise of public authority in a manner that does
not conform to established legal rules and procedures would be considered arbitrary,
in violation of the rule of law and therefore, unconstitutional. As a “set of conven-
tions and arrangements that ensure that it is not left to the whims of individual rulers
to decide on what is good for the populace”,12 the rule of law is important during a
national disaster because constitutional safeguards are lowered to pave the way for
emergency regulations.

3 Does the Rule of Law Matter During a National Disaster?

The answer to the question why the rule of law matters during a national state of
disaster lies in appreciating what the rule of law seeks to guard against in ordinary
times and what it should guard against during a national disaster. Starting from the
premise that no one “should enjoy arbitrary power to act against the public wel-
fare”,13 the common understanding in political and legal theory is that the imple-
mentation of certain legal rules, principles and practices through procedures and
other legal mechanisms (collectively termed the rule of law) protects citizens from
the arbitrary exercise of public power by the government.14 The consensus flows
from the fact that at all time, some public office-bearers tend to misbehave and act
unlawfully, prejudicially, and recklessly disregard procedures.15

No society should permit uncontrolled discretion in the exercise of public power.
If such conduct were to be condoned, the exercise of public power would make peo-
ple reasonably apprehensive that their rights and freedoms will be threatened, that
their security will be imperilled, and that they will be deprived of the opportunity
to contribute to the making of decisions which affect them. Justice cannot be served

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8 See Van der Walt v Metcash Trading Ltd 2002 4 SA 317 (CC), paras 65, 66, 68 and 76 in which the
Court analysed these constituent elements of the rule of law in South Africa.
9 United Democratic Movement v Speaker of the National Assembly 2017 (8) BCLR 1061 (CC), para 1.
10 S 1(c) of the Constitution of the Republic of South Africa, 1996.
11 See Krygier (2014), p. 48 for a description of the rule of law as an antithesis of arbitrary exercise of
state power.
12 Cameron (2014), p. 3.
13 Sellers (2014), p. 4.
14 See Sajó (2019), p. 260. See also Köttler and Schuppert (2014), p. 75.
15 Weir and Beetham (1999), p. 429. See also Venter (2012), p. 738, who argues that by their nature,
humans who have power often exercise it by taking shortcuts.
in such a society.\textsuperscript{16} No matter how dire the conditions leading to the declaration of a national state of disaster, citizens must have the assurance that the government will act lawfully and that its decisions will not be controlled by private interests whose sole purpose could be lining its pocket to cash in from a crisis and subvert the will of the people.\textsuperscript{17} When public power is exercised at the direction of private interests, there is a risk that public office-bearers would exercise their authority corruptly and arbitrarily. The people on whom public power is exercised would not have a say in the making of decisions affecting them, posing a risk for public office-bearers “to intentionally coerce, obstruct, manipulate or otherwise interfere with the ruled, without consulting the views or interests of those affected”.\textsuperscript{18} This risk could be mitigated and avoided if there are strict substantive requirements and procedures to constrain the exercise of public power.\textsuperscript{19}

When a national state of disaster is declared, concerns about the arbitrary exercise of power are justified, given that most safeguards for protecting citizens from arbitrary use of state power are lowered when the government invokes emergency powers under the Disaster Management Act and promulgates regulations that severely limit constitutional rights. Thus, it is reasonable for people to worry about the protection of their rights. Notwithstanding, the rule of law is not a one-way street. It does not only safeguard the rights and interests of citizens against the arbitrary and corrupt exercise of emergency powers, but it is also beneficial to the government in that when citizens are satisfied that the government has acted legally and rationally, the public perception of the legitimacy of the government response to the national state of disaster is enhanced.\textsuperscript{20} The buy-in from society, which accrues as a result of public perceptions of government compliance with the rule of law, legitimises the political order and enables the government to channel more resources to the mitigation of the effects of the national disaster than in enforcing the emergency regulations. When people believe that the rules are legitimate, they will follow them and encourage others to do the same.\textsuperscript{21} In \textit{Khosa}, the court put it as follows:

\begin{quote}
The populace must be able to trust the government to abide by the rule of law to make rational Regulations to promote their stated purpose. These should intrude upon the rights of people (and businesses) either not at all or if they do, or justifiably must, the least restrictive measures, must be, applied and communicated to the public. In return the Government can justifiably expect the citizens to co-operate for the common goal, take responsibility to ensure their own safety and that of others. …if there is no such community of interest, the whole exercise and purpose of a lock-down will fail and a wasteland and social
\end{quote}

