UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW

Towards establishing the 'security laws' interpretation regime' which will facilitate the interpretation of state security laws in a manner that upholds and protects the rule of law and human rights: A South African perspective

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This thesis is submitted in pursuance of the requirements for the degree of Doctor of Philosophy

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2020

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ACKNOWLEDGEMENTS

I wish to thank my supervisor, Professor Shannon Hoctor, for his patience, advice and all the assistance he provided to me throughout my research.

To my family, friends and colleagues, your words of wisdom, encouragement and moral support is much appreciated. Special gratitude also goes to my wife for being patient with me while I was busy with research.

I also wish to also express my most sincere gratitude to the law library staff for their assistance and diligence in securing the material which I needed. I am certainly indebted to each one of you.

A special thanks also goes to the University of KwaZulu-Natal for affording me the opportunity to complete my PhD thesis with the institution, and for providing full funding. Studying at the university has immensely improved my research, writing and analytical skills. I am confident that the skills I have acquired will bode well for my academic career.

ABSTRACT

One issue that has confronted democratic states for many years is the often broad and vague nature of security laws, and the consequent need for striking a balance between security laws and the rule of law as well as human rights. A number of democratic states currently rely on legal interpretation as a method for striking the requisite balance. However, it is unfortunate that the courts do not have a consistent record when it comes to interpreting security laws consistently with the rule of law and human rights. To try and solve this conundrum, this thesis studies and analyses the South African security and emergency laws, and thereafter concludes that certain techniques which have evolved over time, can be used to secure the interpretation of security laws in a manner that is cognisant and respectful of the rule of law and human rights. Taken together, these techniques constitute what in this thesis is termed the 'security laws' interpretation regime'. Thus, the present thesis proposes the formal establishment of the said interpretation regime. Once established, the interpretation regime will become a precedent for how judges in democratic states can achieve a transformative, liberal, purposive and substantive interpretation of security laws that is cognisant and respectful of the rule of law and human rights. The envisaged interpretation regime will also set South Africa on the right path to being a precedent of good practice when it comes to the interpretation of security laws consistently with the rule of law and human rights.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTORY REMARKS

There are three premises from which this thesis proceeds. The first is that the state of emergency jurisprudence emerging on the international stage places at the forefront, among others, the ordinary state security laws (this being a concept denoting those laws (whether common-law or statutory) which deal with threats against the security of the state, and which are permanent within a particular legal system and do not amount to emergency provisions) as the ideal measure for democratic states to invoke during an emergency. However, even though this is the case, state security laws still typically comprise provisions which are overly broad and vague and therefore stand in violation of the rule of law and human rights.

The second premise is that there are certain developments taking place mainly within the South African political landscape, which developments are indicative of the need to be vigilant and to take whatever steps necessary to guard against the use of security laws in a manner that compromises the rule of law and human rights. At the same time, however, there are also developments that indicate the need to have security laws readily in place to deal with legitimate security threats (which, in turn, also threaten the rule of law and human rights).

From a legal perspective, both the first and second premise call for the striking of a balance between security laws, on the one hand, and the rule of law as well as human rights, on the other. Consequently, the third and last premise is that the courts' power of legal interpretation, as informed by the separation of powers doctrine,[1] seems to be

[1] The Constitutions of South Africa have historically been modelled on the British Westminster system, which is mainly characterised by a sovereign legislature to which the judiciary, the Executive and other organs of state are subordinate. However, elements of the American constitutional model also infiltrated the South African law. Chief amongst these was the separation of powers doctrine, in terms of which the division of state power is such that the Legislature is empowered to make the law, the Executive implements the law made by Parliament, and the Judiciary interprets the law. The American Constitution is also known for its preference of constitutional supremacy, and that it comprises a justiciable Bill of Rights and a system of judicial review. These are features which are foreign to the British Westminster

the preferred method for striking the necessary balance. Each of these three premises merit further elaboration in the discussion which follows, preceding the articulation of the purpose of the study.

1.1.1 International emergency jurisprudence

The point of departure in articulating the international emergency jurisprudence is to highlight those models and theories which inform the various emergency systems that democratic states can adopt in a time of crisis. These models and theories were revisited and critically scrutinised in the aftermath of the United States' 11 September 2001 bombings, a season of the frantic search for emergency systems which, ideally, commit to upholding and protecting the rule of law and human rights while, at the same time, not stifling the ability of governments to counter emergencies as swiftly as possible.

Oren Gross distinguishes between three models of emergency systems. In no particular order, the first model is the 'Business as Usual' model, which envisages an emergency system that retains, even in a time of crisis, the ordinary rules or principles applicable in a time of peace.[2] The second model is Gross's own model, which he calls the 'Extra-Legal Measures' model.[3] This model proposes an emergency system that empowers the authorities to act outside the law or the Constitution, provided that the relevant actors or officials believe that so doing is necessary to protect the state and that they openly and publicly acknowledge the nature of their actions.[4] It is then open to the public to decide whether to endorse *ex post facto* the conduct of the official(s) in question or whether to hold them accountable for the actions taken in

system. See generally I Currie & J De Waal *The New Constitutional and Administrative law Vol I* (2001) Part I.

[2] O Gross 'Chaos and rules: Should responses to violent crises always be constitutional?' (2003) 112 *Yale Law Journal* 1014 at 1043-1052. For further detail on this model, refer to the discussion under subheading 3.5.1.1 in chapter 3 below.

[3] For more detail on this model, refer to the discussion under subheading 3.5.1.4 in chapter 3 below.

[4] Gross op cit (n2) at 1096-1111.

response to the emergency.[5] This can be done through the elected representatives in the Legislature passing an Act of Indemnity.[6]

The third and last of Gross's models, the 'Models of Accommodation', groups together those models which propose an emergency system that keeps the ordinary constitutional system intact, but with some exceptions in order to accommodate the time of crisis or emergency.[7] Gross lists the different models grouped under this category as: (a) the Interpretative Accommodation model, in terms of which the ordinary security laws of a state are interpreted by the courts in a manner that is sensitive to the emergency, but without modifying, altering or replacing any aspects or provisions of the ordinary security laws;[8] (b) the Legislative Accommodation model, which entails the introduction of emergency-driven legislative measures in an effort to confront and eliminate an emergency;[9] and (c) the Executive Inherent Powers model, which makes provision for the inherent emergency powers of the Executive within the normal constitutional order.[10]

Another relevant model is advanced by David Dyzenhaus[11] and is called the 'model of legality based on experiments in institutional design'. This model envisages an emergency system that commits to, and upholds, the rule of law. In enforcing compliance with the rule of law, the model of legality prefers to experiment with the design of institutions instead of the traditional approach of relying on the courts as the vanguard of the rule of law, as designated by the separation of powers doctrine.

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[5] Ibid.

[6] Ibid.

[7] Ibid at 1058. For further detail on the models of accommodation and one other similar model (the state of siege model), refer to the discussion under subheadings 3.5.1.2 and 3.5.1.3 in chapter 3 below.

[8] Ibid at 1059-1064.

[9] Ibid at 1064-1066.

[10] Ibid at 1066-1068.

[11] D Dyzenhaus 'The state of emergency in legal theory' in VV Ramraj, M Hor, & K Roach (eds) *Global Anti-terrorism Law and Policy* 1 ed (2005) 65-89. For a further discussion on this model, refer to subheading 3.5.1.6 in chapter 3 below.

Dyzenhaus cites the use of special administrative tribunals as an example of what could be an imaginative institutional design to preserve and protect the rule of law.[12]

Another model is Bruce Ackerman's 'escalating cascade of supermajorities'.[13] in terms of this model, the Executive exercises unlimited emergency powers, but is subject to, among other controls, the supermajoritarian escalator. The essence of the supermajoritarian escalator is that a state of emergency automatically terminates after the lapse of the stipulated time period, and that the extension of the stipulated period can be achieved with a significantly high majority vote in Parliament. Finally, there also exist theories that could also underpin some emergency systems.[14] Despite having different content, features and even names, these theories share a common ideology to the effect that the law plays no role in an emergency.

Amongst the models and theories that have been identified above, the Legislative Accommodation model appears to be gaining traction as the model which gives rise to the preferred emergency system for democratic states.[15] There are numerous

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[12] Dyzenhaus op cit (n11) 82-83.

[13] B Ackerman 'The emergency constitution' (2004) *Yale Law Journal* 1029 at 1047-1049. Full detail on this model follows in 3.5.1.5 in chapter 3 below.

[14] For instance, there is the theory of 'militant democracy' and the 'theory of the exception'. For a discussion on these theories, refer to subheading 3.5.2.2 and 3.5.2.3 respectively in chapter 3 below.

[15] J Ferejohn & P Pasquino 'The law of the exception: A typology of emergency powers' (2004) 2 *International Journal of Constitutional Law* 210 at 215. The Legislative Accommodation model is so popular that the approach to emergencies seems to be that even those jurisdictions which have a Constitution that provides for special emergency powers (following a declaration of a state of emergency) hardly make use of that mechanism in a time of crisis, but would rather rely on legislation. The foregoing is true for stable democracies that face no need to invoke the extreme constitutional powers to protect their constitutional order (ibid).
There are two reasons that have been advanced by Ferejohn & Pasquino (ibid at 215-216) for the reluctance to officially declare states of emergency and thereafter invoke the accompanying emergency powers. The first is that it may well be that there are hardly any emergencies of a sufficiently serious magnitude to warrant the declaration of a state of emergency. It is generally accepted that the declaration of a state of emergency is reserved for serious threats to the constitutional order of a state, such as invasion, revolution or catastrophic military defeat. The second reason is that the advanced policing tactics (supported by technology and other powers made available by ordinary security legislation in place) are so effective that what would have constituted an emergency before can nowadays be easily dealt with using ordinary policing methods.
The one factor that is often overlooked, yet is a significant reason operating against the declaration of a state of emergency, is the adverse economic repercussions which normally follow such a declaration. For instance, following the declaration of the state of emergency in 1960 occasioned by the resistance against the carrying of passes in terms of the then pass law, the apartheid government in South Africa was so concerned about the low investor confidence in the country that it subsequently opted to incorporate emergency provisions into ordinary security legislation, rather than to declare a state of emergency every time there may have been a need to do so. What followed was a series of draconian

reasons for this,[16] but the main seems to be that, regardless of how exceptional the emergency legislation that the Legislative Accommodation model gives rise to in an emergency, the said emergency legislation nonetheless exists within the ordinary legal system and is therefore subject to democratic values such as the rule of law, human rights and judicial review.[17]

The Legislative Accommodation model encompasses two emergency measures, namely the use of emergency legislation,[18] as well as the use of ordinary security laws (usually in the form of security legislation).[19] The emergency legislation option appears

security legislation, thus confirming that South Africa was, during apartheid, under a permanent state of emergency. See J Dugard *Human Rights and the South African Legal Order* (1978) 112.

[16] The other reasons for the preference of the legislative model can be summarised as follows: (a) since the emergency powers are provided for in legislation, the legislative model places Parliament in the position of recognising the emergency, of determining the extent of the powers available in an emergency, of regulating and monitoring the exercise of such powers, of investigating the abuses thereof, and of determining when an emergency has come to an end (Ferejohn & Pasquino op cit (n15) 217); (b) unlike the emergency powers entrenched in the Constitution and which give the Executive special and 'difficult-to-control' powers, legislation permits closer supervision of the Executive in their use of legislative emergency powers (ibid at 218); (c) because legislation is passed by the Legislature, it is seen to be giving popular support to, and thereby legitimises, the Executive's use of emergency powers (ibid at 220); and (d) legislation offers a flexible method of responding to emergencies as its legal instruments can be tailored to the actual circumstances of each individual case (ibid at 229).

[17] Ferejohn & Pasquino op cit (n15) 215. What is ironic about the preference of the legislative model is, firstly, that, while it is acknowledged that modern emergencies are more devastating than ever before, there is a notable shift away from an equally drastic response to such a catastrophic danger, that being the declaration of a state of emergency. Secondly, it is submitted that the alternative to the declaration of a state of emergency (i.e. reliance on legislation) was previously abandoned seemingly because it subjected the exercise of statutory powers to certain constitutional constraints (such as adherence to the rule of law and human rights) which, despite noble intentions, had the effect of hindering governments from acting quickly and decisively in order to counter the emergency. However, part of what makes the legislative model more attractive today is the very fact that it attracts constitutional constraints that were previously seen to be hindering swift and decisive action on the part of the government.

[18] In those states where there is no provision for the declaration of a state of emergency in the Constitution, the emergency legislation is often relied upon, and it provides for emergency powers that are equivalent to those which are normally available following the declaration of a state of emergency. The emergency legislation operates in two ways. The least common *modus operandi* is for special emergency measures or powers to be incorporated into other existing legislation, thus elevating that existing legislation into emergency legislation or at least giving the existing legislation an 'emergency-flavour' or make it to be 'emergency-driven' (Gross op cit (n2) 1065). The most common *modus operandi* is the enactment of a new (and usually temporary) emergency legislation which vests in the Executive the extraordinary emergency powers (ibid).

[19] Such is clear from the submission by Gross to the effect that the legislative model also operates by modifying the ordinary system through the introduction of ordinary legislation with emergency-driven provisions (Gross op cit (n2) 1065). It is submitted that the ordinary legislation envisaged here is the ordinary security legislation, which is permanent within the legal system and comprises security measures which are less drastic in comparison to those which are found in the emergency legislation or those available following a declaration of a state of emergency. This makes the ordinary security legislation ordinary in name, but emergency-driven in substance (ibid).

to be more popular in comparison to the ordinary security legislation option. This is deduced from the fact that the emergency legislation is the most commonly written about and used measure during emergencies in advanced democracies, such as the United States and the United Kingdom.[20] The popularity of the emergency legislation appears to be also driven by the fact that governments would want to be seen to be actually doing something rather drastic to counter the emergency.[21] Merely putting faith in existing enactments, structures and systems does not enhance the picture that the government is doing something meaningful.

As already mentioned, there is a second emergency measure that forms part of the legislative model, and that is the use of ordinary security laws. In most instances, ordinary security laws come in the form of security legislation, such as South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act.[22] However, in South Africa, there also exists the common-law security measures (such as the common-law crimes of treason and sedition). What trivialises the ordinary security laws when compared to the emergency legislation is the very fact that ordinary security laws comprise measures that are 'ordinary' in the face of an extraordinary situation (i.e. the emergency). By virtue of being a less popular measure for responding to emergencies, it comes as no surprise that ordinary security laws occupy limited space in the writings on the Legislative Accommodation model.

The attitude towards ordinary security laws changed drastically after Resolution 1373 of the United Nations Security Council, which was adopted following the 11 September 2001 bombings in the United States. This Resolution compelled all member states of the United Nations 'to put in place measures against the financing of terrorism', it instructed states to refrain from supporting terrorist acts, and also instructed them to bring to justice those who participate in the financing, planning, preparation or

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[20] These jurisdictions do not have their emergency provisions embedded in the Constitution, thus the general approach in times of emergency is to invoke the emergency powers provided for in the emergency legislation. The Constitution of the United Kingdom, in particular, even dictates that that the Executive can only exercise power delegated to it by Parliament by means of legislation.

[21] O Gross & F Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) 69.

[22] 40 of 2004.

perpetration of terrorist acts.[23] Many states, including South Africa, responded by enacting security legislation (commonly known as anti-terrorism legislation), thus triggering the rise to prominence of ordinary security laws.

However, the prominence of ordinary security laws also exposes the extent of under-development of this area of the law, in that security laws remain notorious for containing provisions that are overly broad and vague, and thus in conflict with the rule of law and certain constitutional rights. Therefore, the fact that ordinary security laws are touted as the ideal measure even in the emergency context notwithstanding the shortcomings they suffer, is a loud call for suitable measures to be put in place so as to strike a balance between security laws on the one hand, and the rule of law as well as human rights, on the other. This exercise has already been undertaken in the context of emergency laws. Some of the models and theories cited above strive to strike a balance between emergency laws and the rule of law, as well as between emergency laws and human rights. However, the same has not been done in the context of security laws. The preferred method of striking the much-needed balance (and challenges therewith) will be revealed in 1.1.3 below.

1.1.2 Developments within the South African political and legal landscapes

As already stated, the second premise from which this thesis proceeds is that there are certain developments taking place mainly within the South African political landscape. These developments could, on the one hand, be viewed as indicating the need to be vigilant and to take whatever steps necessary to guard against the improper use of security laws to the detriment of the rule of law and human rights. On the other hand, however, some of these developments are a reminder of the need to have security laws readily in place to deal with legitimate security threats which might compromise the rule of law and human rights.

It is submitted that these developments bolster the call to put in place measures that will strike a balance between security laws and the rule of law as well as human rights. The consideration of the developments in the South African legal landscape lends

[23] CH Powell 'South Africa's legislation against terrorism and organised crime' 2002 *Singapore Journal of Legal Studies* 104.

further credence to the need for striking a balance mainly between security laws and the rule of law. I now turn to discuss these developments.

1.1.2.1 Developments within the South African political landscape

South Africa's democracy had a rough start as it confronted a record of 338 bombing incidents between 1994, being the year of its inception, and 1998.[24] Organised terrorist groups aimed at pursuing domestic acts of terrorism also emerged at the time. Chief amongst these was an organisation named the People Against Gangsterism and Drugs (PAGAD)[25] as well as the Boeremag.[26] Fortunately, the operations of PAGAD and the Boeremag were successfully halted. Members of the Boeremag are currently serving imprisonment terms.

More recently, however, there has been a re-emergence of incidents which the authorities could characterise as a security threat and therefore merit the invocation of security laws. The upsurge of violent protests[27] is one of the incidents envisaged

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[24] South African Law Commission Discussion Paper 92 (project 105) *Review of Security Legislation (terrorism: section 54 of the Internal Security Act 1982 (Act No. 74 of 1982))* (2000) para 1.5. See also A Hubschle 'Among the less restrictive? South Africa's anti-terror law: commentary' (2005) 14 *African Security Review* 105 at 106.

[25] PAGAD began as a multi-religious group aimed at fighting crime and violence in the drug-stricken Cape Flats near the City of Cape Town. Due to being dominated mainly by Muslim people, PAGAD later became an Islamic organisation which adopted an anti-government and anti-Western stance. It also became notorious for acts of terrorism, such as vigilante attacks on various 'synagogues, gay nightclubs, moderate Muslims, tourist attractions and restaurants with Western associations'. It is also reported to have had links with other terrorist groups in the Middle East. See 'People Against Gangsterism and Drugs' available at http://www.sahistory.org.za, accessed on 17 July 2019.

[26] In 2002, an Afrikaner right-wing group called the Boeremag began its operations by detonating bombs in Soweto, a township near the City of Johannesburg. Members of this group were subsequently arrested, and they faced trial which began in May 2003. Due to the various legal wrangles ranging from jail conditions to issues pertaining to legal aid, the Boeremag trial holds the record as one of the longest running criminal trials in South African legal history. It culminated in a conviction and sentence in 2012 and 2013 respectively. See 'Boeremag treason trial timeline' available at *http://www.sahistory.org.za*, accessed on 17 July 2019.

[27] It is a well-known fact that the political, social and economic challenges facing South Africa have led to many communities taking to the streets to express their demands. However, since the year 2004, these protests have gradually been adopting the culture of violence. Be that as it may, these protests, amongst other factors, have exposed the ruling African National Congress's (ANC) service delivery shortcomings, thus damaging the public image of the party. Such a state of affairs can only benefit the opposition parties, as was seen from the results of the 2016 local/municipal government elections in which the ANC's electoral support declined significantly to a point that it lost control of three of the major metropolitan councils that it used to govern. The downward trend of the ANC continued even in the 2019 general elections when its electoral support suffered a further decline, though the party did not lose the elections. For a full discussion of the statistics and other issues relating to violent protests, see

here. In the year 2015, there were reports of two instances where security laws were sought to be invoked in order to prosecute the perpetrators of alleged violence during protests. The first incident took place in June 2015 when a prosecutor in the Durban Magistrates' Court sought authorisation from the National Director of Public Prosecutions to charge with terrorism the perpetrators of violence during a violent demonstration by taxi operators in the City of Durban.[28] The second incident took place in October 2015 when it was reported that the students who wreaked havoc during the march to Parliament organised under the *#FeesMustFall* campaign were charged with treason.[29] However, the National Prosecuting Authority and the Hawks, a specialised police investigations unit, have since denied the latter allegation.[30] In such cases, vigilance is required because of the real possibility that the invocation of security laws might just be nothing more than the abuse of security laws in the name

K Khumalo *Re-opening the debate on developing the crime of public violence in light of the violent protests and strikes* (unpublished LLM thesis, University of KwaZulu-Natal, 2015) 9-16.
The changing trends around protest action, particularly the level of violence, gave rise to the landmark decision in *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC), being the first judgment in a democratic South Africa to pronounce on right to freedom of assembly as enshrined in section 17 of the Constitution of the Republic of South Africa, 1996. In essence, the court upheld the constitutionality of a statutory provision (section 11 of the Regulation of Gatherings Act 205 of 1992) which allows for the imposition of a civil sanction on organisers of protest action in the event that the protest action in question turns violent. It found that the imposition of a civil sanction was a justifiable limitation of the right to freedom of assembly. For a discussion and other views on this case, see K Khumalo 'Developing the crime of public violence as a remedy to the violation of the rights of non-protesters during violent protests and strikes – a critical analysis of the South African jurisprudence' (2015) 36 *Obiter* 578 at 581-584; M Bishop & J Brickhill 'Constitutional Law' 2013 *Annual Survey of South African law* 150-215; and IM Rautenbach 'The liability of organisers for damage caused in the course of violent demonstrations as a limitation of the right to freedom of assembly *SATAWU v Garvas* 2012 8 BCLR 840 (CC): regspraak' 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 151-164.

[28] See, *inter alia*, K Padayachee 'Taxi drivers likely to face terror charges' *IOL News,* 11 June 2015, available at http://*www.iol.co.za/news/crime/taxi-drivers-likely-to-face-terror-charges*, accessed on 29 July 2016; G Stolley 'Taxi strikers facing terrorism charges seek bail' *News24,* 11 June 2015, available at *http://www.news24.com/SouthAfrica/News/Taxi-strikers-facing-terrorism-chargesseekbail20150611*, accessed on 29 July 2016; and A Khoza 'Durban taxi operators face Terrorism Act charges' *News24,* 11 June 2015, available at *http://www.news24.com/South Africa/News/Durban-taxi-operators-face-Terrorism-Act-charges-20150611*, accessed on 29 July 2016.

[29] See, *inter alia*, '#FeesMustFall arrested students to face serious charges' *eNCA News,* 22 October 2015, available at *http://www.enca.com/south-africa/students-held-cape-town-central-police-station-released,* accessed on 3 October 2016.