\textsuperscript{16} See Krygier (2014), p. 50; Sellers (2014), p. 4.
\textsuperscript{17} On the implications of private interests on the rule of law, see Sellers (2014), p. 5.
\textsuperscript{18} Bellamy (2003), p. 119.
\textsuperscript{19} Bellamy (2003), p. 119.
\textsuperscript{20} For a synopsis of the legitimacy which accrues to governments from public perceptions of compliance with the rule of law, see Sajó (2019), p. 262.
\textsuperscript{21} Sajó (2019), pp. 262–263.
unrest awaits us all. This citizenry must also take responsibility to achieve the
stated goal even when they are exercising their rightful freedom of choice.\textsuperscript{22}

While most people who are upset and disagree with the emergency regulations
may still comply to avoid conflict with the law, some are likely to push back against
such regulations and break them at every instance. They would litigate and seek
every possible reason to circumvent such regulations.\textsuperscript{23} The emergency regulations
must be promulgated and enforced in such a way that people do not have to
choose between obeying them and sacrificing their survival incomes. In the context
of COVID-19, the hard lockdown, which prohibited waste pickers, petty traders and
other informal traders from earning a living through their trades, would be examples
of illegitimate emergency regulations. The lockdown regulations made it impossible
for people living on the margins of poverty to put at least one meal on the table
each day. When they were forced to give up their sources of livelihood, they had
little choice except to dodge law enforcement agents with innovative solutions to
reach their customers. Whereas it appears that initially, the government succeeded in
procuring a buy-in from society about the need to impose the lockdown, public con-

22 Khosa v Minister of Defence [2020] JOL 47,215 (GP), para 7.
23 See Khosa, para 9 in which Fabricius J suggested that if the regulations promulgated pursuant to a
national state of disaster are perceived by the public to be legitimate, litigation against such regulations
would be at a minimum.
24 It appears that initially, the government was successful in procuring a buy-in from society about the
need to impose the lockdown. See, for instance, De Beer v Minister of Cooperative Governance and
Traditional Affairs [2020] JOL 47,361 (GP), in which the court said that “When the President of South
Africa eleven weeks ago announced a “hard lockdown” in South Africa when the COVID 19 pandemic
hit our shores, the country and indeed, the world generally lauded him for the fast and decisive action
taken to guard us against the anticipated debilitating (and deadly) consequences of the disaster. The
rationality of this policy direction taken by the national executive then appeared readily apparent to vir-
tually all South Africans” (at para 5.1). In Moela v Habib [2020] JOL 47122 (GJ), para 60, the court
admonished the applicants to buy-in the regulations and directives promulgated to combat the COVID-19
pandemic.
25 Fair-Trade Independent Tobacco Association v President of the Republic of South Africa [2020] JOL
47,480 (GP) para 1.
26 See Ex parte Van Heerden [2020] JOL 46891 (MM), paras 1–2.
27 Ex Parte Heerden, para 9.
in this section that a national state of disaster puts human rights in peril. At such a time, the rule of law is critical because some rights are based on the rule of law in the understanding that good regulations protect human rights. In contrast, bad regulations create conditions and justifications for the violation of human rights. The State must guarantee the protection of fundamental rights and freedoms, which it should only limit in terms of the law of general application in line with section 36 of the Constitution.