[30] See C Bernado 'No treason charges for protesting students' *IOL News,* 22 October 2015, available at *http://www.iol.co.za/crime-courts-no-treason-charges-for-protesting-students-19341,* accessed on 3 October 2016.

of maintaining peace and security,[31] yet the rule of law and human rights are adversely affected.

Another development that constitutes a reason to be wary of the invocation of security laws is the increasing trend in present-day South Africa of confusing political speech with calls of terror, which invite the invocation of security laws. This is evident from two instances where flamboyant politicians who had unequivocally called for the removal of former President Zuma had charges of treason and/or terrorism being laid against them. The ruling African National Congress (ANC) laid a charge of high treason against the leader of the Economic Freedom Fighters (EFF), Julius Malema, for his public utterances that the EFF will take over the country over a barrel of a gun.[32] A charge of treason and/or terrorism was also laid against one Sipho Pityana, a popular figure in business circles, following Pityana's call for former President Zuma to step down as President of South Africa or be removed before the end of his term of office. The argument here was that, while free speech is permissible, actively organising the business sector to support the call for a regime change constituted economic terrorism.[33]

As was mentioned earlier, there are also incidents in the political sphere that serve as a reminder for the need to have security measures readily in place to deal with legitimate security threats (which endanger the rule of law and human rights). It may very well be that South Africa currently faces no significant security threats, but that is not a reason to dispense with security measures altogether, especially given that terrorism is a scourge from which no country is immune.

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[31] At this juncture, one is reminded of the very first line in the much-celebrated article by Matthews and Albino which reads: '[a]nd we should recognise that the proper basis of our security is in good administration rather than in fear of legal penalties'. See AS Matthews & RC Albino 'The permanence of the temporary: an examination of the 90- and 180-day detention laws' (1966) 83 *South African Law Journal* 16.

[32] This statement has since been qualified by the EFF to mean that the EFF would only have taken over the country over a barrel of a gun had the 2016 local government elections been rigged – see LM Khoza 'ANC says its laid charges of high treason against Malema' *EWN News* available at *http://ewn.co.za/2016/04/26/ANC-confirms-laid-charges-against-EFF,* accessed on 23 September 2016.

[33] 'Manyi formally lays treason charges against Pityana' *SABC News,* 20 September 2016 available at *http://www.sabc.co.za/news/*, accessed on 23 September 2016.

There are at least five incidents that have occurred in South Africa and which bear testimony to the need to have security laws readily in place. Firstly, South Africa grapples not just with violent protests, but also other social ills such as sporadic xenophobic attacks, taxi violence, and gang-related violence. Since instability or unrest is a common breeding ground for terrorist activities,[34] the regular occurrence of the aforementioned sporadic incidents of violence can one day be the manifestation of terrorist acts, in which case security laws must be readily available to deal with such situations.

Secondly, South Africa has observed an upsurge in reported incidents of members of certain organisations who are found to be plotting to carry out terrorist acts,[35] and who must therefore be dealt with using the country's security laws. Thirdly, the public utterances of Mr Gwede Mantashe (the former secretary-general of the ANC, now chairperson of the party), to the effect that there are external forces operating to effect a regime change in South Africa,[36] may have been cast aside as nothing more than a political gimmick or paranoia of the ANC, but they nonetheless add some weight, no

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[34] R Kalidheen *Policing mechanisms to counter terrorist attacks in South Africa* Magister Technologicae-Policing (unpublished LLM thesis, University of South Africa, 2008) 94-99.

[35] In the year 2012, a group of men belonging to a certain Afrikaner right-wing group were arrested and charged with high treason for orchestrating a plan to bomb the ANC's elective conference in Mangaung. The plan also entailed the killing of former President Zuma and other senior ANC leaders, in execution style. The men were arrested, and various weapons were seized from their possession (see V Pillay & S Evans 'Mangaung 'bomb' part of Zuma assassination plot' *Mail & Guardian,* 18 December 2012, available at *http://mg.co.za/article/2012-12-18-mangaung-bomb-part-of-zuma-assassination-plot*, accessed on 22 September 2016). One of the accused persons in this case has already pleaded guilty to the charge of conspiracy to take part in terrorist acts and is serving an eight-year sentence (see 'Malema's threats sparked right-wing plot', *IOL News,* 13 February 2012, available at *http://www.iol.co.za/news/crime-courts/malemas-threasts-sparked-rightwing-plot,* accessed on 23 September 2016).
Furthermore, in July 2016, two South African men allegedly with links to a terrorist organisation, ISIS, were apprehended and charged with terrorism for planning to bomb the American embassy as well as other Jewish Institutions (see I Pijoos 'SA brothers charged with planning to blow up US embassy and 'Jewish institutions'' *News24,* 11 July 2016, available at *http://www.news24.com/SouthAfrica/News/sa-brothers-charged-with-planning-to-blow-up-US-embassy-and-Jewish-Institutions,* accessed on 22 September 2016).
As recent as December 2019, leaders of a particular right-wing organisation in South Africa were arrested ahead of executing plans to conduct various terrorist activities, including bombing shopping malls and informal settlements populated by black people (see 'Hawks arrest 3 more alleged members of 'terrorist' Christian Resistance Movement' *IOL News,* 19 December 2019, available at *https://www.iol.co.za/news/south-africa/gauteng/hawks-arrest-3-more-alleged-members-of-terrorist-christian-resistance-movement-38443530*, accessed on 5 January 2020).

[36] I Pijoos & W Pretorius 'South Africans must defend the revolution – Mantashe' *News24,* 19 February 2016, available at *http://www.news24.com/SouthAfrica/News/south-africans-must-defend-the-revolution,* accessed on 23 September 2016.

matter how little, to the need for the country to have security measures readily in place should such an eventuality materialise at some stage.

Fourthly, in 2017, the draft emergency regulations contained in the internal memorandum of the military were widely publicised in the media.[37] Despite the Presidency under former President Zuma denying any knowledge of the draft regulations and reiterating that it was not working on new emergency regulations,[38] one is left wondering what the military was preparing for. Fifthly, as recent as the first half of 2018, South Africa experienced a number of bomb scare incidents, although none have materialised into a catastrophe or have been declared as an act of terrorism.[39]

The foregoing illustrates clearly that the need to be vigilant whenever security laws are being invoked is as equally important as the need to have security laws readily in place to deal with security threats. The only solution to this riddle is to seek to strike a balance between security laws, the rule of law and human rights. Once again, the preferred method in this regard (and the challenges associated therewith) is identified in 1.1.3 below.

1.1.2.2 Developments within the South African legal landscape[40]

The present study comes after some interesting developments in the South African legal sphere have unfolded, which developments bolster the need for striking a balance between security laws and the rule of law, in particular. The study comes at a time when the Executive, especially under former President Zuma, had been found wanting in many highly sensitive political cases, and in which the rule of law (usually

[37] E Gibson 'Draft regulations for state of emergency drawn up' *News24*, 12 December 2017, available at *http://www.news24.com/SouthAfrica/draft-regulations-for-state-of-emergency-drawn-up-2017-1211*, accessed on 19 July 2019.

[38] S Writer '9 alarming state of emergency law proposals you really need to know about' *Businesstech*, 12 December 2017, available at *http://businesstech.co.za/news/government/216191/9-alarming-state-of-emergency-law-proposals-you-really-need-to-know-about*, accessed on 19 July 2019.

[39] N Mngoma 'Hawks step in to investigate Durban bomb incidents' IOL News, 10 July 2018, available at *http://www.iol.co.za/mercury/news/hawks-step-in-to-investigate-Durban-bomb-incidents,* accessed on 11 July 2018.

[40] A further discussion of the cases cited in this section can be found throughout S Ellman 'Struggle for the rule of law in South Africa' (2015) 60 *New York Law School Law Review* 57-104.

represented by the principle of legality) was at the centre[41] either directly or indirectly.[42] As a result, tension had since arisen between the Executive and the judiciary. The tension reached boiling point following the judgment in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development,*[43] in which the full bench of the North Gauteng High Court upheld the government's obligation under international law to have arrested the former Sudanese President, Omar al-Bashir, when he was in South Africa.

The strained relations between the judiciary and the Executive prompted a meeting of delegations comprising senior members of both the judiciary and the Executive, led by their heads (the Chief Justice and President of the Republic respectively), to iron out relations between the two arms of state.[44] It was not long after the judgment in the Omar al-Bashir matter that the wrath of the rule of law once again fell on the Executive. This time, it was the North Gauteng High Court pronouncing on the 'spy tapes'

[41] These cases have contributed to the development of a vibrant body of administrative laws based on the principle of legality, an aspect of the rule of law. In this regard, see C Hoexter 'The rule of law and the principle of legality in South African administrative law today' in M Carnelley and SV Hoctor (eds) *Law Order and Liberty - Essays in Honour of Tony Mathews* (2011) 55-74.

[42] Loosely speaking, the rule of law can be said to apply directly if the basis of the review of certain (Executive) conduct is the principle of legality or the rule of law itself. It applies indirectly if the review is based on other grounds, such as those which are provided for in the Promotion of Administrative Justice Act 3 of 2000, the latter being indirectly influenced by the rule of law.

[43] 2015 (5) SA 1 (GP). The judgment of the High Court was subsequently confirmed by the Supreme Court of Appeal (SCA) in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA).

[44] 'Statement on the meeting of the National Executive and the Judiciary, Union Buildings, Pretoria' 27 August available at *http://thepresidency.gov.za,* accessed on 3 October 2016.

debacle[45] and subsequently the Constitutional Court in the Nkandla saga.[46] The same trend continued in the context of the appointment of public office bearers, which started notably with the setting aside as irrational of the appointment of Advocate Menzi Simelane as the then National Director of Public Prosecutions (NDPP).[47]

The rule of law also played a central role in the legal woes that plagued the South African Police Service's (SAPS) National Head of Crime Intelligence, Richard Mdluli. These legal woes took a different turn when the North Gauteng High Court in *Freedom Under Law v National Director of Public Prosecutions*,[48] guided by the rule of law, reviewed and set aside two decisions pertaining to Mdluli. The first was that of the officials of the NPA to withdraw the charges of fraud, corruption, murder and other related crimes against Mdluli. The second was that of the National Police Commissioner to withdraw the disciplinary proceedings and suspension of Mdluli.

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[45] The earliest judgment in the protracted litigation which was to ensue in the spy tapes debacle was the judgment of the Supreme Court of Appeal (SCA) in *Democratic Alliance v Acting National Director of Public Prosecution* 2012 (3) SA 486 (SCA). In this matter, the Democratic Alliance (DA), the official opposition party in South Africa, successfully relied on the rule of law to secure a favourable finding from the SCA to the effect that it (the DA) be furnished with the controversial spy tapes. These spy tapes had informed the decision of the National Prosecuting Authority (NPA) to discontinue the prosecution of former President Jacob Zuma for corruption on the basis of the abuse of process by the NPA officials, as well as political interference in the prosecution. The court reasoned that the decision to discontinue a prosecution may not have been administrative action under Promotion of Administrative Justice Act 3 of 2000, but it was nonetheless reviewable in terms of the rule of law. The court further reasoned that its exercise of the power of review in this matter was dependent upon the release of the spy tapes to the DA.
A couple of years after the SCA ordered the release of the spy tapes, the DA, in *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP), once again relied successfully on the rule of law in having the decision of the NPA to discontinue former President Zuma's prosecution reviewed and set aside as irrational. Zuma's appeal to the SCA failed, and the charges against him have since been reinstated.

[46] See *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) in which the Constitutional Court, the highest court in South Africa, found that former President Zuma had failed to uphold, defend and respect the Constitution when he failed to act on the recommendations of the Public Protector to pay a portion of the non-security upgrades done to his private residence in the area known as Nkandla. The court also pronounced on the unlawfulness of Parliament's conduct in subverting the report and remedial actions of the Public Protector.

[47] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC). In this case, the Constitutional Court overturned the appointment of Simelane because of the scathing findings of dishonesty on his part by the Ginwala Commission of Inquiry. The Commission had been tasked with investigating the fitness of the then head of the NPA, Advocate Vusi Pikoli, to hold office. Simelane was found by the Commission not to have been a credible witness as he had lied and fabricated evidence several times during the course of the Inquiry. For these reasons, the court found Simelane's character and integrity not to be consistent with the constitutional requirements of the head of the NPA, and declared his appointment to be irrational.

[48] 2014 (1) SA 254 (GNP).

However, on appeal, the Supreme Court of Appeal (SCA) partially upheld the decision of the court *a quo*.[49]

The rule of law was also instrumental in the lengthy litigation between the Democratic Alliance (DA), the South African Broadcasting Corporation (SABC) and the Minister of Communications. The subject of this litigation was the promotion of one Hlaudi Motsoeneng from the position of Acting Chief Operating Officer to permanent Chief Operating Officer (COO) of the SABC. The promotion had been granted in spite of the scathing findings of the Public Protector which rendered questionable Motsoeneng's integrity to hold such an office.

The DA approached the court seeking two outcomes. The first was the enforcement of the recommendations of the Public Protector[50] i.e. that Motsoeneng be subjected to disciplinary proceedings on allegations of his irregular appointment to the post of acting COO and other misconduct, including misrepresenting his qualifications. The DA successfully obtained an order from the SCA which upheld the binding nature of the recommendations of the Public Protector.[51]

The second outcome which the DA successfully obtained was an order reviewing and setting aside as irrational the recommendation by the Board of the SABC that Motsoeneng be appointed as permanent COO, as well as the subsequent approval of the Board's recommendation by the Minister of Communications.[52] Both the Western Cape High Court and the SCA have refused the SABC and the Minister of

[49] See *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA). The SCA held that the decision to withdraw the charge of murder and other related charges was not irrational, but the High Court had gone too far and infringed the separation of powers doctrine when it ordered the reinstatement of the charges and disciplinary proceedings without delay.

[50] The Public Protector is one of the six independent state institutions that are known as Chapter 9 institutions. These are provided for in chapter 9 of the Constitution, and they are mandated to support and defend democracy. These institutions are independent from the government and are subject only to the Constitution and the law. They also report annually to Parliament. In terms of the preamble to the Public Protector Act 23 of 1994, the Public Protector is particularly tasked with investigating, and thus protecting the public, against maladministration in government and other improper conduct of public officials (see 'The office of the Public Protector 1995' available at *http://www.sahistory.org.za/article/office-public-protector-1995,* accessed on 2 August 2019).

[51] *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA).

[52] *Democratic Alliance v South African Broadcasting Corporation SOC Ltd* 2016 (3) SA 468 (WCC).

Communications leave to appeal due to there being no reasonable prospects of success or any other compelling reason to hear the appeal.

Berning Ntlemeza's appointment as the national head of the Directorate for Priority Crimes Investigations (DPCI) has also been dealt a fatal blow by the judgment of the North Gauteng High Court fuelled by the rule of law.[53] Had the DA persisted with litigation against South African Airways (SAA), it was expected that the rule of law would have played a central role in its challenge of the decision of the cabinet to reappoint one Dudu Myeni as the Chairperson of the Board of SAA, despite her failure to run profitably the said state-owned airline.[54] However, Dudu Myeni has since vacated this position, and the DA has apparently abandoned this matter.

What can be deduced from the foregoing is that the rule of law often finds application in politically-sensitive public law matters. Although the rule of law is commended for standing firm in its dispensation of justice even if that means it has to operate against powerful political actors, the reality is that the conclusions which the courts arrive at in following the rule of law have largely been against the Executive, and this has culminated in tension between the two arms of state.

It must be noted with concern that the decay of the rule of law in South Africa's neighbouring country, Zimbabwe, was preceded by similar tension between the Executive and Judiciary following the judiciary's stance in opposition to the Zimbabwean government's land redistribution policy which led to widespread land grabs.[55] Therefore, the obvious danger posed by the tension between the Executive and the Judiciary is that it might lead to the South African government also withdrawing

[53] See *Helen Suzman Foundation v Minister of Police* 2017 (1) SACR 683 (GP).

[54] See media statement delivered by the former DA leader, Mr Mmusi Maimane MP, at a press briefing: 'SAA: DA to challenge Dudu Myeni reappointment in court' available at *http://www.da.org.za/2016/09/saa-da-challenge-dudu-myeni-reappointment-court*, accessed on 23 September 2016.

[55] GE Devenish 'The rule of law revisited with special reference to South Africa and Zimbabwe' 2004 *Tydskrif vir die Suid-Afrikaanse Reg* 675 at 686-690.

its compliance with, and respect for, the rule of law, which event would send the country back to apartheid-style[56] governance and even lead to a state of anarchy.[57]

State security is another politically-sensitive area in which the rule of law will certainly find application. The application of the rule of law to declare security laws unconstitutional would most likely exacerbate the already existing tension, since state security is undoubtedly one of the high-ranking interests of any government, and the survival and authority of any government is dependent upon there being peace and security. This state of affairs discourages the hasty declaration of security laws as unconstitutional. Instead, it encourages the formulation of creative and innovative methods of striking a balance between security laws and the rule of law. This thesis proposes a method that will assist in striking the required balance.

The method proposed in this thesis is identified during the course of the discussion that follows under heading 1.2 below. For present purposes, it is sufficient to mention that the proposed method is neither skewed in favour of upholding the rule of law and human rights nor is it skewed in favour of producing a result that is favourable to the Executive. Thus, it will produce an outcome that upholds the rule of law and human rights where justified, likewise, it will produce a result that favours the Executive where that is required.

Given the objective nature of the proposed method, its operation should convince the Executive that, before a security measure is declared unconstitutional, the courts will have done everything possible to preserve its constitutional validity. This way, state security issues would be removed from the list of issues that contribute to the friction between the judiciary and the Executive, thereby reducing the risk of the Executive's withdrawal from complying with the rule of law.

Most importantly, through the method proposed in this thesis, the removal of state security issues from the list of factors that contribute to the friction between the Judiciary and the Executive will be achieved without the judiciary having appeared to

[56] Apartheid (an Afrikaans language term meaning 'apartness') was effectively a policy of racial segregation that was perpetuated by the National Party government from 1948, when it assumed power, until 1994 when the new democratic dispensation was ushered in (see 'A history of Apartheid in South Africa' available at *http://www.sahistory.org.za,* accessed on 2 August 2019).

[57] It remains to be seen whether the incumbent President Cyril Ramaphosa's promise of change from the Zuma era will also translate to less friction between the Executive and the Judiciary.

be 'backpedalling'[58] when it comes to making tough decisions against the Executive. After all, it is well established in South African jurisprudence that the Constitution and the rule of law reign supreme,[59] and the other democratic institutions, such as the courts in the main, should call the Executive to order in the event that it deviates from the rule of law. This falls squarely within the words of Mangu[60] who aptly states that:

> 'The principles of the rule of law are indispensable cornerstones of constitutional democracy on South Africa. A court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice'.

1.1.3 Legal interpretation as the preferred method of striking the required balance

The third and last premise from which this thesis proceeds is that the preferred method of resolving conflicts in the law, clearing ambiguities, developing the law and striking a balance between competing interests in law, is to rely on the courts' power of interpretation.[61] Normally, the courts are assisted by academic writings in executing this task, albeit the courts' position is strengthened by the fact that its pronouncements are authoritative and binding, whereas academic views are only persuasive. While the whole of this thesis is filled with examples of jurisprudential development being done through legal interpretation by the courts (with the support of academic writings), chapter 4 below provides direct and specific examples in this regard.

The foregoing is a common practice in many democracies, and it has the backing of eminent international and local scholars. Legal interpretation therefore remains the preferred measure for striking a balance between ordinary security laws and the rule

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[58] The term 'backpedalling' is borrowed from AM Mangu 'The Bashir case and backpedalling on human rights and the rule of law in post-Mandela South Africa'(2015) 2 *African Journal of Democracy and Governance* 179 at 190.

[59] Ibid at 192.

[60] Ibid at 190.

[61] Evidence of the preference of legal interpretation is located throughout chapters 4 to 7 below.

of law as well as human rights, especially after prosecutorial restraint has not curbed the temptation to unduly invoke the broadly- and vaguely-worded security laws.

Such heavy reliance on legal interpretation in the present context can be seen as an acknowledgement that security laws are by their very nature and of necessity couched in broad terms, presumably in an effort to capture as much conduct that can be deemed to be a security threat. As a result, there is a reluctance to call for the wording of security laws in precise language. Instead, legal interpretation would rather be relied upon in order to prevent the abuse of security laws, which ultimately compromises both the rule of law and human rights. The ultimate goal which is facilitated by the courts' power of legal interpretation is the preservation of the nature of security laws (i.e. being couched in broad terms), while these laws are clothed with interpretation that renders them consistent with the rule of law and human rights, thus passing constitutional muster.

Despite being vested with the power of interpretation, history proves that the courts do not have a consistent record of upholding and protecting the rule of law and human rights in the face of security breaches requiring the invocation of security laws.[62] This

[62] The courts' inconsistent record when it comes to the protection of the rule of law and human rights persists not only when security laws are invoked, but also when emergency laws are being used.
It remains to be seen whether the legal developments which ensued following government action in the fight against the recent Covid-19 scourge, provide any indication of the courts' behaviour during crisis. Interestingly, in one of the cases heard during the 'hard' (i.e. level 5) Covid-19 lockdown in South Africa, the presiding judge reportedly did not take kindly to the fact that many of the lawyers who appeared in the matter had travelled without permits. The judge went as far as to make obiter remarks to the effect that the 'present extreme circumstances caused by Covid-19 justifies the regulations and directives' made in terms of the Disaster Management Act 57 of 2002, and that these are 'justifiable and reasonable in an open democratic society'. This statement is quite a significant approval of the regulations issued by the Executive, and shows that the judge already has a preconceived view of their constitutionality even before there is an official challenge to these (see P De Vos 'Some lawyers think they are above the law when it comes to lockdown' *Daily Maverick*, 8 April 2020, available at *https://www.dailymaverick.co.za/opinionista/2020-04-08-some-lawyers-think-they-are-above-the-law-when-it-comes-to-lockdown/*, accessed on 12 April 2020.
In another case also decided during the level 5 lockdown, the Constitutional Court refused to even hear an application challenging the constitutionality of some of the regulations. Unfortunately, the application was in any event brought on blatantly shoddy grounds, such that no court would have found differently (see A Karrim 'Concourt dismisses NGO's application to challenge SA's 21-day lockdown' *News24*, 30 March 2020, available at *https://www.news24.com/SouthAfrica/News/concourt-dismisses-ngos-application-to-challenge-sas-21-day-lockdown-20200330*, accessed on 05 April 2020).
Another judgment handed down during level 5 lockdown was in *Ex Parte Karel Willem van Heerden* (MN) unreported case no 1079/2020 of 27 March 2020. In this case, the applicant was refused an order permitting him to bury a loved one in contravention of the lock-down regulations. The court made it clear that it would not grant an order allowing the applicant to act in breach of the regulations.
As is typically the case whenever a country is emerging from a disaster or an emergency, the courts started entertaining legal challenges to the state of disaster rules after the exigency or the hard lockdown had subsided.

could be attributed to two factors. The first is that there are those instances where the courts are prevented by the applicable security laws from properly exercising the power of interpretation. The second is that, generally in some cases of a security nature, even well-meaning and liberal courts can develop the tendency to become executive-minded and thus prefer to defer to the Executive the making of judgment in matters concerning state security, or they opt for Executive-friendly interpretations of security provisions (such as preferring an interpretation which is aligned to, or consistent with, government policy), or they invoke principles and doctrines which prevent them from deciding security matters on the merits. All these factors have had a detrimental effect on the protection of the rule of law and human rights.[63]

Of course, the foregoing is not an indictment particularly on the post-apartheid South African courts as they have not even had a chance to pronounce on security laws and therefore prove themselves. Indeed, nowhere to date have the courts failed to abide by their constitutional mandate. Instead, they have done very well even in politically sensitive cases as seen in the discussion under 1.1.2.2 above. The only drawback is that, when it comes to the lived experience of the South African courts' engagement with security laws, only lessons from apartheid exist, and these paint a bleak picture.