Another dimension of the protection of human rights during a national disaster is that the State must implement safeguards to protect the rights to life and bodily and psychological integrity. The State is not at liberty to use violence during a national disaster. In *Khosa v Minister of Defence*, the court reiterated that the soldiers deployed to enforce compliance with the lockdown could not ‘skop, skiet and donder’ civilians. That case arose because the soldiers shot and killed a civilian for drinking alcohol in his yard. The court made a declaratory order, affirming that all persons in South Africa were entitled to the respect of their human dignity, the right to life, the right not to be tortured and not to be treated in cruel, inhumane and degrading ways. The court further declared that state security services, including the armed forces and the police, were required to instruct their members to act constitutionally and lawfully, bearing in mind South Africa’s obligations in international law. The court also instructed the defence force to initiate disciplinary procedures against soldiers implicated in the shooting of the unarmed civilian and to suspend them immediately. The order of the court underscored the standards for the promulgation, administration and enforcement of emergency regulations under section 27(3) of the Disaster Management Act.

## 4 The Promulgation, Administration and Enforcement of Emergency Regulations

It is a fundamental tenet of the rule of law that the promulgation, administration and enforcement of laws must be “accessible, fair and efficient”. Also, the rule of law requires public office-bearers to make administrative decisions “in the form of law” and that such laws must not operate retrospectively but prospectively. These attributes guide citizens in planning their daily affairs to avoid conflict with the law. This, of course, applies to citizens who are committed to acting lawfully. It

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28 *Khosa*, para 37. The translation for *skop, skiet and donder* is ‘kick, shoot and assault or injure’.
29 *Khosa*, para 2.1. of the order.
30 *Khosa*, para 2.2. of the order.
31 *Khosa*, para 3.1.
32 Agrast, Botero and Ponce (2011), p. 1.
33 Von der Pfordten (2014), p. 16.
34 Sajó (2019), p. 264.
35 The need for laws which are reasonably certain, clear and accessible is founded on the doctrine of vagueness, which is itself a tenet of the rule of law—see *Skole-Ondersteuningsentrum NPC v Minister of Social Development* [2020] JOL 47593 (GP), para 43.
does not consider members of society who feel justified in acting outside the law for one reason or another. In a national state of disaster, the promulgation of emergency regulations must conform with the rule of law. This is achieved when the regulations are promulgated by an authorised person (the Minister of Cooperative Governance and Traditional Affairs) in accordance with enabling legislation, i.e., the Disaster Management Act. Such regulations must be accessible in the Government Gazette and on government websites free of charge. The accessibility of the regulations enables citizens to study them and to channel their conduct accordingly to avoid conflict with the law. During the lockdown, the government generally complied with the preceding tenets of the rule of law. However, some of the lockdown directives applied retrospectively, breaching one of the requirements of the rule of law.

During a national disaster, as is the case during any other time, regulations issued in terms of enabling legislation must be clear and stable. Notwithstanding, clarity and stability do not mean that the executive cannot continually update the regulations through amendments and repeals. Such changes are necessary to sync the regulations with the needs of the day as the government adjusts its response to the national disaster in light of new information and changing circumstances. During the COVID-19 pandemic, the amendment and repeal of the lockdown regulations were mostly informed by the determination of Alert Levels 1, 2, 3, 4 and 5. This had the unintended effect of making it difficult for most people to keep up with the ever-changing regulations. The government could not be faulted for the constant amendments, as failure to amend and repeal regulations when necessary would have made such regulations redundant and unconstitutional. The following subsection considers legality as one of the standards for the promulgation and administration of emergency regulations during a national disaster.

### 4.1 Legality

The doctrine of legality is one of the most articulated tenets of the rule of law in South African constitutional jurisprudence. Legality has emerged as an important doctrine through which the judiciary holds the government accountable under the rule of law. In *Affordable Medicines Trust v Minister of Health*, the court summarised the doctrine of legality as previously expressed in its judgements as follows:

> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of

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36 For instance, on 8 June 2020, the Minister of Higher Education published directions accompanied by a notice which stipulated that the directions applied retrospectively from 1 June 2020—see GN 652 in *GG* 43414 of 8 June 2020. It was not immediately clear why the Minister did this.