Apart from examining the behaviour of the courts in security matters and later bemoaning their failure to fulfil the obligation to uphold and protect the rule of law and human rights, hardly any scholar has sought to overhaul the very system that places the courts' power of interpretation at the forefront of striking a balance between security laws and the rule of law as well as human rights. That being said, it is now appropriate to set out the purpose of the present study.

1.2 PURPOSE OF THE STUDY

This thesis studies and analyses the South African security and emergency laws[64] and concludes that there emerge certain techniques for securing the interpretation of

[63] Chapter 4 provides practical examples of what is stated in the current paragraph.

[64] The main reason for studying emergency laws alongside security laws is that both security and emergency laws share a common trait, which is to regulate the security space. The only difference might just be that emergency laws regulate security threats of serious proportions, whereas ordinary state security laws regulate security threats of less serious proportions. Therefore, the broader study

security laws in a manner that upholds and protects the rule of law. Taken together, these techniques constitute what is termed the 'security laws' interpretation regime'. The purpose of this study is therefore to formally establish a mechanism termed the security laws' interpretation regime, which is a collection of techniques that will bolster the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. The interpretation regime would therefore strike the appropriate balance between security laws, on the one hand, and the rule of law and human rights, on the other.

The thinking behind the establishment of the envisaged interpretation regime is that, since unaided interpretation does not always guarantee the protection of the rule of law and human rights as it should, the courts' power of interpretation must be supplemented with, or anchored by, an interpretation regime that ought to be observed whenever security laws are being interpreted and applied, whether in a time of peace or turmoil. The idea of establishing this regime therefore satisfies the desire for something innovative when it comes to addressing the sometimes fruitless reliance on the courts' unaided power of interpretation.

Establishing the envisaged interpretation regime is no different from what the leading scholars in the emergency law field did in the aftermath of the 9/11 bombings era. Given the exigency of the time and the need for democratic states to respond effectively to the exigency, many scholars turned to establishing models and theories of emergency systems which best serve democratic states during an emergency. Some scholars advanced models drawn from their reading of the work of a renowned

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and analysis of both security and emergency laws, as opposed to a narrow consideration of security laws only, can only benefit this thesis in its search for a mechanism that bolsters the interpretation of security laws in a manner that upholds and protects the rule of law and human rights.
In any event, the existing state security jurisprudence is not as developed as the emergency jurisprudence. As such, the justification and/or authority for the techniques of the envisaged interpretation regime might well have to be sought outside the security jurisprudence. There is no better place than the emergency field to seek such authority. This is not to suggest that the South African emergency system is perfect. Indeed, the system is yet to be even tested in a court of law. However, the logic here is simply that, since the emergency jurisprudence regulates security matters of serious proportions (i.e. emergencies), the same jurisprudence can be relied upon in setting up a scheme which seeks to regulate security matters of less serious proportions.
Borrowing principles from the emergency jurisprudence and applying them in the security context should not be problematic because there are many similarities shared by security and emergency laws. To mention a few, the two have historically been developing alongside one another and they have been abused by the apartheid government in a similar fashion; they both suffer the same criticism of being couched in broad and vague terms, and they have been, and continue to be, challenged on the same ground of violating the rule of law and human rights.

English legal scholar, Albert Venn Dicey. Other models or theories are based on the study of the Roman law approach to regulating emergencies, while others can be traced back to the Roman-Dutch and English law notion of martial law. Other models and theories emerge from the study and analysis of the practice during emergencies in various jurisdictions, mainly the advanced democracies such as that of the United States and the United Kingdom.

In the present context, accepting that the alignment of security laws with the rule of law and human rights is achieved mainly through interpretation, the challenge being faced is that of the courts' failure to always interpret security laws in a manner that upholds and protects the rule of law notwithstanding the exigency of the time. As with the challenge of responding to emergencies, democratic states have to somehow respond to the challenge of the courts' failure to always fulfil its duties and therefore strike the necessary balance between security laws and the rule of law as well as human rights, especially at a time of a security breach or an emergency. Thus, this thesis carefully studies and critically analyses the South African security and emergency jurisprudence and concludes that there evolve certain techniques for securing the interpretation of security laws in a manner that upholds and protects the rule of law. These techniques collectively constitute the security laws' interpretation regime.

The idea of naming this innovation the 'security laws' interpretation regime' is inspired by section 37 of the South African Constitution,[65] also popularly known as the country's 'emergency regime'. As this section neatly organises the laws and powers applicable in an emergency, this thesis cherishes an arrangement of this sort because it consolidates the relevant laws and powers and makes them readily accessible amid the exigency and pressure to hastily resolve all legal obstacles so that the Executive can act to counter the emergency. The envisaged interpretation regime is also intended to consolidate and make readily available the techniques or methods applicable in interpreting the ordinary security laws.

[65] A full discussion of this section appears in chapter 5 below.

Notwithstanding the fact that South Africa's leading constitutional law texts[66] bemoan the lack of development in the area of state security,[67] this thesis will reveal that the South African jurisprudence is nonetheless exemplary in the field of state security. This is because, as we shall see in chapter 7 below, the techniques of the interpretation regime are located within the country's security and emergency jurisprudence, though they are currently operating as uncoordinated units, to the detriment of their efficacy in bolstering the interpretation of security laws that is consistent with the rule of law and human rights. In this sense, South Africa probably surpasses most democracies as the efforts of other democratic jurisdictions in balancing security laws with the rule of law and human rights are hindered by certain practices, principles and doctrines which in South Africa are either inapplicable or are significantly restricted in their operation. In addition, the proposed interpretation regime will become a precedent of a transformative, liberal, purposive and substantive interpretation of security laws expected to be undertaken by judges of truly democratic states.

Of course, other jurisdictions are welcome to adopt the same idea of establishing the interpretation regime if that will assist them in facilitating the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. Should the need also arise, the proposed interpretation regime can certainly be applied not only by the domestic courts of the countries in which ordinary security laws are being invoked, but also the regional and international judicial and quasi-judicial bodies, especially when these are faced with difficult questions surrounding the interpretation of security laws at regional and international level.

1.3 STRUCTURE OF THE THESIS

This thesis entails the study and analysis of South Africa's security and emergency laws so as to show the emergence of certain techniques which are crucial for

[66] See S Woolman 'Freedom of assembly' in S Woolman, T Roux, J Klaaren et al (eds) *Constitutional Law of South Africa* 2 ed (2005) 61-3. See also I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2005) 816.

[67] At the same time, these texts acknowledge the lack of development in the area of state security as a reality which many would rather live with given the country's past encounters with state security laws.

bolstering the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. Taken together, these techniques constitute what in this thesis is termed the security laws' interpretation regime. Therefore, the contribution to knowledge or the originality part of this thesis lies mainly in the careful study and critical analysis or reading of the content of both security and emergency laws.

Since the essence of this thesis is to study and analyse the existing security and emergency laws, it should come as no surprise that the chapters preceding the one in which the envisaged interpretation regime is formally established, contain, for the most part, the content of security and emergency laws which, once carefully studied and analysed, would show that there exist certain techniques for securing the interpretation of security laws in a manner that is in harmony with the rule of law and human rights. Therefore, the first six chapters of this thesis set out the content of security and emergency laws in South Africa, with the view to enable a careful study and critical analysis thereof.

Turning to the breakdown of the chapters, the first and current chapter is titled *the introduction*. It details the premises from which the study proceeds, and sets out the purpose of the study. It is also used to convey certain preliminary information that the reader needs to be aware of ahead of reading the entire thesis. Thus, the chapter is an appropriate platform for setting out the structure of the thesis, the research methodology used in the thesis, as well as the key research questions that this thesis will seek to answer.

Chapter 2 is titled *the centrality of the rule of law and human rights in the South African legal system*. The chapter examines how and why the rule of law and human rights came to be so central in South Africa's legal system and in the regulation of the security and emergency space. The extent of the centrality of the rule of law and human rights in South Africa's constitutional democracy is such that all laws, including security and emergency laws, have to be consistent with the rule of law and human rights, failing which those laws are unconstitutional. The chapter ends with an examination of the prevailing relationship between the rule of law (represented by the principle of legality) and security laws, as well as between the rule of law / legality and emergency laws.

Chapter 3 is titled *the origins of security and emergency laws*. The chapter sets out the Roman, Roman-Dutch and English law origins of both security and emergency laws, as these are the main legal systems whose security and emergency laws came to influence the South African law. In the later parts, chapter 3 reveals that, arguably with the benefit of the knowledge acquired from the study of the Roman, Roman-Dutch and English law emergency systems, modern states have since proceeded to develop other models and theories of emergency systems that democratic states can adopt in a time of crisis. The chapter also shows that there have since evolved various other practices, principles and doctrines which have become an integral part of security and emergency laws. Ultimately, the chapter sets out the foundations of the South African security and emergency laws which are a subject of study and analysis in this thesis.[68]

Chapter 4 is titled the *early development of South African security and emergency laws*. The chapter primarily expands from chapter 3 and demonstrates the influence that Roman-Dutch and English security and emergency laws had on the formation and development of South Africa's common-law security[69] and emergency measures.[70] Later, the chapter visits South Africa's embrace of draconian security and emergency legislation, as well as how legal challenges to, or based on, these far-reaching laws were prevented. In essence, the chapter outlines South Africa's early security and emergency order, with the ultimate view to unearth the detail that will be shown in chapter 7 to have contributed to the establishment of the envisaged interpretation regime.

Chapters 5 and 6 are titled *the delineation of South Africa's post-apartheid emergency jurisprudence* and *the delineation of South Africa's post-apartheid state security jurisprudence* respectively. Both chapters are concerned with delineating and providing a comprehensive breakdown of the prevailing security and emergency jurisprudence. This way, the content of the delineation can be studied and analysed so as to uncover the detail that will be shown in chapter 7 to have contributed significantly to the establishment of the envisaged interpretation regime.

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[68] For a discussion on South Africa's early security and emergency jurisprudence, see chapter 4 below.

[69] The common-law security measures being referred to include the crimes of high treason and sedition.

[70] There is only one common-law emergency measure in place, and that it is the notion of martial law.

Given the content of security and emergency laws disseminated in the first six chapters of this thesis, the ground would then be fertile for chapter 7, which is titled *the proposed security laws' interpretation regime*, to derive and piece together what is deemed to be the techniques for securing the interpretation of security laws in a manner that is consistent with the rule of law and human rights, thus constituting the envisaged interpretation regime. Later in the chapter appears further justifications for the interpretation regime.

Chapter 8 is then the overview of the entire thesis and conclusion. The main message being communicated is that the interpretation regime facilitates the transformative liberal, purposive and substantive interpretation of security laws that can be expected from judges of truly democratic states. In the final analysis, the interpretation regime sets South Africa on a path to being a precedent of good practice when it comes to the interpretation of security laws consistently with the rule of law and human rights.

1.4 METHODOLOGY AND RESEARCH QUESTIONS

The study undertaken in this thesis is qualitative rather than quantitative. It involves a desktop study of existing legal materials, such as textbooks, journal articles, case law (both foreign and local), various official reports, newspaper articles and various internet sources. In terms of presentation, the thesis invokes a legal-historical methodology of research as it traces the South African state security and emergency laws from their origins until currently. This is done in the first six chapters. Chapter 7 then records the outcome of a careful study and analysis of the content of state security and emergency laws, which is that there emerge certain techniques which are crucial for securing the interpretation of security laws in a manner that upholds and protects the rule of law. These techniques, taken together, form what in this thesis is termed the 'security laws' interpretation regime'.

Throughout the thesis, there are also elements of a legal comparative methodology of research. Indeed, there are instances, particularly in chapters 4 and 5, where South African security and emergency laws are, to the extent justified by the context, compared with those of other jurisdictions. It is envisaged that the South African approach to interpreting state security laws, as encapsulated in the interpretation

regime proposed in this thesis, will make a good point of reference and comparison for other democratic states.

The main research question sought to be answered is what mechanism can be put in place in order to bolster or facilitate the courts' interpretation of state security laws in a manner that upholds and protects the rule of law and human rights. There also exist a few other questions which are ancillary to the above main research question and which are also addressed in this thesis. These are as follows:

(a) What makes state security a topic that is worthy of being visited with research in modern South Africa?
(b) What is currently the nature of the relationship between state security laws and the rule of law as well as human rights?
(c) What is the generally accepted legal measure for protecting and upholding the rule of law and human rights in the face of the broad and vague security laws?
(d) What are the shortcomings of the measure in (c) above, which shortcomings are sought to be remedied by means of the mechanism established in the present thesis?
(e) Where does the mechanism established in the present thesis emanate from?

CHAPTER 2

THE CENTRALITY OF THE RULE OF LAW AND HUMAN RIGHTS IN THE SOUTH AFRICAN LEGAL SYSTEM

2.1 GENERAL

Not so long ago, security and emergency laws were some of the topical areas of South African law into which only brave academics dared to venture for fear of being persecuted or purged by the apartheid government using the draconian security and emergency laws of the time. These were interesting areas of law because a lot was open to be said about the sustained violation of the rule of law and human rights occasioned by, among other things, the overly broad and vague provisions of these laws, the common exclusion of the courts' jurisdiction in security and emergency matters, the disregard for individual liberties, and the wide-ranging powers (even of detention without trial) vested in the Executive not subject to meaningful forms of control.

With the demise of apartheid and the elevation of the rule of law and human rights to being the founding values of South Africa's post-apartheid Constitution,[71] one would expect that the enactment or invocation of security and emergency laws in modern South Africa should no longer generate the same level of controversy as before. That, however, has certainly not been the case[72] owing to South Africa's recent history of

[71] See s 1 of the Constitution which provides that: '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights;…(c) Supremacy of the Constitution and the rule of law'.

[72] For instance, the recent publication of the draft emergency regulations by the military was met with a widespread public outcry (refer to notes 37 & 38 above). Furthermore, when the member states of the United Nations were required (by Resolution 1373 (2001) of the United Nations Security Council) to put in place anti-terrorism measures following the terrorist attacks in the United States on 11 September 2001, an intense debate ensued with many using the public comment proceedings to voice their opinions. The basis of the opposition to the then draft anti-terrorism legislation was mainly the fear of the return of draconian security legislation which characterised the apartheid era. Others held the view that South Africa had sufficient laws already in place to deal with the scourge of terrorism. The main argument advanced by those who advocated for the adoption of the anti-terrorism legislation was that the existing laws at the time were not sufficient to cover the various forms in terms of which terrorism

the abuse of these laws, as well as the delicate nature of the competing interests of the government and citizens aroused by security and emergency laws.

In the light of the foregoing, it is clear that the rule of law and human rights are central in South Africa's legal system such that all laws, including the security and emergency laws, have to be consistent with these. This chapter examines how and why the rule of law and human rights came to occupy centre stage in the South African legal system and to be central in the regulation of security and emergency laws, hence the need for the striking of a balance and the achievement of consistency between these laws, on the one hand, and the rule of law as well as human rights, on the other.

The reason(s) for the centrality of the rule of law and human rights will become clear in the discussion of the history of the rule of law and human rights under heading 2.2 below. To complete the discussion on the centrality particularly of the rule of law, this chapter will, under heading 2.3 below, also examine the prevailing relationship between the rule of law (represented by the principle of legality) and security laws, as well as between the rule of law (also represented by the principle of legality) and emergency laws.

This thesis would be fundamentally lacking in detail if the examination of the rule of law and human rights envisaged in this chapter is not undertaken. After all, this chapter addresses a key aspect of this thesis, which is why security and emergency laws have to be consistent with the rule of law and human rights in the first place.

2.2 THE HISTORY OF THE RULE OF LAW AND HUMAN RIGHTS IN SOUTH AFRICA

The study of South Africa's interaction with the rule of law and human rights has to start from the time of the gradual introduction of English law into South African law. This process began effectively from the year 1806 when the United Kingdom seized control of the Cape of Good Hope.[73] The introduction of English law also marked the

could manifest itself. They also argued that the trend internationally was to adopt omnibus legislation. See South African Law Commission (project 105) *Review of Security Legislation (terrorism: section 54 of the Internal Security Act 1982 (Act No. 74 of 1982)* (2002) at 75 & 524-583.

start of what became a tradition of modelling the South African Constitution on the Westminster system.[74] It also marked the beginning of South Africa's engagement with English constitutional principles, such as, *inter alia*, human rights[75] and the rule of law.[76]

The introduction of English law into South Africa was, however, met with a mixed reaction since the English Constitution, which at the time was underpinned by a sovereign Legislature, the absence of a justiciable Bill of Rights and some precepts of the rule of law (which included access to courts and equality before the law), was completely foreign to the Dutch settlers of the Cape of Good Hope. Although the Dutch settlers were receptive of many of the English systems, the introduction of equality between the Cape natives and whites was rejected by the Dutch settlers, and so that became partly the reason for the mass departure of the Dutch settlers (the Great Trek)

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[73] In modern South Africa, the Cape of Good Hope, as it was then known, is located in the Western Cape province, which is presently one of the nine provinces of South Africa.

[74] The introduction of English law did not replace Roman-Dutch law as the common law which was applied in the Cape since 1652. when the Dutch settlers occupied the Cape territory. This was in accordance with the Cape Articles of Capitulation of 1806, which allowed the inhabitants of the Cape to retain 'all their rights and privileges which they have enjoyed hitherto'. It was also consistent with the English common-law principle that 'the laws of the conquered country continue in force, until they are altered by the conqueror'.
What made entrenchment of English law principles easier when the United Kingdom took charge of the Cape is that Roman-Dutch law was no longer developing because Holland, a province in the Netherlands which is the birthplace of Roman-Dutch law, discarded the Roman-Dutch law system after being conquered by France's Napoleon, resulting in the introduction of French law in the Netherlands. Other factors which strengthened the English law influence on the South African law was the introduction of the English court systems, English statutes, the use of English as the language of the courts and the training of advocates in English law. See Dugard op cit (n15) 3-37 (Part 1); and Currie & De Waal op cit (n1) 1-38 (Chapter 1) & 39-71 (Chapter 2).

[75] The theory of human rights was first expounded in the 17th century by John Locke (Q Dlamini 'Mass action and the law – can South Africa do without the Regulation of Gatherings Act?' (2009) 1 *African Journal of Rhetoric* 86 at 88). Since then, the Constitutions of various jurisdictions now incorporate the basic human rights consolidated in the Bill of Rights section. The first Constitution to incorporate an entrenched and justiciable Bill of Rights was that of the United States of America in the 18th century (Rautenbach op cit (n27) 158).

[76] The classical formulation of the rule of law was pioneered and popularised by a renowned English legal scholar, Albert Venn Dicey, in his book titled *An introduction to the Study of the Laws of the Constitution*, which was first published in 1885. Dicey defined the rule of law in terms of at least three interrelated propositions or ideas which Mathews, an eminent South African scholar on the rule of law and security laws, aptly summarises as follows: the first proposition is that 'no man may be punished except for a distinct breach of the law established before the ordinary court of the land'. Second, 'everyone in the State is subject to the ordinary law and amenable to the jurisdiction of the ordinary courts'. Third, 'the principles of the constitution (i.e. the two propositions) are the result, not the source, of the ordinary law of the land'. See AS Mathews 'A bridle for the unruly horse' (1964) 81 *South African Law Journal* 312 at 313. For a historical account of the development of the rule of law in the United Kingdom, refer to the discussion under subheading 3.5.1.7 in chapter 3 below. It is considered expedient to have that discussion later in chapter 3.

who headed for the interior of South Africa to form two colonies which became known as the Orange Free State and the South African Republic (Transvaal).[77] The Constitutions of these colonies were, to a large extent, modelled on the American Constitution. Therefore, they were characterised mainly by the rejection of major tenets of English constitutionalism, that being the supremacy of Parliament, equality before the law and the absence of a justiciable Bill of Rights.[78]

It was not long until the Anglo-Boer War of 1899-1902 following which Britain seized control of the two Afrikaner colonies, the Orange Free State and Transvaal. The result of the seizure was the idea to amalgamate the two Afrikaner colonies with the Cape and Natal colonies to form the Union of South Africa. The Union Constitution, officially known as the South Africa Act of 1909 (passed by the Westminster Parliament in the United Kingdom and proclaimed on 31 May 1910), thereafter followed. The English notion of a sovereign Legislature or parliamentary supremacy made its way back to the Union Constitution, thus paving the way towards its entrenchment in South Africa's then legal system.[79] The rule of law, which accompanied parliamentary supremacy in the United Kingdom, was however restricted to the point of being non-existent. I shall return to the point on the rule of law later below.

As already indicated above, parliamentary supremacy was incorporated into South Africa's constitutional structure of 1910. Its full effect, however, was realised gradually over time as the consolidation of the white minority's control over South Africa was being entrenched. This consolidation project started in 1910 and continued even post-1948.[80] The ground was certainly fertile for this project because the period from 1910 until about the 1950s was relatively stable in that there were no more internal wars

[77] Dugard op cit (n15) 17.

[78] On the functioning of the Constitutions of these colonies and the problems encountered, see Dugard op cit (n15) 18-24. Furthermore, for a synopsis of the American constitutional model, refer to note 1 above.

[79] Section 90 of the Union Constitution provided that parliament could make laws 'for the peace, order and good government of the Union'. In making such laws, parliament was subject only to certain procedural limitations, and there were no substantive limitations. See Currie & De Waal op cit (n1) 44.

[80] The year 1948 marks the National Party government's assumption of power and the official start of the implementation of the policy of apartheid. On the meaning of apartheid, refer to note 56 above.

being fought.[81] The war efforts of the indigenous people of South Africa had been successfully quashed. In the same period, the English and Afrikaans-speaking whites had put their differences aside, and they had their agreement recorded in, and protected by, the Union Constitution.