37 See Agrast, Botero and Ponce (2011), p. 1 and Sajó (2019), p. 264 on the need for clarity and relative stability of law in the context of the rule of law.

38 See *Pharmaceutical Manufacturers Association: In re Ex Parte President of the Republic of South Africa 2000 2 SA 674 (CC)* para 20; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 1 SA 374 (CC)*, para 58.
the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive “are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.\(^{39}\)

The import of the doctrine of legality during a national state of disaster is that the designated Minister must comply with the Constitution, whose obligations must be fulfilled, and the enabling statute, which is the Disaster Management Act. Section 27(3) of the Disaster Management Act stipulates that the Minister may issue regulations and directions to combat a national state of disaster. Such regulations or directions must be promulgated and implemented for the following purposes:

(a) assisting and protecting the public;
(b) providing relief to the public;
(c) protecting property;
(d) preventing or combating disruption; or
(e) dealing with the destructive and other effects of the disaster.

If the Minister promulgates regulations and directions which are not reasonably connected to these purposes, the regulations and directions would be *ultra vires* and in breach of the principle of legality.\(^{40}\) In *De Beer v Minister of Cooperative Governance and Traditional Affairs*,\(^{41}\) the court acknowledged this principle by stipulating that since the lockdown regulations and directions were an exercise of public power, they could not go beyond the express provisions of the enabling statute—the Disaster Management Act. As the cases discussed in this paper show, many challenges to the lockdown regulations failed because the courts could not find any unconstitutionality or disconnect between the regulations and the enabling legislation.

Thus, the principle of legality could also be interpreted to mean that those who exercise public power can only do so when authorised by the Constitution, enabling legislation or other law. Regarding a national disaster, decisions purportedly taken under the Disaster Management Act must be taken by authorised persons. This became contentious in *Esau v Minister of Co-operative Governance and Traditional Affairs*,\(^{42}\) in which the applicants unsuccessfully asked the court to declare the establishment of the National Coronavirus Command Council (NCCC) unconstitutional and in violation of the Disaster Management Act as far as the applicants interpreted the NCCC to be a duplication of the functions of the National Disaster Management Centre. The applicants submitted that the NCCC had been unlawfully established

\(^{39}\) *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC), para 49 (references omitted).

\(^{40}\) See the logic in *Affordable Medicines Trust v Minister of Health*, para 50 in relation to the issuance of regulations under another statute.

\(^{41}\) *De Beer*, para 6.1.

\(^{42}\) *Esau v Minister of COGTA* [2020] JOL 47479 (WCC).
and had been given impermissible decision-making powers. In *Freedom Front Plus v President of the Republic of South Africa*, the applicant asked the court to rule on the legality of the COVID-19 response adopted by the State. It also challenged the constitutionality of the enabling legislation, the Disaster Management Act. The thrust of the applicant’s argument was that the Disaster Management Act was unconstitutional for permitting the imposition of a state of disaster without the safeguards imposed for a declaration of a state of emergency. The court accepted that a state of emergency “legitimises a drastic reduction in constitutional protections” but that such limitations remain subject to section 36 of the Constitution, which stipulates the grounds on which rights could be limited. The court could not find a reason to hold the Act unconstitutional and accordingly dismissed the constitutionality challenge.

### 4.2 Rationality

One of the requirements of the rule of law is that decisions taken by public functionaries must be rationally connected to the purposes for which they are made. Whether a decision is rationally connected to its purpose calls for an objective assessment which is not concerned with whether there are other means to achieve the objective but with the connection between the means and the end, i.e. whether a genuine relationship exists between the decision and the purpose for which the enabling statute conferred the power to make the decision. However, the decision-maker would not succeed in mounting a defence against a challenge to the rationality of the decision if he/she relies on a mistake or good faith in making the decision. Judicial pronouncements during the lockdown point to the conclusion that the emergency regulations were rational. In *Dr. JS Moroka Municipality v Kubheka*, the court confirmed that the Minister had promulgated the regulations for a good (and rational) cause, i.e. “to prevent, alleviate, constrain or minimise the effects of the disaster”. In *Freedom Front Plus*, the court echoed similar sentiments and accepted that the measures adopted in response to the outbreak of the pandemic were special circumstances and were

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43 See Esau, paras 1, 10; 53.
44 *Freedom Front Plus v President of the Republic of South Africa* [2020] JOL 47592 (GP), para 1.
45 *Freedom Front Plus*, para 3.
46 *Freedom Front Plus*, para 20. States of emergency are regulated in section 37 of the Constitution.
47 *Freedom Front Plus*, para 65.
48 *Freedom Front Plus*, para 65.
49 *Pharmaceutical Manufacturers Association*, para 85.
50 See *Pharmaceutical Manufacturers Association*, para 90, in which it was stated that the principle of rationality forbids the court from inquiring whether there are other purposes to achieve the objective and from substituting the government decision with its own decision because it disagrees with the government decision or because it thinks that its decisions is better than that of the government.
51 See *Fair-Trade Independent Tobacco*, para 20. See also *De Beer*, para 6.3.
52 *Pharmaceutical Manufacturers Association*, para 86; *Khosa*, para 5.
53 *Dr. JS Moroka Municipality v Khubeka* [2020] JOL 47053 (ML) para 53; *Khosa*, para 19 (in which the court held that the lockdown was necessary) and *Fair-Trade Independent Tobacco*, para 42.
urgently needed to convert an ailing and deteriorated public health care system into a state of readiness, able to cope with a previously unprecedented demand for high-care and intensive care facilities should there not be a “flattening” but an uncontrolled “spike” in the rate or number of seriously affected patients...\(^\text{54}\)

In *Fair-Trade Independent Tobacco Association*, the court agreed with the Minister that the regulations which banned the sale of cigarettes and other tobacco products were “to protect human life and health and to reduce the potential strain on the health care system.”\(^\text{55}\) In *Mohamed v President of the Republic of South Africa*, another challenge to the rationality of the regulations, the applicants accepted that the regulations which banned religious gatherings during the lockdown were rational (and thus constitutionally permissible) but asked for an exception.\(^\text{56}\) The court agreed that the regulations were reasonable and justifiable\(^\text{57}\) in light of the enormous sacrifices made by South Africans in the spirit of *ubuntu* and the ‘greater good’.\(^\text{58}\) However, the courts were not entirely in agreement on the rationality of the lockdown regulations, leading to conflicting judicial decisions on the same issues. This led to uncertainties on the legal status of the regulations.

In *De Beer v Minister of Cooperative Governance and Traditional Affairs*, the court considered the rationality of the hard lockdown, which prohibited indigent people and the poor living on the brink of poverty to “eke out a living” through fishing, shore-foraging, construction, street-vending, waste-picking and hairdressing. It held that the prohibition of these trades without providing financial relief to affected people essentially condemned them to hunger, stripped them of their dignity, and violated their rights to equality and to earn a living. For hungry children, the court said that the regulations violated the right to have their best interests considered.\(^\text{59}\)

The court further poked holes in the rationality of other regulations, such as the regulations which allowed the purchase of jerseys but prohibited the buying of undergarments and open-toed shoes;\(^\text{60}\) the total prohibition of night vigils;\(^\text{61}\) limitations on funeral attendance based on a familial relationship to the deceased;\(^\text{62}\) limitations on hours of exercise through time periods;\(^\text{63}\) and allowing people to run on

\(^{54}\) *De Beer*, para 4.12. The court noted that the government was following the guidelines of the World Health Organization and also that there was no cure, vaccine or effective treatment for the coronavirus.

\(^{55}\) *Fair-Trade Independent Tobacco*, para 34. In this case, the applicants had argued that the banning of the consumption of the impugned products was misguided and had no rational connection to the containment of the pandemic—see para 13.

\(^{56}\) The applicants also asked the court to rule on the reasonableness and justifiability of the refusal by the State to provide an exemption permit for congregational religious worship—see *Mohamed v President of South Africa* [2020] JOL 47131 (GP) para 42.