In 1931 came the repeal of the Colonial Laws Validity Act of 1865.[82] This piece of legislation had restricted the sovereignty of the Union Parliament through a provision that 'there could be no competition between Westminster and a colonial legislature: any colonial law repugnant to an Act of the British Parliament extending to that colony was null and void'.[83] The passing of the Colonial Laws Validity Act opened way for the whites only Parliament to utilise parliamentary supremacy to its fullest by passing whatever law it deemed appropriate.

The first target of the enormous power in the hands of Parliament became the limited right of Black and Coloured people to vote.[84] In 1936, Parliament flexed its muscle and passed the Representation of Natives Act.[85] In passing this Act, Parliament used the unicameral procedure laid down in the Union Constitution, and the effect of the Act was that it removed African voters from the common voters' roll and gave them separate representation. Parliament's stance must also have been strengthened by the fact that parliamentary supremacy had received judicial endorsement from the

[81] This excludes, of course, the first and second World Wars. Also, in 1914, there was a challenge of white labour unrest, but the government passed the Riotous Assemblies Act 27 of 1914 in order to effectively deal with that unrest.

[82] This legislation was repealed by the Statute of Westminster in 1931. The Statue of Westminster was notably passed after the Commonwealth Convention had already started to restrain the English Parliament from legislating for the colonies without their consent (see Dugard op cit (n15) 28).

[83] Dugard op cit (n15) 28. Also see Currie & de Waal (op cit (n1) 46). Therefore, requirements such as, among others, that all parliamentary Bills needed the assent of the Governor-General or the King before becoming law were also repealed by the same Act which repealed the Colonial Laws Validity Act (Currie & de Waal op cit (n1) 44-45).

[84] It is noteworthy that during the negotiations which preceded the Union Constitution, a compromise was reached to the effect that the Cape would retain the qualified franchise for Africans and Coloureds. This became entrenched in section 35 of the Union Constitution. Section 152 of the Union Constitution allowed Parliament to alter or repeal sections 35 and 137 (which entrenched the equality of two official languages, being English and Afrikaans) only if this was done with a two-thirds majority vote of the two Houses of Parliament sitting together (Dugard op cit (n15) 26-29).

[85] 12 of 1936.

Appellate Division[86] in the case of *Sachs v Minister of Justice*[87] wherein the Court found that:

> 'Once we are satisfied on a construction of the Act, that it gives the Minister an unfettered discretion, it is no function of a court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will'.

A court challenge to the Representation of Natives Act in *Ndlwana v Hofmeyr N.O.*[88] provided the Court with occasion to pronounce that:

> 'Parliament…can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act so far as Courts of Law are concerned is at the mercy of Parliament like everything else… . Parliament's will…as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law, whose function it is to enforce that will not to question it'.

Shortly after the 1948 elections which saw the National Party ascend to government and begin implementing the policy of apartheid, Parliament resumed the process of removing the Coloured voters from the common voters' roll and to give them separate representation. The events accompanying the removal of Coloured voters plunged the country into a constitutional crisis[89] from which South Africa emerged with the result that parliamentary sovereignty was officially entrenched.

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[86] This was the country's highest court at the time.

[87] 1934 AD 11 at 36-37.

[88] 1937 AD 229 at 237-238.

[89] Unlike the removal of African voters which was done following the procedure laid down in the Union Constitution, this time, the apartheid Parliament, driven by its sovereign status, wanted to have the Coloured voters' removal passed with a simple majority in both Houses of Parliament sitting separately. This was because the ruling party knew that it lacked the necessary majority in Parliament, and there also existed some legal authority supporting the approach of the ruling party. The Separate Representation of Voters Act 46 of 1951 was then passed. However, a successful challenge to the Act was lodged in *Harris v Minister of the Interior* 1952 (2) SA 428 (A), with the court basically upholding not so much the substantive constraints on legislation, but certainly the procedural constraints on Parliament in passing the aforementioned legislation. Government responded by passing the High

Given the foregoing developments, the ground was, as early as the 1950s and for many years thereafter, fertile for the apartheid government (which enjoyed unlimited powers of Parliament guaranteed by the doctrine of parliamentary supremacy and a party system which ensured loyalty to the Executive) to take bolder steps towards the implementation of its apartheid policy. What followed was a series of racially-charged laws permeating every sphere of life ranging from race classification;[90] separate facilities;[91] family life, morality, marriage and sexual relations;[92] separate living

Court of Parliament Act 35 of 1952 through a simple majority. This Act empowered Parliament, acting through a body called the High Court of Parliament, to review and set aside the decision of the Appellate Division nullifying any Act of Parliament. Parliament's response was itself struck down by the Appellate Division in *Minister of the Interior v Harris* 1952 (4) SA 769 (A). Finally, the success of the ruling party in removing the Coloured voters from the roll came after the government increased the size of the Appellate Division from five to eleven judges in cases involving the validity of an Act of Parliament. This was in terms of the Appellate Division Quorum Act 27 of 1955. Using the Senate Act 53 of 1955, Parliament also increased the number of representatives in the Houses of Parliament, and also changed the method of their election. Assured of success, the National Party government amended the Union Constitution through the South Africa Act Amendment Act 9 of 1956 which was passed by a two-thirds majority of both Houses sitting together. The latter legislation which amended the Union Constitution revalidated the Separate Representation of Voters Act, it did away with the entrenchment of a qualified non-racial franchise, and also did away with the courts' jurisdiction to pronounce on the validity of a law passed by Parliament, except the law that alters or repeals the remaining entrenched provisions (these being the equality of two official languages (s 137) and s 152 which, after amendment, allowed Parliament to alter or repeal s 137 only with a two-thirds majority vote of the two Houses of parliament sitting together). A challenge to the foregoing legislative scheme failed before the then newly-reconstituted Appellate Division in *Collins v Minister of the Interior* 1957 (1) SA 552 (A). See generally Dugard op cit (n15) 28-34. See also Currie & de Waal op cit (n1) 46-50.

[90] One piece of legislation which falls into the present category is the Population Registration Act 30 of 1950, which provided for the compilation of a population register in terms of which an individual could be classified as White, Coloured or Bantu. For the Bantu (or Black people), there was a further classification into the ethnic or other group to which that person may belong. The basis for the classification was imperfect, as it was simply based on the criteria of appearance, social acceptance and descent. The government's main aim was to avoid attempts to cross the colour line from a less privileged racial group to a more privileged one (see generally Dugard op cit (n15) 59-62).

[91] The attitude of the South African courts towards cases concerning the allocation of separate facilities for different races was largely influenced by the law in the United States at the time. The courts in the United States had been upholding the policy of separate but equal facilities for different races. The rationale was that the 'Legislature is presumed not to intend anything so unreasonable as inequality between races'. Thus, it was found in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 that the regulations establishing separate post office counters for blacks and whites may have constituted discrimination, but because there were equal resources, the regulations were not unreasonable. Where the regulations created separate but substantially unequal facilities in railway coaches and premises, the courts struck down those regulations (see, for instance, *R v Abdurahman* 1950 (3) SA 136 (A) and *R v Lusu* 1953 (2) SA 484 (A)). Therefore, only in cases where there has been separate but unequal facilities did the courts strike down the subordinate legislation, unless there was empowering legislation which specifically provided for separate and unequal facilities. As would be expected, the government did introduce the Reservation of Separate Amenities Act 49 of 1953. This piece of legislation permitted any person in control of public premises to reserve separate but unequal facilities for different races, and did away with the power of the courts to declare such reservations invalid. As a result, the separate and unequal facilities policy of the apartheid government permeated every public sphere ranging from buses, trains, restaurants, libraries, parks, beaches, etc. See Dugard op cit (n15) 63-68).

areas;[93] separate education;[94] labour;[95] and liberty and freedom of movement.[96] The foregoing is not a comprehensive list, but indicates some of the aspects of life which the apartheid policy permeated.

The ushering in of parliamentary supremacy, with the result that Parliament, in exercising its law-making power, was subject only to certain procedural limitations and not substantive limitations, had significant implications for the rule of law and human rights. For human rights, parliamentary supremacy meant that the common-law rights and freedoms were available to the extent that they were not restricted or excluded by an Act of Parliament. Accordingly, various pieces of legislation were passed notwithstanding the adverse effects that these pieces of legislation had on human rights.

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[92] The Prohibition of Mixed Marriages Act 55 of 1949 is one of the first laws to be passed by the National Party government after it assumed power in 1948. It forbade marriages between Europeans and non-Europeans and even criminalized the solemnisation of a marriage by a marriage officer in contravention of this law. Sexual intercourse between people of different races was also criminalized under the Immorality Act 23 of 1957 (see Dugard op cit (n15) 69-71).

[93] The Bantu Land Act 27 of 1913 and the Bantu Trust and Land Act 18 of 1936 reserved some 13% of the land in South Africa for occupation by Africans. In terms of the 1913 Act, Bantu or Africans were allocated reserve land and could not transfer or lease the reserved land to other races. Africans also could not acquire land from elsewhere. The 1936 Act sought to give Africans more land, a promise that was never really fulfilled. The statutory basis for racial segregation in the urban areas was the Group Areas Act 36 of 1966, which created separate group areas in towns and cities for different races (Dugard op cit (n15) 78-82).

[94] The Bantu Education Act 47 of 1953 catered for the education of Africans and was at the centre of the protest by school pupils in 1976. Also, tertiary education in some universities was open based on merit (the so-called open universities). However, in 1959 the government introduced the Extension of University Education Act 45 of 1959 which imposed the requirement that Blacks obtain a permit from the relevant Minister before attending the open universities. The same Act also provided for the establishment of separate universities for Africans and other non-whites. White students were barred from the universities designated for non-whites (Dugard op cit (n15) 83-85).

[95] The discriminatory laws in the labour context operated to reserve many skilled and best paying jobs for whites. It also restricted the access of Africans to bargaining tables, which resulted in lower wages for Africans. See for instance, the Mines and Works Act 27 of 1956, which, in the mining context, reserved skilled jobs for Whites and Coloureds only. The Industrial Conciliation Act 28 of 1976 empowered the Minister of Labour to reserve certain classes of jobs for certain races and to prevent inter-racial competition (Dugard op cit 85-89).

[96] Freedom of movement for people of Indian descent was notably regulated in terms of Union Regulation Act 22 of 1913, the Admission of Persons to the Republic Regulation Act 59 of 1972, and the Aliens Control Act 40 of 1973. For Africans, permission was required for travelling within the Union as the law confined them to tribal homelands. The most notorious statute in point is the Bantu (Urban Areas) Consolidation Act 25 of 1945, which controlled the influx of Africans into urban areas and also made provision for the carrying of a pass (Dugard op cit (n15) 71-78).

Apart from the operation of parliamentary supremacy, what also bolstered the apartheid government's sustained violation of human rights with impunity was the insistence on the omission of a justiciable Bill of Rights from the Constitution. It also did not help the plight of human rights that the rule of law suffered its own limitations at the hands of parliamentary supremacy, as will be indicated immediately below.

For the rule of law, parliamentary supremacy meant that, in order for the rule of law to be consistent with the doctrine of parliamentary supremacy (which at the time was the cornerstone of the South African legal system), it (the rule of law) had to be restricted strictly to the formal/procedural conception (which conception is discussed later on below). There are at least four factors which must have assisted the apartheid government in achieving the objective of restricting the rule of law conception strictly to the formal/procedural conception.

The first is the fact that the rule of law had always been a controversial and contested concept,[97] and its meaning was open to be swayed in different directions. The second factor is the fact that society held different views on the rule of law, and some of these views coincided with those of the apartheid government.[98] The third factor is that, in seeking to show that it was complying with the rule of law, the apartheid government also drove the narrative of its own account of the requirements of the rule of law (i.e. the procedural requirements).[99] The fourth and last factor is the fact that the rule of

[97] To enhance this point, one of the most incisive critiques of the rule of law was that of Sir Ivor Jennings who, in his book titled *The Law and the Constitution* (published in 1959), dismissed Dicey's rule of law as a 'principle of political action and not a juridical principle' (see Dugard op cit (n15) 678). For a summary and response to the arguments raised by Jennings, see generally Mathews op cit (n76) 312-326.

[98] Thus, the apartheid government embraced with glee the views of some academics, lawyers and judges whose ideologies and religious convictions coincided with the essence of parliamentary supremacy and the formal conception of the rule of law. For instance, one Afrikaans scholar, Mr F Venter, once rejected the rule of law arguing that it 'presupposes the notion of fundamental rights accruing to the individual against state authority and thus reflects a humanist philosophy, which is unacceptable in South Africa' (Dugard op cit (n15) 41, citing F Venter The Withering of the Rule of Law' (1973) 8 *Speculum Juris* 69 at 86-88). This view was driven not by the support of the policy of apartheid, but by the author's belief that a state in which God is sovereign must stand in opposition to a humanist philosophy (ibid).
In addition, many of the Afrikaans-speaking politicians and lawyers, including those considered to be liberal, held the view that the rule of law imposed a procedural or a due-process restraint on Parliament (Dugard op cit (n15) 39). They also held the view that Dicey's concept of the rule of law was not an appropriate standard by which to judge the South African legislation because it closely identified with English legal traditions, it was uncertain in its content, it was not acceptable to legal positivists and was too narrow in its scope (Dugard op cit (n15) 41). Once again, it was merely coincidental that the above views were the same as those of the apartheid government.

law lacked precise meaning and content, and so the competition for the appropriate conception or understanding of the rule of law was coincidentally between the substantive conception and the formal/procedural conception.[100]

A substantive conception of the rule of law means that the scope of the rule of law extends to the actual content of the law.[101] Therefore, this conception permits the rule of law to venture and enquire into issues such as whether a particular law protects human rights and other liberties.[102]

On the formal/procedural conception of the rule of law, the darling of the apartheid government, the scope of the rule of law is limited to the way in which the law is enacted.[103] In this sense, the rule of law merely imposes procedural or due process restraints on law-making or any government action.[104] Thus, on the formal conception, the rule of law will be complied with if, for instance, there is certainty in the laws being passed[105] or if the exercise of certain powers is authorised by law.[106] As a result, the criticism of the formal/procedural conception is that even those jurisdictions the laws

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[99] In 1968, the Department of Foreign Affairs Board sought to show that the rule of law was being complied with in South Africa. It then produced a document entitled 'South Africa and the Rule of Law, in which it defined the rule of law as follows:
'[t]he rule of law may mean different things to different people, but there is a general agreement that it requires that a person on trial be accused in open court; be given an opportunity of denying the charge and of defending himself and that he be given the choice of a counsel. These rights are at all times assured by the South African Courts' (see Dugard op cit (n15) 42).
The foregoing account of the rule of law is very limited. For instance, it is silent on the rule of law also embracing the requirement of equality before the law. Indeed, it says nothing about the substantive ideals of the rule of law. The stance of the apartheid government on the rule of law cannot be clarified better than the words of BJ Vorster, the then Minister of Justice, who in 1962 declared that 'there were as many interpretations of the Rule of Law as there are people…' (Dugard op cit (n15) 43).

[100] The perspectives of various eminent writers across the world on the content of the rule of law are documented in FC De Coste 'Redeeming the rule of law' (2002) 39 *Alberta Law Review* 1004 at 1007.

[101] AL Young 'The rule of law in the United Kingdom: Formal or substantive' (2012) 6 *Vienna Online Journal on International Constitutional Law* 259 at 273.

[102] D Dyzenhaus 'The pasts and future of the rule of law in South Africa' (2007) 124 *South African Law Journal* 734 at 736.

[103] Young op cit (n101) 273.

[104] Dugard op cit (n15) 39.

[105] Young op cit (n101) 273.

[106] Dyzenhaus op cit (n102) 736.

of which facilitate the worst forms of human rights abuses, like apartheid, do comply with the formal conception,[107] thus passing off 'rule by law' as the 'rule of law'.[108]

Given the operation of parliamentary supremacy, the accompanying absence of a justiciable Bill of Rights, as well as the restriction of the rule of law to a formal/procedural conception, the South African courts, in exercising the power of judicial review of legislation, could only test whether the procedural steps in making the law were complied with. It was not open to the courts to venture into the substance of the laws made by Parliament. To further prevent any possibility of the court reviewing the substance of legislation, the outright ousting of the courts' jurisdiction in certain matters (especially security and emergency matters) was not a strange occurrence during apartheid.[109] Furthermore, the apartheid government was notorious for appointing only pliable judges to the country's then top court, the Appellate

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[107] It must be stated that, notwithstanding its shortcomings, the importance of the formal conception must not be underestimated, for it distinguished the apartheid state from a prerogative state where parliamentarians could remove legal requirements (both substantive and procedural) if they so wished. Of course, this does not change the fact that, to a large extent, adherence to the formal conception and not to the substantive conception effectively undermined the rule of law itself.

[108] Young op cit (n101) 273. This view is also echoed by De Coste op cit (n100) 1004-1005. The following quote from Dyzenhaus (op cit (n102) 738) also captures the point:

> 'Consider that decisions in the early 1960s by the Appellate Division signalled to the officials of the apartheid state that as long as they had a bare formal warrant in law for their decisions in important areas of government policy, including security, the courts would not generally act to control them. As I have argued elsewhere, those decisions allowed the government to have its cake and eat it too. Because the courts were ready to equate the rule of law with rule by law, the government could have statutes enacted that gave its officials authority to act in a legally uncontrolled fashion at the same time as the courts endorsed the officials' actions as in accordance with the rule of law. In other words, pockets of the Prerogative State can emerge within the law if courts subscribe to the formal conception alone and the legislature does not impose explicit rule of law controls on public officials, or even indicates, more or less explicitly, that it does not intend such controls to apply. The officials have formal authority to act as they do, so do not, as in the Prerogative State, have the power simply to sidestep the law when its controls seem inconvenient. But the authority they wield seems so barely limited that within their mandate they seem virtually uncontrolled'.

[109] One of the earliest examples of the ousting of the courts' jurisdiction came with the South Africa Act Amendment Act 9 of 1956 (which amended the Union Constitution). Amongst other things, the Act dispensed with the courts' jurisdiction to pronounce on the validity of a law passed by Parliament, except the law that alters or repeals the remaining entrenched provisions (see note 89 above). This provision was further incorporated into the Constitution Act 32 of 1961 (the Republic Constitution), which was passed in order to declare South Africa a Republic following a referendum which voted in favour of this route. The abovementioned Acts cemented the limitation of the courts' testing power (judicial review) only to legislation that repeals or amends or purports to repeal and amend the remaining entrenched provisions of the Union Constitution. Other examples of security and emergency legislation which explicitly ousted the jurisdiction of the courts appear in the discussion under headings 4.4 and 4.5 in chapter 4 below.

Division.[110] When all else failed, the sovereign Parliament would go as far as to override any court judgment it was uncomfortable with.[111]

An unintended result of the distortion of the rule of law was the opening of the way for significant attempts, especially by the Congress of the International Commission of Jurists,[112] to give the rule of law precise content. In this regard, the one significant contribution of the Congress was its Declaration of New Delhi in 1959 where it recognised that the 'Rule of Law is a dynamic concept … which should be employed not only to safeguard and advance civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised'.[113] Over the years the rule of law came to be widely understood to include within its content the substantive and procedural rights and much more.

Amongst many things, the rule of law is nowadays acknowledged as also representing the aspirations of good governance and respect for human rights, it 'demands that disputes be adjudicated in accordance with the law', it 'requires access to the courts', it 'obliges the state to provide mechanisms for the resolution of its citizens' disputes' and for the 'execution of court orders without undue social disruption', and it 'requires that judges must be accountable and not act arbitrarily'.[114] It is also argued that included within the scope of the rule of law is the requirement that laws comply with international law obligations, and that they adhere to principles of procedural fairness and natural justice.[115] The rule of law is also argued to be at odds with public officials'

[110] Dyzenhaus op cit (n102) 737. It will also be recalled that the strategy of appointing pliable judges was used as one of the methods to secure the removal of Coloured voters from the common roll (for a full discussion, see note 89 above).

[111] Dyzenhaus op cit (n102) 737. The overriding of a court judgment by an Act of Parliament occurred during what has been dubbed the constitutional crisis of the 1950s. Refer to the discussion under note 89 above.

[112] The International Commission of Jurists is a non-governmental organization that was formed in 1952 in order to promote respect for the rule of law (Dugard op cit (n15) 47)

[113] Dugard op cit (n15) 47.

[114] See Hoexter op cit (n41) 55-56.

[115] Young op cit (n101) 261.

'inefficiency', 'incompetence', 'laziness', 'corruption' and 'failure to implement court orders'.[116] The possibilities are indeed endless.

Understood in the foregoing sense, the rule of law emerges as a catalyst for a true democratic order, hence it is central to any democratic dispensation, including that of South Africa. Human rights too have received protection through being entrenched in a Bill of Rights and being recognised as part of the substantive conception of the rule of law. The discussion in this section thus illustrates the turbulent historical developments towards the triumph of the rule of law and human rights as the cornerstone of South Africa's democracy. The end result is that all laws, including security and emergency laws, that are inconsistent with the rule of law and human rights are unconstitutional and therefore invalid.

2.3 THE PRINCIPLE OF LEGALITY

It will be recalled that one of the propositions in terms of which Mathews[117] views Dicey to have defined the rule of law is that 'no man may be punished except for a distinct breach of the law established before the ordinary courts of the land'. This proposition is widely accepted as representing the aspirations of the principle of legality, a concept which lies at the heart of the rule of law. This section examines the prevailing relationship between the rule of law (represented by the principle of legality) and security laws, as well as between the rule of law (also represented by the principle of legality) and emergency laws. However, before doing so, the principle of legality, particularly its own relationship with the rule of law, needs to be understood within its historical context.

It must be stated upfront that that there is no consensus as to the origins of the legality principle. Mathews[118] suggests that the idea of legality first found expression in the contrast between the idea of 'government according to law' and 'government by arbitrary decree', with the legality principle facilitating the attainment of the former. He

[116] H Corder 'Securing the rule of law' in M Carnelley and SV Hoctor (eds) *Law Order and Liberty - Essays in Honour of Tony Mathews* (2011) 24.

[117] Refer to note 76 above.

[118] AS Mathews *Law, Order and Liberty in South Africa* (1971) 5.

observes further that its underlying principle (that is, the reign of law over authority) is ancient. It was there even in the early thinking about the law and society and its roots can be traced back to the early writings of Plato and Aristotle.[119]

Another proposition as to the origins of the legality principle is that the expression of the legality principle in Latin terms as *nullum crimen sine lege* (which means that prohibited conduct is only punishable if it is explicitly identified by a properly made law as constituting a crime) and *nulla poena sine lege* (which means that, for there to be a crime in law, there must be punishment affixed to the commission of that crime), suggests that the legality principle is of Roman origin. Hall[120] identifies some traces of the legality principle in Roman times, though he concedes the incoherence in the line of development. Unlike Hall who sought to present conclusive proof of the link between the legality principle and its Roman law antecedents, it is perhaps best to conclude that the ideas which are presently encapsulated in the principle of legality were present in Roman times, though these were unelaborated and not clearly organised as forming part of the principle of legality. This conclusion is further supported by an accepted historical fact that the most visible assertion of the idea of legality took effect in the Middle Ages (which is a period after the Roman empire had fallen) where clear references to the reign of law over authority were made and certain bold steps taken in order to realise this principle.[121]

In the 15th century United Kingdom, it had become established policy that judges were bound by oath to determine rights according to the law, not the will of the King.[122] The formal acceptance of the theory of the reign of law is marked by the recording of the said theory in the Year Book of 1441.[123] For quite some time thereafter, this principle was never challenged in English law.[124] Parliamentary supremacy was at the time not yet a dominant theme in English jurisprudence. In the early 17th century, a renowned

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[119] Ibid.

[120] J Hall *General Principles of Criminal Law* 2 ed (1960) 28-29.

[121] Mathews op cit (n118) 6.

[122] Ibid.

[123] Ibid at 7.

[124] Ibid.

English jurist, Sir Edward Coke, affirmed the reign of law (that being the common law) as being authoritative and even binding on Parliament.[125] When parliamentary supremacy subject to the rule of law became the norm, the above aspirations of the legality principle were incorporated by Dicey into his account of the rule of law.

Despite the lack of consensus as to the origins of the legality principle, there seems to be agreement that although the legality principle may be adumbrated in the early writings of some scholars, as well as in the jurisprudence of Roman law, the middle ages and of English law, its formal acceptance is recognised to have come after the French revolution when the principle was openly stated in the French Declaration of the Rights of Man and the Citizen of 1789.[126] Subsequent developments saw the incorporation of the legality principle into the 1810 Code Penál, as well as into the Bavarian Code in 1813, owing largely to the work of Feuerbach who was instrumental in systemising and popularising the principle.[127] In 1871, the principle of legality was incorporated into the German Penal Code.[128] Today, the principle is included in the Universal Declaration of Human Rights and the European Convention on Human Rights.

Presently, it is widely accepted that, for the criminal law, the principle of legality, now recognised as an aspect of the rule of law, encompasses two principles which are expressed in Latin terms as *nullum crimen sine lege* and *nulla poena sine lege* Snyman[129] summarises the rules or principles embodied by the principle of legality as follows: (a) the accused person may only be found guilty of a crime if the type of act so committed is regarded by the law as a crime (*ius acceptum*); (b) the accused person may only be found guilty of a crime if the unlawful act so committed was recognised as a crime at the time of its commission (*ius praevium*); (c) the definitions of crimes should reasonably be precise and not vague (*ius certum*); (d) the definitions of crimes

[125] See Dugard (op cit (n15) 15) who cites various *dicta* from historic cases of the 17th and early 18th centuries, which cases reaffirm that an Act of Parliament is void to the extent that it is inconsistent with the common law.

[126] S Hoctor 'Specific crimes' (2007) 20 *South African Journal of Criminal Justice* 78 at 80. See also G Williams *Criminal Law* 2 ed (1961) 576.

[127] Hoctor op cit (n126) 80.

[128] Ibid.

[129] CR Snyman *Criminal Law* 6 ed (2014) 36-37.

should be interpreted narrowly rather than broadly (*ius strictum*); (e) After conviction, the sentencing must be in accordance with the above-named principles, which is to say that the sentence for the crime must have been already fixed and that the words defining punishment must be interpreted narrowly (*nulla poena sine lege*).

The constitutional recognition of the principle of legality in South Africa is marked by section 35(3)(l) and (n) of the Constitution. Section 35(3) provides for the right to a fair trial, which, under paragraph (l) of subsection 3, includes the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. Section 35(3)(l) is a clear reference to the *ius praevium* principle and, by implication, the *ius acceptum* principle.[130] In section 35(3)(n), the right to a fair trial further includes the right 'to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'. This relates to the *nulla poena sine lege* principle. Although there are no direct references to the *ius certum* and *ius strictum* principles in section 35 of the Constitution, Snyman[131] is of the view that the Constitutional Court can interpret the said section in such a way that it incorporates the principles that have been omitted.

Turning to the relationship between the rule of law/legality and security laws, as well as between the rule of law/legality and emergency laws, the constitutionality of security and emergency laws is rendered questionable if tested against the principle of legality, owing to the fact that these laws are couched in broad and vague terms. The usually broad and vague security and emergency provisions directly infringe the *ius certum* principle, which denotes that crimes must be defined in a reasonably precise manner. This aspect of legality is further enhanced by section 35(3)(a) of the Constitution which makes provision for the accused's right to be informed of a charge with sufficient detail to be able to answer it.[132] The implication of violating the *ius certum* principle is that security and emergency laws also violate the *ius acceptum* and *ius praevium* principles insofar as the vagueness of security and emergency laws casts doubt as to whether

[130] Ibid at 38.

[131] Ibid.

[132] J Burchell *Principles of Criminal Law* 5 ed (2016) 35.

the law regards particular conduct as a crime and whether the conduct in question was regarded as crime at the time of its commission.

The courts have stressed that, in order to comply with the *ius certum* principle, what is required is not absolute clarity but reasonable clarity in the definitions of crimes.[133] Furthermore, the courts are directed to approach the issues of precision in the definitions of crimes on the basis that they are is dealing with reasonable and not foolish or capricious people.[134] Therefore, the question is always whether the security and emergency laws are so broad and vague that they exceed the limits of reasonable clarity, and that no reasonable person can understand exactly what conduct is being criminalised. As already mentioned, it does appear that the broad and vague security and emergency provisions typically exceed these limits and therefore violate the principle of legality.

Notwithstanding the foregoing, the reality of the matter is that it would not be prudent to hasten to declare, without more, the security and emergency laws as unconstitutional on the basis of their non-compliance with the rule of law or the legality principle. The reason for this is that it also serves the interests of the rule of law to have adequate security and emergency laws readily in place. Just as Corder[135] views the public officials' 'inefficiency', 'incompetence', 'laziness', 'corruption' and 'failure to implement court orders' as ultimate threats to the rule of law which may seem temporary at the moment but carry the possibility of being permanent,[136] by the same logic, the rule of law is threatened if the security of the state and its people is threatened. Just as Devenish[137] convincingly argues that the rule of law is not an enemy of radical economic reform done within the framework of the Constitution and the relevant law, by the same logic, the rule of law is certainly not an enemy of peace

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[133] Snyman (op cit (n129) 43), citing *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A) at 176H; and *S v Engeldoe's Taxi Service (Pty) Ltd* 1966 (1) SA 329 (A) at 339G.

[134] Snyman (op cit (n129) 43), citing *S v O'Malley* 1976 (1) SA 469 (N) at 474G; and *S v Mahlangu* 1986 (1) SA 135 (T) at 141G-H.

[135] Corder op cit (n116) 24.

[136] By these words, Corder (ibid) was referring to the much-celebrated article by Mathews and Albino (op cit (n31) 16-43). In this article, the authors address the issue of detention without trial, which was typically a temporary emergency measure but easily became a permanent security measure during apartheid.

[137] Devenish op cit (n55) 682.

and security and would thus endorse the existence of measures for the attainment of such peace and security.

The foregoing illustrates that, as things stand, security and emergency laws may be at odds with the principle of legality or the rule of law, owing to their overbroad and vague provisions. However, declaring these as unconstitutional is both naïve and untenable. What is required is that a balance be struck so as to render the security and emergency laws consistent with the principle of legality or the rule of law. As can be observed from the discussion under subheading 1.1.1 in chapter 1 above, as well from the discussion under heading 3.5 in chapter 3 below, significant steps (in the form of the formulation of various models, theories, principles and/or doctrines) have been taken in an effort to strike the required balance between the rule of law and emergency laws. This thesis is also taking a step towards striking a balance between the rule of law and security laws through proposing the envisaged interpretation regime. Ultimately, neither the rule of law can guarantee its existence without security and emergency laws, nor can security and emergency laws do the same without the rule of law.

CHAPTER 3

THE ORIGINS OF SECURITY AND EMERGENCY LAWS

3.1 GENERAL

This chapter sets out the Roman, Roman-Dutch and English law origins of both security and emergency laws, as these are the main legal systems whose security and emergency laws came to influence the South African law. It will then become apparent in the discussion under heading 3.5 below that, arguably with the benefit of knowledge acquired from the Roman, Roman-Dutch and English law emergency systems, modern states have since developed other models and theories of emergency systems that democratic states can adopt in a time of crisis. Also, there has been the evolution of various other practices, principles and doctrines which have become an integral part of the legal response mechanism to security threats and emergencies.[138]

Because South Africa encountered and engaged these models, theories, practices, principles and doctrines in developing its early security and emergency laws,[139] it is imperative that the present chapter covers the detail thereof. Therefore, in essence, chapter 3 sets out the early security- and emergency-related content, which later informed the early South African security and emergency laws. The foundations of

[138] The models, theories, practices, principles and doctrines envisaged above are divided into two categories. The first category comprises those models, theories, practices, principles and doctrines which have the effect regulating, limiting or controlling emergency laws and powers. In this category, it is possible to access the courts in order to subject security and emergency laws to judicial scrutiny and to legal interpretation which is cognisant and respectful of the rule of law and human rights. The second category comprises those models, theories, practices, principles and doctrines which have the effect of restricting the regulation, limitation or control of security and emergency laws and powers. Under this category, access to courts is either prohibited altogether or certain restrictions are imposed so as to shield security and emergency laws from any judicial scrutiny and interpretation in light of the rule of law and human rights. Consequently, the latter category provides a veneer of legality for the virtually unregulated, unlimited or uncontrolled security and emergency laws as well as powers. I shall return to this point in the discussion under heading 3.5 below.

[139] As is shown in chapters 4 and 5 below.

South African security and emergency laws, which are a subject of study and analysis in this thesis, are thus articulated in the present chapter.

3.2. ROMAN LAW

The challenges faced by states in responding legally to security threats and emergencies have long been recognised, hence the existence of legal remedies dating back centuries. In early Roman law, 'betrayal to the enemy' was the common act perceived to threaten the 'security'[140] of the Roman state,[141] and the crime of high treason (*perduellio*) existed as a remedy against such acts.[142]

In the later parts of Roman history, notably towards the fall of the Roman Republic[143] and throughout imperial Rome or the principate (being a period during which the emperor reigned),[144] acts which threatened the security of the Roman state were punished as the *crimen laesae majestatis*.[145] The *crimen laesae majestatis* was a generic name for various prohibited acts listed in the statute called the *lex Julia de Majestatis*.[146] The statute made provision for offences against the existence, independence, safety, authority or dignity of the *majestas* or supreme power.[147] The crime of treason (*perduellio*) became an important species of this generic crime.[148]

[140] The word security is placed in inverted commas in order to indicate that it is modern terminology denoting the various threats to the sovereignty, safety, dignity, honour or respect for the Roman state.

[141] Note that the state was at the time personified in the figure of the *majestas* or the sovereign ruler. As a result, the applicable laws criminalised the threat to the personal safety and honour of the *majestas* as a threat to the safety and honour of the state itself.

[142] Burchell op cit (n132) 841.

[143] SV Hoctor 'Criminal law' in WA Joubert (founding ed) *The Law of South Africa* Vol 11 (2017) par 173.

[144] Burchell op cit (n132) 841.

[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Hoctor op cit (n143) para 173.

Another important crime that emerged from the genus *crimen laesae majestatis* became known as the crime of sedition. Although this crime emanates from the genus, there is very little that was known about it in Roman law because the various species of the genus were not properly defined.[149] Only Roman-Dutch law, as discussed in 3.3 below, provides a clearer version of the crime of sedition in its infant stages. Be that as it may, Milton[150] does highlight three points which he deems to be common cause regarding the Roman law stance on sedition. These are: (a) all the instances given in the writings on the *crimen laesae majestatis* which could amount to the crime of sedition appear to entail acts against public authority, and not merely against peace and order; (b) in all instances which are likely to amount to the crime of sedition, what is envisaged is the assembly of a mob which creates tumult and/or violence; and (c) the intent required is not 'hostile intent' (as this is the requirement for treason).

The various ill-defined security offences of Roman law origin remained the law throughout the Middle Ages[151] until the 18th century.[152] The period after the 18th century saw most legal systems remove the figure of the *majestas* from the institution of the state, and regarded treason to be committed mainly by external enemies in pursuit of a goal to overthrow the established government of a state.[153]

It appears from the writings of Nicollò Machiavelli[154] that while Roman law was developing as outlined above, it was, at the same time, also generating a significant body of laws for dealing with grave security threats or emergencies, such as war. Modern scholars therefore glean from the writings of Machiavelli the detail of the

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[149] JRL Milton *South African Criminal Law and Procedure vol II: Common Law Crimes* 3 ed (1996) 44-45.

[150] Ibid at 45.

[151] To enhance the point, Milton (ibid at 10) notes that the early Germanic law (which applied after the fall of the Roman empire) was applied by small and close-knit tribal communities in which strict fidelity to the ruler was jealously observed. Departure from this norm amounted to treasonable conduct.
Under the feudal system, again the state subject owed allegiance to the state ruler (personified in the figure of the king). A breach of allegiance was also viewed as treason. This state of affairs remained until about the end of the 18th century.

[152] Burchell op cit (n132) 816.

[153] Ibid at 841.

[154] Nicollò Machiavelli's contribution titled *Discourses upon the first ten (books) of Titus Livy* is available at *http://www.constitution.org/mac/disclivy.htm*. A useful summary is provided by Woolman op cit (n66) 61-4 and 61-5.

Roman emergency system applicable notably from the Roman Republic onwards. The Roman emergency system entailed the appointment of a dictator in times of crisis.[155] The powers of the dictator were constrained by a series of predominantly *ex ante* controls (i.e. controls applicable prior to the exercise of specific powers). Examples of such *ex ante* controls include the following:[156]

(a) that the Senate, being the body which recognised and declared an emergency, was separate from the body which identified and appointed the dictator (i.e. the Consuls);

(b) although the dictator enjoyed absolute powers during an emergency, which includes the power to even suspend the constitution and other ordinary laws, he could not arbitrarily alter, amend, repeal or modify the constitutional order of the state as well as the ordinary laws;

(c) that the dictator could not serve for more than six months;

(d) that the dictator was empowered to 'suspend rights and legal processes and to marshal military and other forces to deal with the threat of invasion and insurrection for the purpose of resolving the threat to the Republic'; and

(e) that upon cessation of the threat, the dictator would step aside and normal order would be resumed.[157]

It can be observed from the foregoing that the first connection between security and emergency laws emerges as early as the Roman law. Both security and emergency laws shared the state security space, with the crime of high treason (*perduellio*) and later the *crimen laesae majestatis* constituting the ordinary security laws, and the appointment of the dictator being the emergency measure of the time. The dictator model was in use during the Roman Republic era and for three hundred years

[155] One scholar by the name of Clinton Rossiter developed the 'constitutional dictator' model based on the institution of a dictator of Roman origin. Clinton Rossiter's writings are cited and summarised well in D Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (2006) 35-38.

[156] These examples are found throughout Ferejohn & Pasquino op cit (n15) 210-239. See also Gross & Ní Aoláin op cit (n21) 17-26.

[157] Thus, the authority of the dictator did not extend to introducing permanent changes to the existing constitutional order but was limited solely to addressing the threat in order to return the constitutional state to its normal functioning.

thereafter.[158] It is noted to have been invoked 95 times,[159] hence the system is hailed as having contributed immensely to the success and greatness of the Roman Republic.[160] Centuries later, the legal systems of the world still benefit from the Roman law innovation captured in the writings of Nicollò Machiavelli.[161]

3.3 ROMAN-DUTCH LAW

The Roman-Dutch law security system in Holland, Netherlands, developed along the same lines as that of Roman law. Therefore, the Roman-Dutch law authorities also recognised the generic crime called the *crimen laesae majestatis*. There is also consensus that, for the Roman-Dutch law, the genus *crimen laesae majestatis* comprised the following species: (a) high treason (*hoog-verraad*), which is the equivalent of the Roman *perduellio*; [162] (b) disrespectful behaviour towards the *majestas* of the state (*laesae venerationis*); and (c) the usurpation of the power of authority of the state.[163]

The aforementioned species of the genus omit one species which Roman-Dutch law recognised as '*oproer*' (which later became the crime of sedition in South African law).[164] Milton[165] attributes the omission to the fact that the Roman-Dutch law scholars could not locate the crime of sedition independently from either the crime of treason

[158] Ferejohn & Pasquino op cit (n15) 226.

[159] Ibid.

[160] Gross & Ní Aoláin op cit (n21) 17-18. Of course, this is not to say that there was no abuse of this institution by some rulers, or that the possibility of abuse is a phenomenon of the modern world.

[161] This will become clear in the discussion under heading 3.5 below.

[162] High treason was undoubtedly the most serious of the three species of the genus, singling out acts committed by people who acted like external enemies of the state even if there was at the time no such external enemy (Milton op cit (n149) 12).

[163] Burchell op cit (n132) 841. See also Milton op cit (n149) 10-12. This classification of the species of the genus is attributed to Humanist Gothofredus, and is supported by other eminent Roman-Dutch law scholars, including, among others, Voet, Decker and Moorman (Milton op cit (n149) 11).

[164] Roman-Dutch law dealt with sedition under the notion of '*oproer*', though this concept is understood to connote public disorder and riotousness, instead of the subversion of government authority. The subversion of government authority constitutes the essence of what the crime of sedition seeks to criminalise (Burchell op cit (n132) 851).

[165] Milton op cit (n149) 11.

(though it was accepted that a 'hostile intent' was required for treason) or the crime of public violence. Although some Roman-Dutch law scholars could locate the crime of sedition in Roman-Dutch law, their view is seemingly drowned by the overwhelming endorsement of the aforementioned three-fold classification of the species of the genus.

Fortunately, Milton[166] resolves the conundrum surrounding the Roman-Dutch law stance on sedition or *oproer*, by making the following concluding remarks: (a) sedition or *oproer* is an offence directed primarily against the authority of the state; (b) there must be a gathering of a number of people (whether or not they are violent); and (c) the intent of the gatherers is that of defying the government or subverting its authority (if there is a 'hostile intent', then high treason would be committed).

Roman-Dutch law responded to emergencies using the notion of martial law.[167] By way of description, martial law denotes an existing state of affairs, usually the existence of war, insurrection or internal strife.[168] There are no fixed rules during martial law, and the state, acting through the military, is empowered to use all force necessary as required by necessity.[169] Individual rights can also be curtailed to the extent required by the interests of the safety of the state.[170] Thus, in Roman-Dutch law, martial law provided a legal justification for the actions of the state committed in self-defence[171] or as born out of necessity.[172] The two conditions recognised to have been applicable to the exercise of martial law were that the courts could inquire into

[166] Milton op cit (n149) 47.

[167] GE Devenish 'Martial law in South Africa' (1992) 55 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 349 at 350. See also RS Welsh 'Martial law' (1941) 58 *South African Law Journal* 111 at 112.

[168] Devenish op cit (n167) 350. Welsh op cit (n167) 112.

[169] Devenish op cit (n167) 350.

[170] Ibid.

[171] If action was to be taken based on self-defence, the requirement was that there must have been an unlawful and imminent threat to safety of the state, and that the action so taken must have been commensurate with the threat so confronted (Devenish op cit (n167) 351).

[172] If the steps taken were justified by necessity and not self-defence, then the action needed not be directed at the unlawful action of the aggressor. However, it still had to be proportional to the danger, so that the rights of citizens would not be curtailed to the extent that was beyond what was required by the emergency (Devenish op cit (n167) 351).

whether the material conditions objectively justified martial law, and whether the measures adopted were justified by the emergency.[173]

3.4 ENGLISH LAW

The English version of the crime of treason is largely the result of the Treason Act of 1531.[174] The acts of treason listed in the Act pertained largely to the protection of the personal safety and honour of the monarch.[175] Although the Act also created other treasonable acts, it is noteworthy that those acts were not comprehensive, hence many subsequent laws relating to treason were enacted with the aim to fill the gaps in the original statute of 1531.[176] The bias of the Treason Act and other subsequent English treason laws in favour of the protection of the personal safety and honour of the king (and later the protection of the state) makes the English law of treason comparable to that of Roman and Roman-Dutch law, which was also centred on the impairment of the safety and dignity of the *majestas* or the sovereign figure.[177]

Another of the earliest traces of the criminalisation of the threat to the security of the English state seems to have come in the form of the 17th century crime of seditious libel. This crime criminalised any written, printed or depicted criticism, whether truthful or not, of the government.[178] The thinking behind such criminalisation was that, for a government to be able to govern effectively, it needed to command the respect and allegiance of the people, and if people openly criticised the government, that could lead to disorder and the undermining of such respect and allegiance.[179] As can be

[173] Devenish op cit (n167) 353.

[174] Milton op cit (n149) 15.

[175] Ibid. Milton further notes that the statute provided that the following acts constituted treason: (1) compassing the sovereign's death; (2) violating his wife or eldest unmarried daughter; (3) levying war against the king in his realm; (4) being 'adherent to the king's enemies in his realm giving to them aid and comfort in the realm, or elsewhere; and (5) killing certain of the king's officers while performing their duties'.

[176] Milton op cit (n149) 16-17.

[177] Ibid.

[178] Ibid at 47. See also Burchell op cit (n132) 825.

[179] Milton op cit (n149) 47.

expected, numerous prosecutions for this crime followed,[180] and the crime became the main state machinery against the advocacy of political reform in the United Kingdom.[181] The relaxation of seditious libel laws came in the 19th century when, following widespread criticism, the definition of the crime was confined to the advocacy of violent or revolutionary change.[182]

English law also recognised and made special provision for emergencies through martial law.[183] In the context of the United Kingdom, martial law[184] emerged as military law designed to ensure the order and discipline of soldiers during wartime, but transcended over time to represent a series of extraordinary and non-statutory powers for dealing with emergencies.[185] The scope of the powers available during martial law remains, as in the case of the Roman-Dutch law,[186] debatable,[187] as is the legal source of martial law. One view on the legal source of martial law is that it derives from the inherent right of governments and citizens to repel force by force.[188] The other view is that the legal source of martial law is the royal prerogative.[189] Another view is

[180] Ibid.

[181] Burchell op cit (n132) 825

[182] Milton op cit (n149) 48.

[183] For a description of martial law, refer to the discussion under 3.3 above.