\(^{57}\) *Mohamed*, para 77.

\(^{58}\) *Mohamed*, para 75.

\(^{59}\) *De Beer*, para 7.3.

\(^{60}\) *De Beer*, para 7.13.

\(^{61}\) *De Beer*, para 7.5.

\(^{62}\) *De Beer*, para 7.6.

\(^{63}\) *De Beer*, para 7.8.
the promenade but outlawing going to the beach adjacent to the promenade.64 One
take-away from the judgement is that the rule of law does not give the government
carte blanche permission to do all that it can to combat the coronavirus. Instead,
the government must make sure that whatever regulation or direction it promulgates
must be authorised by enabling legislation, be consistent with the Constitution and
directly intended for the curtailment of the spread of the coronavirus and mitigation
of its effects on society. The rationality of emergency regulations during a national
state of disaster is closely connected with their proportionality.

4.3 Proportionality

When rights are limited during a national disaster and any other time, the courts
must—when called upon to decide on the constitutionality of such a limitation—be
satisfied that the “limitation is reasonable and justifiable in an open and democratic
society based on human dignity, equality and freedom”.65 The court must consider
the following:

(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 measures to achieve the purpose.66

In constitutional discourse, this is known as the proportionality test. It overlaps
with rationality and reasonableness. Its purpose is to enjoin the government to
uphold human dignity, promote equality and refrain from unconstitutionally interfer-
ing with freedoms. As an anchor of the rule of law, the principle of proportionality
emphasises the need to ensure the effectiveness of legal norms and their modesty.67
As Allan notes:

The rule of law requires that a grant of official discretion should be no greater
than strictly necessary for the tasks in view: the scope of a power must be con-
fined by its proper purposes, as those purposes are ascertained by interpreta-
tion of the empowering statute.68

In a national disaster, the emergency regulations must serve their purpose in the
least intrusive way. The government cannot promulgate and enforce excessively
restrictive regulations in the name of the greater good. Thus, it is not enough to
simply state that the emergency regulations will ‘flatten the curve’ and ‘save lives’. Instead, the regulations must be proportional to those purposes and should not

64 De Beer, para 7.9.
65 S 36(1) of the Constitution.
66 S 36(1) of the Constitution.
67 Von der Pfordten (2014), p. 27.
68 Allan (2014), p. 160.
unduly restrict the autonomy of individuals to live their lives as they deem fit. Interpreting emergency regulations and ascertaining whether their promulgation, administration and enforcement meet the rule of law test is a judicial function.

5 Judicial Enforcement of the Rule of Law in a National Disaster

Since a declaration of a national state of disaster and the promulgation of emergency regulations have far-reaching implications on the lives of peoples, it follows that the enjoyment of constitutional rights and freedoms would be curtailed. Since anyone whose rights have been infringed is entitled to protection by the courts, it follows that emergency regulations that restrict movement and the function of state institutions must leave room for people who believe that the regulations are unconstitutional, illegal, irrational and overboard to challenge such regulations in the courts. The courts may review the regulations under the principle of the rule of law. The courts can also invoke section 33 of the Constitution (the right to lawful, reasonable and procedurally fair administrative action) and section 37(5) (prohibition against the granting of indemnities to persons who commit unlawful acts during a national emergency).

Litigation against emergency regulations has the unavoidable result that different divisions of the High Court could find themselves dealing with similar issues related to the same regulations, making it inevitable for them to make conflicting judgments on the same issues. Such a situation makes it necessary for the Supreme Court of Appeal and the Constitutional Court to hear appeals and make binding precedents on the issues of difference. Given that the Constitutional Court can hear direct appeals from the High Court, grant direct access to it and consider any matter in the public interest, its intervention is crucial to bring legal certainty. However, the Constitutional Court reneged on this obligation during the COVID-19 pandemic. It said that all the appeals and applications which it received during the lockdown regarding the emergency regulations were not in the interests of justice and had no prospects of success. This was an avoidance of jurisdiction and a blow to the right to access to justice, particularly given the weighty nature of the challenges brought to the Constitutional Court regarding certain aspects of the regulations.