[184] The roots of martial law go as far back as the early Roman-Dutch law and English law. In the 19th century, the United States also joined the two abovenamed jurisdictions in having the invocation of emergency powers justified on the basis of martial law or necessity. An example in point dates back to the 19th century civil war when President Lincoln availed to himself various emergency powers and justified these on the basis of constitutional necessity, among other things (Gross & Ní Aoláin op cit (n21) 47-49) . Nowadays, these powers are also justified as the Executive inherent powers or the war powers of the federal government (Gross & Ní Aoláin op cit (n21) 48).

[185] Gross & Ní Aoláin op cit (n21) 31.

[186] Refer to the discussion under heading 3.3 above.

[187] In their early (but now obsolete) sense, the emergency powers available under martial law were unlimited and uncontrolled. However, this has since been qualified to a certain extent. For instance, English martial law powers are subject to the same conditions recognised under Roman-Dutch law. That is, the courts can review or test whether there exist objective material conditions justifying martial law, and can also test the legality of the actions taken by the authorities during martial law (see Devenish op cit (n167) 352 & 354).

[188] Gross & Ní Aoláin op cit (n21) 31-32.

[189] Gross & Ní Aoláin op cit (n21) 31. See also Welsh op cit (n167) 112; and Devenish op cit (n167) 352. According to John Locke, the leading proponent of the royal prerogative, prerogative power vests in the Crown (or the Executive) and means, in a nutshell, the discretionary power to act contrary to, or even beyond, the law for the 'public good'. Some of the famous descriptions of the concept of

that martial law is the result of paramount necessity.[190] Notwithstanding the uncertainty, the common denominator is that martial law gave the Crown discretionary powers to quell an emergency.

In his *Introduction to the Study of the Law of the Constitution*, Dicey treated Executive discretionary power with suspicion, characterising it as leading to the use of arbitrary power which could undermine the supremacy of Parliament.[191] Dicey, however, had foresight of a unique challenge that emergencies would present. Thus, he conceded the need for the use of discretionary power in the case of an emergency, provided the Executive obtained *ex ante* authority for the use of such powers from Parliament through (exceptional) legislation.[192] This is generally accepted as being Dicey's preferred approach[193] seemingly because it enables Parliament to put in place the grounds for the exercise of emergency powers and for testing the legality and legitimacy of such emergency powers.

Dicey also had foresight of a different dimension to emergencies, one which the nature of the emergency is such that the law must be broken and faith be placed in the *ex post* ratification of an illegality done by the Executive during an emergency. Such *ex post* ratification could be achieved through Parliament's passing of an Act of Indemnity.[194] Dyzenhaus submits that, in the latter situation, Parliament would have been slow or unable to act and provide the Executive with the required resources to

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prerogative power include that it is 'nothing but the power of doing public good without a rule' or, put differently, 'the power to act according to discretion, for the public good, without the prescription of the law and sometimes against it'. Locke's justification for prerogative power is that Parliament could not at all times proscribe in advance for the public good, or that the ordinary legislative process may be too slow to respond to the necessity of the time. Locke expounded these views in his *Two Treatises of Government*, a useful summary of which can be found in Gross & Ní Aoláin op cit (n21) 119-123; Gross op cit (n2) 1102-1104; and O Gross 'Stability and flexibility: A Dicey business' in VV Ramraj, M Hor, & K Roach (eds) *Global Anti-terrorism Law and Policy* 1 ed (2005) 95-98.

[190] This point is clear from the dictum of Selikowitz J in *End Conscription Campaign v Minister of Defence SA* 1989 2 SA 180 (C) at 186F, which reads:

> 'In seeking a theoretical basis for martial law, lawyers have suggested a number of possibilities. Dicey ... and Stephen ... favour urgent and paramount necessity as the origin and justification of all actions taken under martial law which are taken *bona fide* in the interest and in the defence of the realm. Other writers classify martial law as part of the inherent prerogative'.

[191] Gross & Ní Aoláin op cit (n21) 130.

[192] Ibid at 131. See also Gross op cit (n189) 93-94.

[193] Dyzenhaus op cit (n11) 66.

[194] Gross & Ní Aoláin op cit (n21) 131-132. See also Gross (stability and flexibility) op cit (189) 94-95.

repel the emergency.[195] The power to pass an Act of indemnity thus revives Parliament's supremacy, as it gives it (Parliament) the power to render legal that which the officials did illegally in order to overcome an emergency.

3.5 SUBSEQUENT DEVELOPMENTS

The war-time experience of various jurisdictions has for a long time been a cause for the honing of security and emergency laws. In recent times, however, sporadic terrorist attacks have since taken over as the leading factor behind the honing of both security and emergency laws. Modern states now approach the honing of security and emergency laws armed with knowledge obtained from earlier emergency systems, such as the Roman, Roman-Dutch and English law emergency systems.[196]

Being 'all the wiser' as a result of knowledge gained from previous emergency systems, modern states have since developed more models and theories of emergency systems that democratic states can invoke in a time of crisis. In addition, modern states have also developed certain practices, principles and doctrines which have become an integral part of the response mechanism to security threats and emergencies.

The discussion which follows below sets out the content of the subsequent models, theories, practices, principles and doctrines. The approach will be to first classify these into one of two categories under which their content will be unpacked. The first category (hereinafter referred to as 'the first category') comprises those models, theories, practices, principles and doctrines that have the effect of regulating, limiting or controlling the security and emergency laws and powers. The second category (hereinafter referred to as the 'second category') comprises the models, theories, practices, principles or doctrines that have the effect of restricting the regulation, limitation or control of security and emergency laws and powers.

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[195] Dyzenhaus op cit (n11) 66.

[196] In so honing the security and emergency laws, modern states also have to pay attention to the dictates of the applicable Treaties and Resolutions of the United Nations. One glaring example is the bombing of 11 September 2001 in the United States, following which the United Nations Security Council exercised its power under Chapter VII of the UN Charter to pass Resolution 1373 (2001) which bound all member states to put in place anti-terrorism laws.

3.5.1 The first category

This section sets out the content of the various models of emergency systems which have the effect of regulating, limiting or controlling the emergency laws and powers.[197] Later on, it sets out the content underlying the substantive and formal conception of the rule of law,[198] since the rule of law is the main doctrine that has the effect of regulating, limiting or controlling the security and emergency laws and powers.

3.5.1.1 The 'Business as Usual' model

Emanating from the majority judgment of the United States' Supreme Court in *Ex Parte Miligan*[199] is the Business as Usual model. In the *Miligan* case, Justice Davis declared that the Constitution was 'law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances'. Therefore, an emergency system adopting the Business as Usual model insists on the law being the same in a time of peace and in a time of war.[200] Thus, even in an emergency, the government is not vested with additional powers which it does not ordinarily have in a time of peace.

It is quite clear that the present model rejects the Roman, Roman-Dutch and English approach of establishing a set of laws for the time of peace and the other set for emergencies. Instead, the present model has faith in the perfection of the ordinary legal system, and assumes that it (the ordinary legal system) has sufficient remedies for both the ordinary and crisis situations. One similarity that the Business as Usual model coincidentally shares with the Roman dictator model is that all its legal responses to the emergency are determined *ex ante*. Therefore, by putting in place the *ex ante* legal requirements, the Business as Usual model undoubtedly regulates,

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[197] See 3.5.1.1 to 3.5.1.6 below.

[198] See 3.5.1.7 below.

[199] 71 U.S. (4 Wall.) 2, 141 (1866) (Chase, C.J., dissenting), as cited in Gross op cit (n2) 1060, and in Gross & Ní Aoláin op cit (n21) 75.

[200] Gross op cit (n2) 1042.

limits or controls the emergency laws and powers, and thus falls under the first category.

3.5.1.2 The Models of Accommodation

The Models of Accommodation are a group of models of emergency systems which share a common characteristic, which is to keep the ordinary legal system intact but with exceptions to accommodate an emergency. From the foregoing characteristic, it can be deduced that the Models of Accommodation accommodate an emergency by allowing the invocation of special emergency laws and powers that are not applicable in the ordinary legal system. It can also be deduced from the same characteristic that the accommodation models adopt the Roman, Roman-Dutch and English law approach of having two sets of laws, one for the time of peace and the other for the time of crisis. Be that as it may, the roots of the accommodation models do not go that far back in history, as these models are extracted mainly from the 19th century practices of the United States in combatting emergencies.

Starting with the Legislative Accommodation model, which is one of the three models classified as the Models of Accommodation, this model operates by either modifying the ordinary legal system through the introduction of ordinary legislation with emergency-driven provisions, and/or by introducing the emergency provisions contained in a new stand-alone emergency legislation, and/or by having the emergency provisions incorporated into already existing legislation, thus elevating that legislation into emergency legislation.[201] In practice, we often observe both ordinary and emergency legislation vesting in the Executive varying degrees of emergency power, subject, however, to several legislative regulations, limits and controls. It is this trait that places the Legislative Accommodation model under the first category.

In terms of the Interpretative Accommodation model, the second accommodation model, the courts are, during an emergency, afforded the power to clothe the existing ordinary laws with expansive interpretation that is sensitive to the emergency, but without modifying, altering or replacing any aspect of these ordinary laws.[202] This

[201] Gross op cit (n2) 1064-1066. See also Gross & Ní Aoláin op cit (n21) 66-72.

model originates from the minority judgment of Chief Justice Chase in the United States' case of *Ex Parte Miligan*.[203] Chief Justice Chase agreed with Justice Davis (who wrote for the majority) that the powers to deal with an emergency must be sourced from the Constitution, and that the interpretation of such powers must also be 'constrained within the existing constitutional framework'. The two justices only differed in that, while Justice Davis favoured the continuity of the laws applicable in ordinary times (the so-called Business as Usual approach), Chief Justice Chase saw the possibility of expanding the powers of government through interpretation.[204]

Explained differently, the Interpretative Accommodation model's point of departure is the Business as Usual approach, which keeps the ordinary legal system intact. However, in order to accommodate an emergency, the interpretative accommodation model modifies the ordinary laws through interpreting them in an emergency-sensitive manner. Once the emergency has ceased, the courts will also cease to interpret the ordinary laws in a manner that is sensitive to the emergency. Thus, at no point are emergency laws and powers unregulated, unlimited or uncontrolled, hence the interpretative model falls under the first category.

Of course, the expansion of Executive powers following a special emergency-sensitive interpretation results in an increase of government powers and the contraction (though not the total suspension) of the protection of fundamental rights.[205] All this is, according to Chief Justice Chase, acceptable and justified within the constitutional framework. By analogy, the Interpretative Accommodation model applies in the same manner as in the context of crime rates, such that if crime is high, the restrictions on law enforcement agencies are reduced, but if crime is less, the restrictions are increased.[206] Chief Justice Chase's dissenting view in *Miligan* has subsequently been

[202] Gross op cit (n2) 1059.

[203] Supra (n199).

[204] Gross op cit (n2) 1060.

[205] Ibid at 1060-1061.

[206] See Gross & Ní Aoláin op cit (n21) 74, citing the analogy of William Stuntz in WJ Stuntz 'Local policing after the terror' (2002) 111 *Yale Law Journal* 2138-2139.

favoured and cited with approval by the majority of the Supreme Court in *Wilson v New*[207] and in *Home Building & Loan Ass'n v Blaisdell*.[208]

Turning to the Inherent Executive Powers model, the third and last of the accommodation models, this model has its genesis from the manner in which the then United States' President Lincoln availed to himself the far-reaching powers to deal with the civil war in the late 19th century. These powers were used before Congress had convened to decide on the emergency powers it would allow.[209] Given that the President had already exercised various emergency powers, Congress had no choice but simply to ratify the decisions the Executive had already taken.[210] Lincoln's actions were explained and justified as constitutional on the basis of the 'war powers' of the government, thus introducing the theory of Inherent Executive powers.[211]

It would appear that the classification of the Inherent Executive powers as a Model of Accommodation can be explained on the basis that this model accommodates an emergency situation by availing certain powers which inherently vest in the Executive. However, the difficulty lies in justifying that these inherent powers of the Executive, which are exercised in the Executive's discretion, are regulated, limited or controlled. The fact that Gross now associates the inherent Executive powers with the notion of necessity (in terms of which an emergency is not regulated by law) aggravates the difficulty.[212]

A response to the above might be that the inherent Executive powers are subject to some legal control, although it is a weak form of control. To illustrate the point, one must return to the example of President Lincoln. Albeit he assumed inherent Executive powers in dealing with the civil war, he nonetheless still needed parliamentary approval, which he received after the fact. The legal requirement of parliamentary authorisation, especially *ex post* authorisation, is a fully-fledged legal requirement,

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[207] 243 U.S. 332 (1917), as cited in Gross op cit (n2) 1061.

[208] 290 U.S. 398 (1934), as cited in Gross op cit (n2) 1062.

[209] See Gross op cit (n2) 1067.

[210] Ibid.

[211] Ibid at 1067-1068.

[212] See Gross & Ní Aoláin op cit (n21) 46-54.

though it imposes a weak form of control on the inherent Executive powers.[213] For this reason, the Inherent Executive Powers model does regulate, limit or control the emergency laws and powers, and thus falls under the first category.

3.5.1.3 The 'State of Siege' model

Another model of emergency systems which falls under the first category is the 'State of Siege' model. This is because the operation of the State of Siege model does have the effect of regulating, limiting or controlling the applicable emergency laws and powers. For instance, the state of siege could only be declared by law, and only in the event of imminent danger resulting from a foreign war or an armed insurrection; only Parliament could declare a state of siege and determine when it ceases; the law providing for the declaration of a state of siege also had to indicate the time period upon which the state of siege would automatically terminate; the law had to be specific as to which parts of the country the state of siege would apply; during the state of siege, all state power was delegated to the military commander, the equivalent of the Roman dictator; and the powers of the military during a state of siege were determined by law prior to the emergency.[214]

The State of Siege model emerged from France in the 19th century.[215] Its approach to regulating emergencies is therefore similar to that of Roman law since it subjected emergency powers to a series of *ex ante* controls.

3.5.1.4 The 'Extra-legal Measures' model

[213] It is submitted that the requirement particularly of *ex post* parliamentary authorisation offers a weak form of control on emergency power. This is mainly because such a requirement only comes into effect after the emergency powers have been exercised without any form of legal control. Whether the exercise of those emergency powers is subsequently ratified or not, that does not change the damage already done by the unrestricted exercise of such powers. It is even doubtful that a tyrant who enjoys unrestricted power would ever surrender such power knowing that an objective assessment of his/her exercise of emergency power is to be conducted by Parliament with a view to either ratify or not ratify his/her actions.

[214] Gross & Ní Aoláin op cit (n21) 26-30.

[215] Ibid at 28.

The Extra-legal Measures model proposes that, in order to counter an emergency, it may be necessary for the government to act outside the law, provided it does so openly.[216] At first glance, the idea that the government can act outside the law subject to no limits or constraints gives the impression that this model makes provision for unregulated, unlimited and uncontrolled emergency powers. However, because the model further subjects the government's extra-legal action to, among other things,[217] the requirement of *ex post* ratification,[218] the Extra-legal Measures model does regulate, limit or control the emergency laws and powers, thus it falls under the first category.[219] This remains the case regardless of the criticism that *ex post* parliamentary ratification amounts to a weak form of control on emergency power.[220]

3.5.1.5 The 'escalating cascades of supermajorities' model

The escalating cascades of supermajorities model is advanced by Bruce Ackerman[221] who proceeds from the premise that little faith can be placed in the ability of judges to

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[216] Gross op cit (n2) 1099.

[217] For other controls of emergency power offered by the Extra-legal measures model, see Gross & Ní Aoláin op cit (n21) 169-170. For an incisive critique of the Extra-legal measures model, see Dyzenhaus op cit (n11) 65-77. For a response to Dyzenhaus's critique, see Gross (stability and flexibility) op cit (n189) 90-106.

[218] Such ratification can be given directly by members of the public or indirectly through, for example, the Courts or the Legislature (Gross op cit (n2) 1099). It is most common for the required ratification to be granted through Parliament's passing of legislation which indemnifies the government officials from liability following their extra-legal acts committed during an emergency. This approach is derived from Dicey's idea of an Act of Indemnity, which he advanced as an alternative to the norm that it is better for Parliament to grant the Executive the emergency powers in advance through exceptional legislation (refer to the discussion on English law in 3.4 above).

[219] The only rare aspect of the Extra-legal Measures model is that it subjects emergencies to legal regulation after the fact and not beforehand, as is typically the case especially for the models founded on the Roman model. The reason for this is that the Extra-legal Measures model is founded on, and therefore takes the posture of, the English notion of martial law or the royal prerogative (in terms of which the Executive enjoys unlimited and uncontrolled powers during an emergency), but adds certain *ex post* controls instead of leaving the exercise of emergency powers totally unregulated.

[220] The criticism levelled against *ex post* parliamentary authorisation in the context of the Inherent Executive Powers model also applies in the present context (refer to note 213 above). Another factor that weakens the requirement of *ex post* parliamentary ratification is that it is possible for politicians to manipulate the process and obtain the desired indemnity. A glaring example is how Hitler's actions in rendering legal the obnoxious actions of his government were justified *ex post* by the passing of indemnifying legislation by the Executive following the delegation of legislative power by the Legislature. The atmosphere of fear also makes the attainment of indemnity quite easy (see Dyzenhaus op cit (n11) 71-73).

constrain the powers of the Executive in an emergency, and so prefers political solutions in which judges have a limited role.[222] A major political solution that Ackerman relies upon is the 'supermajoritarian escalator', in terms of which a state of emergency automatically terminates upon the expiry of a stipulated short period of time, and an extension thereof requires a significantly high majority of the members of Parliament who vote in favour of such an extension.[223]

During the period of the subsistence of a state of emergency, the Executive enjoys unlimited emergency powers. The only restraint on the emergency powers of Executive is the fact that, with the supermajoritarian escalator in force, the emergency will come to an end within a short period.[224] The coming to an end of a state of emergency will be occasioned either by the lapse of the often limited time period stipulated for the subsistence of the state of emergency or by the failure to secure the majority of the Legislature required to extend the operation of a state of emergency beyond the set time limit.

Therefore, in terms of the escalating cascades model, the time periods stipulated for the duration of a state of emergency, as well as the staggered parliamentary majority required for extending the state of emergency beyond the stipulated period, are the legal requirements which regulate, limit or control the applicable emergency laws and powers. It is thus these requirements that qualify the present model to fall under the first category. The model falls under the first category regardless of the likely criticism that the foregoing requirements amount to weak forms of control on emergency power.[225]

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[221] See Ackerman op cit (n13) 1029-1091. A useful summary is provided in Dyzenhaus op cit (n155) 40-42.

[222] Ackerman op cit (n13) 1031.

[223] An example in point is a requirement in s 37(2)(b) of the South African Constitution, to the effect that the declaration of a state of emergency may be effective for no more than 21 days. This period may be extended by Parliament for no more than three months at a time. Further, the first extension must be taken by resolution of Parliament adopted with a supporting vote of a majority of the members of parliament, and any subsequent extension requires a supporting vote of 60% of the members of parliament.

[224] Ackerman op cit (n13) 1069.

[225] Such a criticism is justified by the fact that the said requirements impose only procedural constraints on emergency power, and not substantive constraints. Take, for instance, a country like South Africa

3.5.1.6 The 'model of legality based on experiments in institutional design'

The model of legality based on experiments in institutional design is advanced by David Dyzenhaus.[226] His thinking in formulating the model was shaped by Dicey's view that it is better for Parliament to state in advance the powers of the Executive and therefore rely on legislative solutions that preserve the rule of law.[227] While this model is not opposed to the existence of emergency laws and powers, it nonetheless places at the forefront the relentless subjection of such laws and powers to the rule of law. In enforcing compliance with the rule of law, the model is willing to abandon the traditional approach of relying on the courts as the custodian of the rule of law, and instead rely on creative experiments with the design of institutions.

Dyzenhaus[228] cites as an example of such creative experiment with the design of institutions the establishment of the Special Immigration Appeals Commission (SIAC) in the United Kingdom. This is a body that is statutorily empowered to hear appeals in cases of deportation from the United Kingdom on security grounds. Initially, those who were deported from the United Kingdom on security grounds had as their only recourse the option to appeal to an Executive committee, which then advised the responsible minister.[229] This placed the power of deportation beyond the reach of the courts and the law.

After the European Court of Human Rights refused to accept that the Executive committee was a proper platform before which the legality of detention and deportations could be challenged, [230] the government responded with the establishment of the SIAC, a quasi-judicial body before which appeals could be brought. Even the most sensitive and confidential security information could be disclosed before the SIAC in the interests of holding government officials accountable.

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where the ruling party occupies around 60% of the seats in Parliament, the procedural requirements of the supermajoritarian escalator would be met with ease.

[226] Dyzenhaus op cit (n11) 65-89.

[227] Ibid at 83.

[228] Ibid at 81-83

[229] Ibid.

[230] See *Chahal v UK* (1996) 23 EHRR 413, as cited in Dyzenhaus op cit (n11) 81.

The SIAC thus seemed to be a workable experiment in institutional design. It preserved the rule of law especially by enabling the holding of government officials accountable, while at the same time catering for the unique demands of security cases, such as keeping certain sensitive information secret. Through various creative design of institutions, the model of legality is able to regulate, limit or control the emergency laws and powers, and thus falls under the first category.

3.5.1.7 The formal and substantive conception of the rule of law

The rule of law is one doctrine that has the effect of regulating, limiting or controlling the security and emergency laws and powers (thus falling under the first category). As shown in the discussion under heading 2.2 in chapter 2 above, the controversy surrounding the rule of law turned on the preferred conception of the doctrine, i.e. the formal/procedural conception versus the substantive conception. This debate is, however, resolved in favour of adopting both the formal and substantive conception of the rule of law.

A legal system which adheres to the formal conception of the rule of law automatically attracts certain procedural requirements for the making of laws, which includes the security and emergency laws. Examples of such procedural requirements could be a requirement of certainty in security and emergency laws or that the exercise of security and emergency powers be authorised by law. Any shortcoming or failure on the part of security and emergency laws to observe the procedural requirements of the rule of law renders those security and emergency provisions unconstitutional.

Furthermore, the laws (including security and emergency laws) applicable in a legal system which adopts the substantive conception of the rule of law automatically have to observe certain substantive requirements. An example of a substantive requirement is the requirement that security and emergency laws have to be consistent with human rights and other freedoms. Failure to observe the substantive requirements results in those security and emergency provisions failing constitutional muster.

It follows that, since operation of the rule of law has the effect of imposing both formal and substantive requirements on the law, the rule of law has to be one doctrine that regulates, limits or controls the security and emergency laws and powers, and

therefore qualifies to fall under the first category. The one aspect of the rule of law that has not been discussed at this point are the origins of the rule of law. Chapter 2 above only considered the history of the rule of law in South Africa, but deferred to the present section the discussion of the origins of the rule of law. Therefore, the discussion which follows below traces the English origins of the rule of law.

As a starting point in tracing the origins of the rule of law, it is noteworthy that major reforms in English constitutionalism emerged notably after the 'Glorious Revolution' and the revolutionary settlement of 1689.[231] This was a period in English history which, after a gruesome struggle, marked the assumption of power and authority over the United Kingdom by Parliament away from the Crown.[232] In that war, parliamentarians had received support from the common lawyers of the time who had as their object the achievement of the independence of the udiciary, a goal which was successfully achieved and recorded in the constitutional settlement.[233]

The independence of the judiciary, however, was very costly because the common lawyers had to compromise the advances that had been made in elevating the (common) law above the powers of the monarch, such that any conduct of the monarch could be disqualified for being contrary to the law. It was in line with the wide acceptance of the idea of the superiority of the common law that Sir Edward Coke became popular in the 17th century for his judgment in *Dr Bonham's* case wherein he declared that the common law could invalidate any Act of Parliament that is contrary to it.[234] This decision was followed by other judges in the later parts of the 17th century into the earlier parts of the 18th century.[235] The common lawyers thus acceded to the

[231] Devenish op cit (n55) 675. For a historical perspective of English constitutionalism, see L Boulle, B Harris, & C Hoexter *Constitutional and Administrative Law - Basic Principles* (1989) 1-101 (Part I); and G Devenish *Constitutional change and reform in South Africa* (unpublished doctoral thesis, University of South Africa, 1986).

[232] Devenish op cit (n55) 675.

[233] Ibid. Before then, the judiciary did not enjoy any independence from the monarch (Currie & De Waal op cit (n1) 15).

[234] See Dugard op cit (n15) 14.

[235] Dugard op cit (n15) 15-16. The idea of the superiority of the law also became a fundamental premise upon which the founding American Constitution of 1787 was based.

fact that their support for parliamentarians would transform the supremacy of the common law into the supremacy of the law made by Parliament.[236]

The work of Sir William Blackstone titled *Commentaries on the Laws of England* (published in 1765) played a major role in the triumph of parliamentary sovereignty in the United Kingdom.[237] The supremacy of Parliament is embodied in Blackstone's sentiments that 'if the legislature positively enacts a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it'; that Parliament can 'do everything that is not naturally impossible'; and that its power is 'absolute and without control'.[238]

Parliamentary supremacy thus reflected the victory of Parliament over the monarch.[239] However, the supremacy of Parliament was, and continues to be, qualified by the rule of law doctrine.[240] Therefore, the rule of law was always 'part of the fabric of the British Constitution, and, as such should be, and generally are, respected by Parliament'.[241]

The classical formulation of the rule of law came in the work of an English scholar, AV Dicey, in his publication titled *An introduction to the Study of the Laws of the Constitution.* Dugard[242] reads Dicey as suggesting that the rule of law 'forms a fundamental principle of the Constitution and means:

(1) 'The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government;
(2) Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts;

[236] Devenish op cit (n55) 676.

[237] See Dugard op cit (n15) 16.

[238] Quoted in Dugard op cit (n15) 16.

[239] Currie & De Waal op cit (n1) 46.

[240] Dugard op cit (n15) 37.

[241] Ibid.

[242] Dugard op cit (n15) 37, citing AV Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (1959) 202-203.

(3) The constitution is the result of the ordinary law of the land … the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts'.

Of the different forms of attack levelled against the rule of law, the most significant (at least in the South African context, if not the entire world) is the limitation of the rule of law to nothing more than a procedural or due-process requirement (i.e. the formal/procedural conception). Fortunately, the substantive conception of the rule of law has since triumphed, and the rule of law is presently understood to impose both the formal and substantive requirements and much more. In fact, the rule of law is presently an embodiment of many other ideals of a true democratic order.

This marks the end the discussion on the models and doctrines which have the effect of regulating, limiting or controlling the security and emergency laws and powers. The next section discusses those practices, theories, principles and doctrines which have the effect of restricting the regulation, limitation or control of security and emergency laws and powers, and therefore falls under the second category.

3.5.2 The second category

As already indicated, there are also those models, theories, practices, principles and doctrines which have the effect of dispensing with the regulation, limitation or control over security and emergency laws and powers, thus falling under what in 3.5 above has been termed the second category. This section therefore sets out the following: firstly, the various practices which have the abovementioned effect and which fall under the second category;[243] secondly, the content of the theories which have the abovementioned effect and which fall under the second category;[244] and thirdly, the content of the various principles and doctrines which have the abovementioned effect and which also fall under the second category.[245]

[243] See 3.5.2.1 below.

[244] See 3.5.2.2 and 3.5.2.3 below.

[245] See 3.5.2.4 to 3.5.2.6 below

3.5.2.1 Various practices

The detail of South Africa's early security and emergency laws which appears under heading 4.5 in chapter 4 below reveals that there emerges from apartheid security and emergency jurisprudence certain uniquely South African practices which effectively did away with the regulation, limitation or control over security and emergency laws and powers. To avoid repetition, these practices will, in the present section, simply be named without engaging the detail thereof. The provision of the detail thereof is deferred to chapter 4 heading 4.5 below.

The first of the applicable practices is the use of statutory language that places the exercise of security and emergency powers in the subjective opinion or discretion of particular designated official(s). Through this practice, the apartheid government of South Africa managed to prevent any regulation, limitation or control on security and emergency powers. The second practice is the outright ousting of the courts' jurisdiction in matters concerning security and emergency laws. This way, it was rendered impossible to enforce any of the possible methods of regulating, limiting or controlling security and emergency laws and powers.

The third practice is the operation of parliamentary supremacy. The discussion under subheading 2.2 in chapter 2 above revealed that the operation of parliamentary supremacy meant that Parliament could legislate as it deems appropriate. In so legislating, it is not restricted in any way, save for the few procedural rules. The apartheid Parliament therefore could, and did, pass laws with provisions which had the effect of restricting any regulation, limitation or control on security and emergency laws and powers. The fourth and last practice is that of executive-mindedness on the part of the judges of the courts. Executive-minded judges are notorious for stretching the interpretation of the law in favour of the Executive. Thus, the law is interpreted in such a way that it imposes no regulation, limitation or control over the security and emergency laws and powers.

It is also noteworthy that even the models of emergency systems in 3.5.1.1 to 3.5.1.5 above can, through certain practices, be effectively weakened to the point of having the effect of lifting any regulation, limitation or control over emergency laws and powers. Starting with the Business as Usual model, the weakening of this model to the point that it no longer regulates, limits or control emergency laws and powers could

take the form of ordinary laws making provision for unlimited emergency powers of the Executive. To ensure the smooth enforcement of unlimited emergency powers, the common *ex ante* controls on emergency laws or powers which normally come with the Business as Usual model could be excluded, or only the weak forms of control could be imposed, or there could be a partial or permanent suspension of the operation of the rule of law.

Turning to the Legislative Accommodation model, which is one of the models of accommodation, the weakening of this model could take the form of the applicable legislation making provision for unlimited emergency powers of the Executive. Once again, the enforcement of such a legislative provision could be achieved through the exclusion of the common controls on emergency powers usually imposed by such legislation, or through the imposition of the weakest forms of control, or through even the partial or total suspension of the rule of law.

In the case of the Interpretative Accommodation model, the second of the models of accommodation, the weakening thereof could take the form of this model facilitating the interpretation of existing laws in a manner that vests the Executive with unlimited emergency powers, which are not subject to the rule of law or any other form of control or which are subject to the weakest forms of control. In the case of the Inherent Executive Powers model, which is the last of the models of accommodation, the manipulation thereof could come in the form of the use of the inherent powers of the Executive subject only to the discretion of the Executive, and not subject to the usual requirement of parliamentary authorisation, either *ex ante* or *ex post*.

Turning to the Extra-legal Measures model, this model already facilitates the lawful exercise of unfettered powers by the Executive during an emergency. However, such powers are still subject to some control since the restraint in place could be that, at the end of the emergency, the Executive will, in seeking indemnification for the extra-legal acts, have to account for the powers it availed to itself during an emergency. The removal of, or any tempering with, the requirement of *ex post* ratification usually by Parliament would be an example of the weakening of the present model so that it no longer regulates, limits or controls emergency laws and powers.

The escalating cascades of supermajorities model also facilitates the exercise of unlimited emergency powers, but there is still one control in place in the form of a

supermajoritarian escalator. The majoritarian escalator provides that a state of emergency automatically terminates after the expiry of the stipulated short period of time, and that the stipulated period can be extended with a significantly high majority vote in the Legislature. Once again, the removal of, or any tempering with, the supermajoritarian escalator would amount to the weakening of the escalating cascades model such that it no longer regulates, limits or controls emergency laws and powers.

The State of Siege model can also be weakened to the point that it no longer regulates, limits or controls emergency laws or powers. This would happen if, during a state of siege, the military is empowered by legislation to exercise unlimited powers which are not subject to the rule of law or any of the usual *ex ante* controls or which are subject to some other weak forms of control. Lastly, the model of legality based on experiments in institutional design can also be weakened if strict adherence to the rule of law is abandoned altogether or if only the formal conception of the rule of law is recognised, to the exclusion of the substantive conception.[246]

3.5.2.2 Militant democracy

Turning to the theories that restrict the regulation, limitation or control of emergency laws or powers, the first of such theories is the militant democracy theory. Established in the writings of Karl Loewenstein,[247] the theory of militant democracy emerged as a theory with a noble goal of equipping the European liberal democracies with tools to deal with the threat posed by Fascism and Nazism in the 1930s.[248]

Its architect, Karl Loewenstein, observed that the democratic guarantees of the rule of law and other similar mechanisms of liberal democracies play into the hands of the enemies of democracy who would abuse these democratic guarantees and hide behind human rights protections, yet continue advancing their cause to destroy the

[246] As to how the formal conception of the rule of law can have the effect of facilitating a veneer of legality for unlimited and uncontrolled emergency powers, refer to the discussion in 3.5.2.5 below.

[247] An insightful summary, commentary and citation of the relevant writings of Loewenstein can be found in Gross & Ní Aoláin op cit (n21) 38.

[248] Gross & Ní Aoláin op cit (n21) 38

democratic order from within.[249] He then resolved that the best way to protect the democratic order is to adopt 'democratic militancy', in terms of which the will to survive and maintain self-preservation may mean that democracies must assume autocratic methods.[250] Ultimately, the notion of democratic militancy is what enables the present theory to restrict the regulation, limitation and control of emergency laws and powers.

3.5.2.3 The theory of the exception

The most daring of the theories that restrict the regulation, limitation or control of emergency laws and powers is Carl Schmitt's infamous[251] 'theory of the exception'.[252] According to the theory, the exception (i.e. an emergency) is not just a legally created black hole[253] or a 'juridically produced void', but is instead a space that is beyond the law or a space in which the law 'recedes leaving the legally unconstrained state'.[254] In the envisaged state, the exception, be it real or perceived (depending on how the sovereign dictator views the prevailing circumstances), is dealt with by the sovereign dictator using unlimited powers.[255] The sovereign dictator can suspend or change the existing legal order as he/she wishes. In essence, the will of the sovereign dictator is always above the law or the Constitution.

The theory of the exception certainly presented the most radical theory for those legal systems which sought unlimited and uncontrolled emergency laws and powers. It is

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[249] Ibid.

[250] Ibid.

[251] The theory of the exception is described as such because it was notably developed in order to offer a legal justification for the Nazi government's rule effectively without law (Gross & Ní Aoláin op cit (n21) 162).

[252] For a useful summary of the complex content of the theory of the exception and the citation of various publications across which this theory is established, see Gross & Ní Aoláin op cit (n21) 162-168 & Dyzenhaus op cit (n155) 35-54.

[253] On the notion of 'black holes' and 'grey holes', see Dyzenhaus op cit (n155) 42. In essence, a 'black hole' in the emergency context means that emergency laws are not subject to any controls, thus becoming a 'lawless void' which is not governed by the law. On the other hand, a 'grey hole' in an emergency context means that emergency laws appear to be subject to some controls, but these controls are so weak and insubstantial that they may well permit the government to do as it pleases. Grey holes in law can therefore become as equally pernicious as black holes.

[254] Dyzenhaus op cit (n155) 39.

[255] Gross & Ní Aoláin op cit (n21) 164-166.

most radical not because it gives greater powers than any other theory which facilitates the exercise of unlimited and unrestricted emergency powers, but because it openly went against the approach of liberal legal theorists of seeking to locate within the Constitution or the law the authority for the grant of unlimited and uncontrolled emergency powers.[256] Since liberal theorists cannot conceive of a space which is beyond the law, the grant of unlimited emergency powers requires some veneer of legality even though the end result would be to place those emergency powers beyond regulation by law. Schmitt therefore established a model that openly and unapologetically embraced that emergencies are not constrained by the law, and even went as far as to glamourise the sovereign dictator whose will inevitably becomes the law.

An example of a provision which appear to subscribe to the theory of the exception can still be found in the Algerian Constitution. Article 96(1) of the Algerian Constitution provides that the Constitution is suspended during a period of the state of war and the President assumes all power.[257] Another example can be located in Switzerland jurisprudence where, during an emergency, the Swiss federal government is empowered to act in a way that would otherwise be unconstitutional in the interests of security.[258] The same also applies in Ireland.[259]

3.5.2.4 The formal conception of the rule of law

Turning to the principles and doctrines which have the effect of restricting the regulation, limitation or control of security and emergency laws and powers, the first applicable doctrine is the formal conception of the rule of law, the operation of which is even worse in those jurisdictions where the doctrine of parliamentary supremacy is applicable. The rule of law has been considered extensively in the discussion under heading 2.2 in chapter 2, as well as in 3.5.1.7 above. However, what is being conveyed here is that the total suspension of the rule of law or the removal of the substantive

[256] Dyzenhaus op cit (n155) 39.

[257] Gross & Ní Aoláin op cit (n21) 61.

[258] Ibid.

[259] Ibid at 61-62.

conception from the meaning of the rule of law (leaving only the formal/procedural conception) can play a role in restricting the regulation, limitation or control of security and emergency laws and powers.

In amplification, we saw in chapter 2 that the virtually unlimited security and emergency powers that were exercised by the apartheid government were facilitated by, among other things, the recognition of only the formal/procedural conception of the rule of law working alongside the doctrine of parliamentary supremacy. Accordingly, as long as the due-process requirements were met in the process of making the apartheid security and emergency laws, those laws had full legal effect regardless of their disregard for human rights and other liberties. It is for this reason that the operation of the formal/procedural conception of the rule of law can be argued to have the effect of restricting the regulation, limitation or control of security and emergency laws and powers.

3.5.2.5 Constitutional/judicial minimalism and judicial deference

The next principle/doctrine which could also serve to restrict the regulation, limitation or control of security and emergency laws and powers is the principle of constitutional/judicial minimalism. Coined by Cass Sunstein,[260] judicial minimalism encourages minimum judicial involvement particularly in resolving controversial constitutional questions.[261] Ultimately, under judicial minimalism, the judiciary may identify problems or constitutional issues, but must leave the applicable democratically accountable actor (usually the Legislature) to make a judgment as to how best to respond to the problem identified by the court.[262] Through the practice of judicial minimalism, the far-reaching security and emergency laws and powers are allowed to pass through the courts with a stamp of legality despite there being lingering questions

[260] The various writings of Sunstein in which the principle of constitutional minimalism is established are cited, summarised and critiqued in Dyzenhaus op cit (n155) 43-49.

[261] It does this by promoting shallowness over depth, in terms of which the courts are permitted to identify problems or contested questions, but must avoid taking a stand on these contested constitutional questions, thus leaving those questions unresolved. In addition, minimalism encourages narrowness over width as it prefers resolving one case at a time and avoids resolving more than what is demanded by the case (Dyzenhaus op cit (n155) 43).

[262] Dyzenhaus op cit (n155) 43.

of constitutionality.[263] In the foregoing sense, judicial minimalism has the effect of restricting the regulation, limitation or control of security and emergency laws and powers.

Operating along similar lines as the principle of constitutional minimalism is the doctrine of judicial deference. In terms of this doctrine, the courts would hear a matter raising a controversial constitutional issue, but find that, in the light of the prevailing conditions (i.e. an emergency or whatever security threat so confronted), judgment on the questions raised in the matter should be deferred to the Executive.[264] Through such deference, the courts abdicate the duty to resolve disputes and prefer to defer to the Executive, either out of respect (deference as respect)[265] or submission (deference as submission).[266] As is the case with the practice of judicial minimalism, with judicial deference, the far-reaching security and emergency laws and powers are also let through the court process with a stamp of legality despite there being lingering questions of constitutionality. This way, the judicial deference can have the effect of restricting the regulation, limitation or control of security and emergency laws and powers.

3.5.2.6 The political question doctrine

The political question doctrine can also operate to restrict the regulation, limitation or control of security and emergency laws and powers. The political question doctrine is

[263] Two case law examples serve as evidence of the operation of the minimalist approach. These are *Korematsu v United States* 323 US 214 (1944) (as cited in Dyzenhaus op cit (n155) 45) and *Ex Parte Endo* 323 US 283 (1944) (as cited in Dyzenhaus op cit (n155) 45). In both these cases there was an Executive order permitting the evacuation of American citizens of Japanese descent so as to facilitate their detention in order for the military to establish who amongst them was loyal. The said Executive order was upheld by the court in *Korematsu* because there was legislative authorisation for the evacuation and detention. On the contrary, the court in *Endo* refused to uphold the detention order because there was no statute authorising the detentions, only the evacuations were provided for in the applicable statute. Because the courts in these two cases confined themselves to statutory interpretation and avoided engaging and resolving any controversial constitutional question, the courts in these cases are seen to have decided the matters in a minimalist fashion (see Dyzenhaus op cit (n155) 45.

[264] Dyzenhaus op cit (n155) 19.

[265] Here the court decides for itself if a law violates rights, but has due regard to the weight of the opinion of the Executive or the Legislature (see Young op cit (n101) 275).

[266] Deference as submission occurs when the court merely submits to the will of the Executive or the Legislature without deciding the issue itself (see Young op cit (n101) 275).

slightly more radical than the principle of constitutional/judicial minimalism and judicial deference in that it allows the courts to declare certain legal questions as 'so quintessentially political that they are not regulated by law'.[267] It further holds that 'questions that can be labelled as 'political' should be authoritatively resolved, not by the courts, but rather by one (or both) of the political branches'.[268] The political question doctrine was founded in *Marbury v Madison*[269] where Justice Marshall stated:

> 'By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to this country in his political character and to his own conscience… . The acts of such an officer can never be examinable by the courts.'

The political question doctrine was further developed in *Baker v Carr*[270] where the court set out the criteria for a political question as follows:

> 'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

Therefore, the political question doctrine has the effect of ousting the court's jurisdiction in matters considered to be politically sensitive. In the security and emergency context, the ousting of the court's jurisdiction occasioned by the classification of a security or emergency matter as politically sensitive would indirectly

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[267] Dyzenhaus op cit (n155) 18.

[268] M Swart & T Coggin 'The road not taken: Separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling*' (2013) 5 *Constitutional Court Review* 346 at 362.

[269] 5 US (1 Cranch) 137 (1803) at 165-166, as cited by Swart & Coggin op cit (n268) 362-363.

[270] 369 US 186 (1962) at 217, as cited in Swart & Coggin op cit (n268) 362.

restrict any regulation, limitation or control of security and emergency laws and powers.[271]

[271] It is noteworthy that the political question doctrine is seen by some scholars to be on the path to extinction (Swart & Coggin op cit (n268) 362-363).
Further articulation of the origins of the political question doctrine can be found in: MO Mhango 'Separation of powers in Ghana: The evolution of the political question doctrine' (2014) 17 *Potchefstroom Electronic Law Journal* 2703-2744; DB Dennison 'The political question doctrine in Uganda: A reassessment in the wake of CEHURD' (2014) 18 *Law, Democracy & Development* 264-288; and TJO Musiga 'The political question doctrine and justiciability of rights in Kenya in the post-2010 constitution period' (2018) *Africa Journal of Comparative Constitutional Law* 115-136.

CHAPTER 4

EARLY DEVELOPMENT OF SOUTH AFRICAN SECURITY AND EMERGENCY LAWS

4.1 GENERAL

Chapter 4 primarily expands from chapter 3 and illustrates the extent of the influence that Roman-Dutch and English security and emergency laws has had on the formation and development of South Africa's early common-law security crimes,[272] as well as South Africa's common-law emergency measure.[273] Later, the chapter visits South Africa's embrace of security and emergency legislation, as well as the significant strides taken to ensure that legal challenges to, or based on, such legislation are prevented.[274] In essence, the chapter depicts South Africa's early security and emergency order. As to precisely what the contents of this chapter contribute to the envisaged interpretation regime will become clear in chapter 7 below when the interpretation regime is officially established.

A recurring theme throughout the sections in the present chapter is that the content in these sections not only unpacks the detail of South Africa's early security and emergency laws, but it also proves a fundamental premise of this thesis that is set out in the discussion under subheading 1.1.3 in chapter 1 above. This premise entails that legal interpretation by the courts (assisted, of course, by academic writings) is the preferred method of resolving conflicts in the law, of clearing ambiguities, of developing the law and of striking a balance between competing interests.

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[272] These being the crimes of high treason and sedition.

[273] This being the notion of martial law.

[274] Refer to the discussion under headings 4.4 and 4.5 below.

4.2 EARLY SOUTH AFRICAN SECURITY LAWS

Upon the arrival of the Dutch settlers in the year 1652, Roman-Dutch law became the common law of the Cape of Good Hope and ultimately South Africa.[275] This means that, ideally, South Africa ought to have inherited only the Roman-Dutch law version of security and emergency laws. However, the United Kingdom seized control of the Cape effectively from 1806, but retained Roman-Dutch law as the common law.[276] The clear position that Roman-Dutch law remained the common law did not stop the English law influence on South African law. Consequently, the South African legal system has as its roots both the Roman-Dutch and English law. Thus, the early security and emergency laws of South Africa are sourced mainly from these two legal systems.

In the security and emergency laws context, the fact that the early South African law inherited the Roman-Dutch and English law traditions means that the country automatically subscribed to the tradition of having two set of laws, one for the time of peace and the other for the time of crisis. [277] Chapter 3 revealed that this has been the tradition in Roman law, Roman-Dutch law, English law and various other jurisdictions. Thus, the *crimen laesae majestatis*, treason and sedition became South Africa's peacetime or ordinary security laws, whereas martial law was the country's emergency measure. These security and emergency measures are given individual attention below.

4.2.1 *Crimen laesae majestatis*

Part of South Africa's inheritance from Roman-Dutch law is the crime known as the *crimen laesae majestatis*. [278] The crucial question concerning this crime is what

[275] For a full account of the early developments in South African law, refer to the discussion under heading 2.2 in chapter 2 above.