In a national disaster, the independence of the judiciary is critical to enable the courts to pronounce the constitutionality of the emergency regulations. For this reason, Mogoeng CJ pushed back against what he perceived as an attempt by the Minister of Justice to dictate how the courts would operate during the lockdown.

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69 See Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (A), para 14.
70 Freedom Front Plus, para 66.
71 See De Beer, para 3.4.
72 Unlike the Constitutional Court, the Supreme Court of Appeal granted leave to appeal against some of the regulations and partly granted the appeal—see Esau v Minister of Co-operative Governance and Traditional Affairs [2021] ZASCA 9.
The Chief Justice questioned the authority of the executive to close the courts using emergency regulations and then *post-facto* consult the judiciary about it:

> This is arguably comparable to a situation where the executive takes a vehicle that belongs to the judiciary, drives it to a destination of its choice, then seeks to offer a lift to the judiciary on the terms determined by the executive itself.\(^{73}\)

The tension over who had the powers to promulgate regulations on the operation of the courts during the national disaster arose for several reasons. First, the Constitution insulates the judiciary from executive and parliamentary interference by stipulating that the courts are independent and only subject to the law and the Constitution. No one may interfere with the courts in their functions.\(^ {74}\) The Minister’s promulgation of the regulation closing the courts during the pandemic was an interference with the functioning of the courts. Second, the Chief Justice is the head of the judiciary.\(^ {75}\) Therefore, the Chief Justice is the person who should, through directions, decide how the courts would operate during a national disaster. The Chief Justice cannot consult the Minister of Justice or any other person (except the heads of courts), as that would put the judiciary in a compromising position when a constitutionality challenge is raised against such a consultative process. A consultation between the Chief Justice and the executive on how to run the courts during a national disaster could be expedient, but it would erode the independence of the judiciary.

When deciding legal challenges to the emergency regulations, the courts must maintain their independence and not rule in favour of the government merely because there is a national disaster. They must not put their integrity into question by unduly leaning on the side of the government.\(^ {76}\) However, a national disaster presents a situation that requires the courts to defer to the executive as much as possible and to show restraint for the simple reason that having declared a national state of disaster, the executive must be given latitude to stir the ship out of the troubled waters. It could be for this reason that the Constitutional Court refused to hear applications and appeals on the COVID-19 regulations. The judges, unlike their counterparts in the executive, do not govern. They have neither the expertise nor the resources to analyse the trajectory of a national disaster and decide on the best response. While judicial review enables the courts to hold the executive to stay on the right side of the Constitution, a national disaster presents unprecedented circumstances which even a President, with all members of cabinet and advisors, find hard to navigate. An interdict during such a time will be catastrophic to the co-ordination of a national response to the disaster.

The foregoing caveats against judicial interference with emergency regulations during a national state of disaster open the question about what courts should do

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73 Rabkin (2020).
74 Section 165(2)-(3).
75 Section 165(5).
76 *Dr. JS Municipality v Kubheka* [2020] JOL 47362 (ML), para 138 on judicial integrity during the lockdown and how ridicule affects the judiciary.
when faced with challenges to the constitutionality, legality and rationality of emergency regulations. The courts are obliged to interpret and apply the regulations to the full extent that such regulations are lawful. It is trite that a court should declare conduct that is inconsistent with the Constitution invalid to the full extent of its invalidity and that a court must grant an equitable, just and appropriate remedy in each case based on its merits. The courts must grant relief that vindicates the rule of law. At times, vindicating the rule of law through a judgement entails reversing the effects of the unconstitutional conduct.\textsuperscript{77} The courts should “ameliorate the effect of vindicating the rule of law”.\textsuperscript{78} During a national disaster, this means that when a court finds the emergency regulations irrational, it should grant an order which directs the executive to reconsider the regulations instead of outrightly holding the regulations null and void for failing to meet the rationality test. This is because a finding to the effect that the regulations are irrational, unconstitutional and invalid has the effect of throwing the government response to the national disaster into disarray and causing uncertainty and alarm in the process.\textsuperscript{79}

Judicial intervention against illegal, irrational and disproportionate emergency regulations depends on access to justice, which, in turn, depends on the ability of legal practitioners to travel to courts when necessary and to address the courts through other means such as virtual hearings. However, this right was severely restricted during the lockdown when the court in Mpumalanga admonished counsel for bringing an application to it. In the view of the judge, the legal practitioners were not permitted to be in court.\textsuperscript{80} The court went as far as to disallow counsel in one case to charge their clients fees and expenses for travelling and appearing in court. The judge further directed the Legal Practice Council to take disciplinary action against the legal representatives.\textsuperscript{81} In the judge’s view, counsel had “flouted the Constitution, regulations and the rule of law”.\textsuperscript{82} In the light of the definition of the rule of law adopted in this contribution and confirmed with reference to various leading authorities, it would appear that the judge’s conclusion that counsel had infringed the rule of law was a misplaced misunderstanding of the tenets of the rule of law, confirming contentions that the rule of law is a widely misunderstood concept.

\textsuperscript{77} Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC 2018 10 BCLR 1179 (CC), para 69.
\textsuperscript{78} Nxasana, para 82.
\textsuperscript{79} The courts can also make orders couched in terms which leave the lockdown regulations intact but which also ameliorate unnecessary suffering or infringement of rights. See, for instance, CD v Department of Social Development [2020] JOL 47084 (WCC), in which the court dispensed with the lockdown regulations to enable the applicants to fetch their children in another province in direct contrast to the lockdown regulations which prohibited interprovincial travel. Furthermore, the court dispensed with the requirement for permits for the purposes of that journey. However, in Ex Parte Heerden, para 16, the court refused to allow the applicant to travel for a funeral because “in doing so, I will be authorizing the applicant the law under judicial decree—that no court can do”. This case can be contrasted with Stran- sham-Ford v Minister of Justice and Correctional Services 2015 6 BCLR 737 (GP).
\textsuperscript{80} Kubheka II, para 3.
\textsuperscript{81} Kubheka II, para 7.
\textsuperscript{82} Kubheka II, para 48.
6 Conclusion

The Disaster Management Act gives the executive wide powers to adopt and enforce a response to a national disaster. These powers trigger emergency powers through which the executive adopts emergency regulations. Although such emergency powers and regulations could lawfully limit constitutional rights and curtail freedoms, they are constrained by the Constitution, which requires the government to act within a set of prescribed rules and procedures to guard against uncontrolled, arbitrary and irrational regulation. Whereas the Constitution and the Disaster Management Act give the government wide powers and more discretion to combat a national disaster, the rule of law does not give uncontrolled discretion to deviate from the fundamental constitutional requirement of constitutionality. Emergency regulations must be adopted and enforced in a manner that upholds human rights and enhances access to justice so that persons who are aggrieved can challenge the regulations in the courts.

This paper examined how to protect human rights from infringement on the pretext of ‘saving lives’ during a national disaster and argued that the government must uphold the rule of law by ensuring that the adoption, administration and enforcement of emergency regulations satisfy the principles of legality, rationality and proportionality. The government must ensure that the regulations are promulgated for the purposes set in section 27(3) of the Disaster Management Act, which provides that emergency regulations adopted in response to a national disaster must be meant to combat the national disaster and mitigate its effects, assist and protect the public, and provide relief. The discussion of several cases emanating from legal challenges to the COVID-19 lockdown regulations shows that the pandemic, as a first national disaster in post-apartheid South Africa, presented unique challenges on the protection of constitutional rights and freedoms. The lockdown, imposed through emergency regulations, allowed the government to limit rights by, inter alia, the deployment of military battalions to enforce civilian compliance with the emergency regulations. Notwithstanding, court decisions show that the government generally did well in striking a balance between mitigating the national disaster and protecting human rights. The government mostly acted within the confines of the Constitution and upheld the rule of law.

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