[276] See note 74 above.

[277] It is also arguable that to subscribe to the tradition of having peacetime and crisis laws serves as an indication that the early South African jurisprudence rejected the Business as Usual model in fashioning the country's emergency system. For the detail of the Business as Usual model, refer to the discussion under subheading 3.5.1 in chapter 3 above.

remains of it if the crimes of treason and sedition are divorced from the genus *crimen laesae majestatis* and are recognised as independent crimes (as is currently the case). The study of Roman-Dutch law reveals that three species of the genus would remain if the crimes of treason and sedition are removed from the genus. These species are:[279] (a) the usurping of imperial prerogatives and public authority; (b) *crimen laesae venerationis* (which covered conduct which impaired the dignity of the emperor, the *princeps* or head of state); and (c) conduct which challenged the authority or safety of the state (without constituting high treason or sedition).

After a careful examination of the relevant authority, eminent South African criminal law scholars conclude that there is nothing left of the generic *crimen laesae majestatis* in South African law today if, of course, treason and sedition are removed from the genus. The reasons for this position vary between the other species of the genus being abrogated by disuse, or being covered by some other common-law and statutory crimes, or that the other species were never a crime even in Roman-Dutch law, or that the other species of the genus are no longer compatible with the modern-day constitutional and governance system.[280] It is therefore safe to conclude that only high treason and sedition are species of the genus that have survived to constitute independent South African common-law security crimes.

In closure, one observation that merits being made at this point is that the development of the *crimen laesae majestatis* in Roman-Dutch law was largely in the hands of academic writers. However, in South Africa, the development of the law is shaped by authoritative and binding judicial pronouncements (i.e. case law) following the interpretation and application of the law by the courts. Academic writings play a supporting role and are merely persuasive, though they may hold same the position held in authoritative and binding case law or may hold a position that is subsequently confirmed in authoritative case law.[281]

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[278] For the background on the *crimen laesae majestatis*, a generic name for various offences against the existence, safety, authority or dignity of the *majestas* or supreme power, refer to the discussion under headings 3.2 and 3.3 in chapter 3 above.

[279] Milton op cit (n149) 60-62.

[280] Milton op cit (n149) 62-69. See also Hoctor op cit (n143) paras 185-188.

[281] See the various cases cited as authority for the academic views on the genus *crimen laesae majestatis*, expressed in Milton op cit (n149) 62-69 and Hoctor op cit (n143) paras 185-188.

The above observation thus lends support to the fundamental premise of this thesis, as mentioned under 4.1 above. Further proof of the same premise will be provided during the course of the discussion in the sections below.

4.2.2 Treason

The development of South Africa's treason jurisprudence can also be attributed to legal interpretation (as reflected in case law), supported by scholarly writings. To illustrate the point, the controversy over whether South Africa adopts the Roman-Dutch or English law version of treason has been conclusively resolved by case law (following the process of legal interpretation) and scholarly writings in favour of Roman-Dutch law.[282]

Furthermore, one of the earliest definitional difficulties of the crime of treason that had to be resolved was the meaning of hostile intent, i.e. whether such intent was restricted only to the intent to overthrow the state. The Appellate Division in *R v Erasmus*[283] resolved the impasse by interpreting the relevant principles and thereafter proceeding to authoritatively find that hostile intent exists even where the intent is to coerce the state (without the intent to overthrow it). From then onwards, subsequent case law cited the foregoing position with approval.[284]

Taking their cue from the authoritative and binding *Erasmus* case, academic writers also sought to advance definitions of high treason that are cognisant of the fact that the intent required could either be intent to overthrow or to coerce the state. The foregoing has culminated in differently phrased, but substantially similar, definitions and elements of the crime of high treason. These definitions and elements can be

[282] See Milton op cit (n149) 17-20, and the cases cited therein.

[283] 1923 AD 73 at 81.

[284] See *R v Leibbrandt* 1944 AD 253; and *R v Mardon* 1947 (2) SA 768 (Sp Ct) at 774.

found in Hoctor,[285] Burchell,[286] Milton,[287] and Snyman.[288] These are some of the leading criminal law texts in the country. The essential elements which are common to all the definitions are:[289] (a) an overt act;[290] (b) unlawfully committed;[291] (c) by a

[285] Hoctor (op cit (n143) para 174) defines high treason as consisting in any act committed, either inside or outside the borders of the Republic of South Africa by a person who owes allegiance to the Republic, with the intention unlawfully to overthrow, coerce, impair or endanger the existence, independence or security of the government.

[286] Burchell (op cit n132) 838) defines high treason as consisting in any overt act unlawfully committed by a person owing allegiance to a state with intent to overthrow, impair, violate, threaten or endanger the existence, independence, or security of the state or to overthrow or coerce the government of the state or change the constitutional structure of the state. Furthermore, Burchell (ibid at 838) has had the privilege of accessing the lengthy judgment of a fairly recent Boeremag Treason trial (Case no CC 90/03), and notes that the court sought to refashion the definition of treason so as to bring it in line with the Constitution. Thus, it was stated that: '[t]he acts of treason should have been directed directly and indirectly at the Constitution or constitutional structures. It should have been alleged and proven by the prosecuting authority. The unlawfulness will stem from the fact that the intention was to replace the Constitution as such, in contravention of the provisions of the Constitution itself. The accused persons are however charged with an offence that obtained in the old dispensation in accordance with which Parliament was sovereign, with a government that exercised that sovereignty'.

[287] Milton (op cit (n149) 2) defines treason as consisting in any overt act committed by a person owing allegiance to a state possessing *majestas* with intent unlawfully to overthrow, impair, violate, threaten or endanger the existence, independence or security of the state, or to overthrow or coerce the government of the state, or change the constitutional structure of the state.

[288] Inspired by the definition of high treason provided in the South African Law Commission Report on the Codification of the Common Law Relating to the Crimes against the State RP 17/1976 (1976), Snyman (op cit (n129) 299) defines high treason as follows: '[a] person commits high treason if, owing allegiance to the Republic of South Africa, she unlawfully engages in conduct within or outside the Republic, with the intention of (a) overthrowing the government of the Republic; (b) coercing the government by violence into any action or inaction; (c) violating, threatening or endangering the existence, independence or security of the Republic; or (d) changing the constitutional structure of the Republic'.

[289] See generally Milton op cit (n149) 20.

[290] By 'overt act', it is meant that there must be some physical manifestation of the (hostile) intent to commit treason. Some of the principles applicable to the notion of an 'overt act' include the following: (a) that the overt act need not be of a violent nature (provided it is committed with hostile intent), (b) an act of attempt, conspiracy or incitement qualifies as the overt act for treason purposes, (c) an overt act can take the form of speaking or writing words, (d) an overt act can be committed in South Africa or abroad, (e) an overt act can be committed in a time of peace and war, (f) there is also an overt act where one fails to report treason which is being committed or is to be committed or has been committed (see Milton op cit (n149) 20-25).

[291] It is the unlawfulness element that protects against the criminalisation of lawful or constitutional means of replacing the government and the head of state, as well as the lawful adoption or abandonment of policies or legislation by the government. Any recognised ground of justification or defence which serves to negate the unlawfulness of the perpetrator's actions is recognised (Milton op cit (n149) 26-27).

person owing allegiance to the state;[292] (d) which possess *majestas*;[293] and (e) intention (hostile intent).[294]

In 1976, the South African Law Commission, as it was then known, also produced a report calling for the codification of the crimes of treason, sedition and public violence.[295] In that report, The following definition of treason was advanced:

2. (1) Any person who, owing allegiance to the Republic, commits an act, within or outside the Republic, with the intention of-

(a) unlawfully impairing, violating, threatening or endangering the existence, independence or security of the Republic;

(b) unlawfully changing the constitutional structure of the Republic;

(c) unlawfully overthrowing the government of the Republic; or

(d) unlawfully coercing by violence the government of the Republic into any action or into refraining from any action,

shall be guilty of high treason…

(2) Without derogating from the general purport of subsection (1)-

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[292] Only a person owing allegiance to a state commits treason if he or she endeavours to overthrow or coerce the government of the state. The notion of allegiance has roots in the feudal system of government in terms of which the subject had a duty to be faithful to the state in return for the state's protection of the subject. Therefore, allegiance is owed by someone who has the duty to be faithful to the state, or sometimes any person who is entitled to protection by the state. Thus, in terms of the current law, the following persons owe allegiance: (a) South African citizens and subjects; (b) a non-citizen who has taken up domicile in the Republic; and (c) a non-citizen who is resident in the country, but has not taken up domicile (Milton op cit (n149) 28-31). People who do not owe allegiance include: (a) foreigners who have never set foot in the Republic, (b) casual tourists from abroad who visit the country for a brief period only; (c) foreign business people who visit the Republic for a brief period of time for business reasons; and (d) crews of foreign aircrafts or ships who stay in the country for a brief period of time while, for instance, they wait for a flight back or while they wait for repairs to the aircraft or ship to be completed (Snyman op cit (n129) 302).

[293] A *majestas* remains a vague concept, but it would appear that it denotes some supreme power or sovereignty. The government (i.e. the Executive), the Legislature and the Judiciary are all identified with the state and it is no longer necessary to specify which body has *majestas*. Therefore, a hostile intent against any organ of state can amount to treason (Milton op cit (n149) 31-32).

[294] This is a key element, and it distinguishes treason from other lesser crimes. Milton approaches the process of describing what a hostile intent is by firstly indicating what a hostile intent is not. Thus, he points out that that intent and motive are different concepts; that a hostile intent is not to be associated only with intent to assist a foreign enemy for treason can be committed even during a time of peace when there is no foreign enemy; and that a hostile intent may consist in the intention to overthrow the state or in the coercion of the governing authority by force to adopt or abandon a particular policy or any action (without the intent to overthrow it). When describing what a hostile intent is, Milton submits that a hostile intent does exist if one intends to treat the government as the enemy or when one is intentionally antagonistic towards the state. A hostile intent can take the form of actual intent or *dolus eventualis*, without regard to motive. Negligence alone is not sufficient (Milton op cit (n149) 33-37).

[295] South African Law Commission Report op cit (n288).

(a) any person referred to in that subsection who within or outside the Republic unlawfully and intentionally-

(i) takes up arms against the Republic;

(ii) takes part in an armed revolt or rebellion against the Republic or instigates such revolt or rebellion;

(iii) causes any part of the Republic to secede from the Republic or attempts to concert with others to cause any part of the Republic to secede;

(iv) joins or performs service under an enemy that wages war against the Republic;

(v) assists an enemy at war with the Republic or makes propaganda for such enemy or supplies such enemy with information that may be useful to it in its war effort against the Republic;

(vi) after becoming aware of any act by any other person that constitutes high treason in terms of this section, fails to report such act forthwith to the police or other authorities, unless he has reason to believe that the police or other authorities are already aware thereof; or

(b) being a citizen of the Republic who, when the Republic is in a state of war, leaves the republic and settles in the territory of the enemy of the Republic,

shall be guilty of the crime of high treason.

(3) Without restricting the circumstances in which any person owes allegiance to the Republic, any person who is a citizen of the Republic or is domiciled or resident in the Republic or is the holder of a valid South African passport shall owe allegiance to the Republic.

In the light of the ancient tradition of developing the law, which includes the crime of treason, through case law (after the courts have interpreted and applied the law) and supporting scholarly writings,[296] the academic views expressed in the discussion under subheading 6.2.3.1 in chapter 6 below, pertaining to how the interpretation and ultimate development of the impugned provisions of the crime of treason may be approached, should be a welcome contribution to the treason jurisprudence, more so as these views also have the effect of resolving the constitutional challenges facing the crime of treason.[297]

[296] The South African Law Commission report is included within the category of scholarly writings as the concept of scholarly writings is meant to embody all secondary sources of law.

[297] Notwithstanding the much-celebrated strides in developing the crime of treason to what we know and understand today, academic arguments which place the constitutionality of the crime of treason in

4.2.3 Sedition

The development of the crime of treason to what we know and understand today has also been achieved through legal interpretation (in authoritative case law) and academic commentary. Take, for instance, the uncertainty as to whether the South African version of the crime of sedition was based on the 'seditious libel' crime of English law[298] or the Roman-Dutch law notion of '*oproer*'.[299] This uncertainty was authoritatively resolved in favour of Roman-Dutch law when the court in *R v Endemann*[300] interpreted the relevant principles and identified the South African

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doubt and therefore threaten its very existence started to surface at the beginning of the 1990s. Note that the 1990s is the stage in South African history which marked the transition away from apartheid rule to a constitutional democracy founded on the rule of law and human rights. These arguments are advanced by Labuschagne in JMT Labuschagne 'Menslike outonomie en staatlike majestas: opmerkings oor die dekriminalasie van hoogverraad' (1992) 5 *South African Journal of Criminal Justice* 117-131, an article written in the Afrikaans language but summarised in English by Burchell (op cit (n132) 839-840). The first argument is that the crime of treason is unconstitutional because its definition is intractably vague so as to violate the rule of law or the principle of legality (Burchell op cit (n132) 840). Being so vague, the crime is seen as being susceptible to abuse by the government (ibid). Snyman (op cit (n129) 307) further submits that the effect of the vagueness of the crime of treason could, for instance, lead to the failure to pay one's taxes constituting treason because that may show an intention to threaten or endanger the independence and security of the state or government.
Another argument for the abolition of the crime of high treason is that the crime is anachronistic and inappropriate for a modern popular democracy as it is based on the notion of allegiance, a concept that is outdated and no longer consistent with the modern understanding of the relationship between a state and the citizen (Burchell op cit (n132) 839-840). As the law stands, virtually any form of disobedience or betrayal of allegiance, whether justified or unjustified, could constitute an act of high treason. This is in sharp contrast to the right of citizens to challenge and question the government.
Another argument is that conduct deemed to be treason is capable of being criminalised as some other crime and should therefore be punished as such (Burchell op cit (n132) 840).
One cannot help but be curious as to why these arguments only surfaced towards the end of apartheid and not during apartheid. Why were they not raised before the courts in the many treason trials which took place during apartheid? Perhaps one can speculate that the potential unconstitutionality of the common-law crime of treason was obscured by the fact that, during apartheid, the focus was on developing the crime to what it is today, and so the court cases turned on the interpretation and application of the law rather than on questioning its legality or constitutionality. It can also be speculated that the unconstitutionality of the crime of treason was obscured by the fact that political activity which was taking place in South Africa during apartheid was being dealt with using the specially-designed security laws, and so the focus of the litigation and academic writings was on security legislation. One can perhaps speculate even further that the onslaught against the rule of law during apartheid is what obscured these constitutionality questions. We have already seen in chapter 2 that the effect of parliamentary supremacy was that the meaning of the rule of law had to be reduced to a formal/procedural conception which amounts to no more than a due-process requirement which is devoid of any substantive requirements for the law. Given the foregoing, the success of challenging a law for violating the rule of law or the legality principle was in doubt since that argument would have gone into the substance of the law.

[298] The detail on seditious libel can be found in the discussion under heading 3.4 in chapter 3 above.

[299] The detail on the Roman-Dutch law notion of *oproer* appears in the discussion under heading 3.3 in chapter 3 above.

[300] 1915 TPD 142.

version of sedition with the Roman-Dutch law notion of *oproer*.[301] '*Oproer*' connotes an assembly of persons in defiance of authority and is therefore much narrower than the English law seditious libel which criminalised any criticism (either written, printed or depicted), whether truthful or not, of the government.[302]

Even when further uncertainty erupted following the deviation of the court in *R v Malan*[303] from the precedent in *Endemann* to find that the South African crime of sedition carried English law connotations, the Appellate Division in *R v Viljoen*[304] interpreted the relevant principles and authoritatively declared that the South African version of sedition was aligned to the Roman-Dutch law *oproer*. Today, sedition is defined as consisting in an unlawful gathering, together with a number of people, with the intention of impairing the *majestas* of the state by defying or subverting the authority of its government, but without the intention of overthrowing or coercing that government.[305]

Similarly, Snyman[306] defines sedition as consisting in unlawfully and intentionally: (a) taking part in a concourse of people violently or by threats of violence challenging, defying, or resisting the authority of the state of the Republic of South Africa; or (b) causing such a concourse. Hoctor[307] submits that sedition consists in the unlawful and intentional gathering of a number of people in order to defy or resist the authority of the government of the Republic of South Africa, or the unlawful and intentional causing of such a gathering with such a purpose. The essential elements of the crime are: (a)

[301] Burchell op cit (n132) 851.

[302] Ibid.

[303] 1915 TPD 180.

[304] 1923 AD 90.

[305] Milton op cit (n149) 42. See also Burchell op cit (n132) 825.

[306] Snyman op cit (n129) 308.

[307] Hoctor op cit (n143) para 181.

unlawfully;[308] (b) gathering with a number of people;[309] (c) the state must possess *majestas*;[310] (d) intent (but not hostile intent).[311]

Once again, in light of the ancient tradition of developing the law, which includes the crime of sedition, through case law and supporting scholarly writings,[312] the academic views expressed in the discussion under subheading 6.2.3.2 in chapter 6 below, pertaining to how the interpretation and ultimate development of the impugned provisions of the crime of sedition may be approached, should be a welcome contribution to the sedition jurisprudence, more so as these views of academics also have the effect of resolving the constitutional challenges facing the crime.[313]

4.3 EARLY SOUTH AFRICAN EMERGENCY LAWS

Emergencies that were confronted by South Africa during the colonial or pre-apartheid era were dealt with using the common-law notion of martial law.[314] The development

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[308] The gathering must be for some unlawful purpose. This is compounded in the intention element to defy or subvert the authority of the government (Milton op cit (n149) 51).

[309] Milton argues that there is great emphasis on the requirement of people forming a gathering or concourse of people. Thus, the two people in *S v Twala* 1979 (3) SA 864 (T) could not have constituted a gathering or a concourse. The gathering or concourse of people must actually occur, which means that those conspiring to defy or subvert authority must be physically gathered either in a public or private place (Milton op cit (n149) 51-53).

[310] Similar to the crime of high treason, the state must possess *majestas* and not recognise a superior within its own territory. It is the *majestas* of the state that will be impaired by seditious acts which defy or subvert the authority of the government (Milton op cit (n149) 54).

[311] The intent required here is not hostile intent as that is required for high treason. Instead, the intention must be to defy or subvert the authority of the government of the state (Milton op cit (n149) 54-56).

[312] Once again, the South African Law Commission report is included within the category of scholarly writings for the same reason expressed in note 296 above.

[313] The constitutionality of the crime of sedition is rendered questionable by the possibility that it inhibits legitimate gatherings of people who are protesting against the government or are expressing some grievance (Milton op cit (n149) 44). The current legal position, as confirmed by the courts *S v Twala* supra (n309) and *S v Zwane* 1989 (3) SA 253 (W), is that the crime of sedition can be committed through violent and non-violent conduct which is intended to defy or subvert the authority of the government of a state. The court in *Twala* gave as examples of non-violent sedition the burning of passbooks with seditious intent, as well as the workers' strike against labour legislation if it (the strike) is accompanied by seditious intent (see Milton op cit (n149) 51). The argument by Milton (ibid) is that the criminalisation of non-violent gatherings such as those mentioned in *Twala* would infringe the right to freedom of expression and the right to gather and protest, which rights are enshrined in ss 16 and 17 of the South African Constitution respectively.

of martial law jurisprudence follows a similar approach as that of ordinary security laws in that it was also done through authoritative case law (after the courts had interpreted and applied the law), supported by academic commentary. The only difference is that, while legal literature and case law attempt to resolve the controversial aspects of martial law, in most cases, such controversies have not been conclusively resolved.[315]

To illustrate the above point, the lack of unanimity as to whether the South African law version of martial law was inherited from Roman-Dutch law or English law has not been conclusively resolved by case law and/or academic texts,[316] though it seems to be generally accepted that both the English and Roman-Dutch law versions of martial law have influenced the South African version. To this end, like the Roman-Dutch and English law version of martial law, South Africa accepts that martial law is basically a 'state of affairs, rather than settled body of rules, although rules and orders will be promulgated[317] and enforced by the military authorities as they deem fit'.[318]

The one qualification that formed part of the Roman-Dutch and English law versions of martial law and which was inherited by South African law is that any action taken by the Executive (mainly through the military) during martial law had to be objectively necessary.[319] The objective necessity of Executive conduct could be enquired into by the courts according to the Roman-Dutch law and, after some reluctance, even English

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[314] Thus, martial law was invoked on various occasions in South Africa's turbulent political history, such as during the Anglo-Boer War, the Zulu or Bambata Rebellion of 1906, the 1914 Rebellion which took place during the First World War, the 1922 'Red Revolt' and the *Ossewabrandwag* activities during the Second World War (Devenish op cit (n167) 350. See also Milton op cit (n149) 19-20).

[315] The reason for the inability to resolve the grey areas in respect of martial law is unknown. Perhaps one can speculate that the reason is that the events which occasion the need for the invocation of martial law occur infrequently and that possibly slows down cases and commentary on the controversial aspects of martial law. Another possibility is that the move away from relying on martial law in combating emergencies to adopting legislation allowing for the declaration of a state of emergency came before the martial law jurisprudence was fully developed.

[316] Devenish op cit (n167) 351.

[317] A common practice was that, during martial law, the Executive would seek special martial law powers from Parliament. Thus, for the first world War, there was the Indemnity and Special Tribunal Act 11 of 1915. For World War II, there was the War Measures Act 13 of 1940 (as amended by Act 20 and 32 of 1940 and Act 30 of 1949). These Acts provided for martial law powers such as that of detention without trial and internment (Devenish op cit (n167) 351. See also Mathews op cit (n118) 133).

[318] Devenish op cit (167) 350 & 353.

[319] Devenish op cit (n167) 352 & 354.

law.[320] However, in South Africa, the question of whether or not the courts can review or test the legality of decisions to invoke martial law has been answered in the affirmative in some cases[321] and in the negative in others,[322] thus plunging the legal position into deep uncertainty which has not been resolved even today.[323]

Another unresolved controversy concerning martial law is the question of what conditions or circumstances justify martial law. The lack of unanimity on this aspect is evidenced by the existence of conflicting case law on the issue. In the case of *Ex parte DF Marais*,[324] a South African case emanating from the events which took place during the Anglo-Boer War and which made it all the way to the Privy Council (thus assuming the status of being a case decided by the South African Appellate Division, as it was then known),[325] the court found that martial law exists 'where war actually prevails' and 'where war is actually raging'. Ultimately, the court treated the notion of 'war actually prevails' as synonymous to 'war is raging'.

In *Ex parte Kotze*,[326] the court found that where there is armed conflict between states, martial law comes into existence in all the states involved, even if the war is not taking place within the borders of all the affected states. This position is endorsed in *Trümpelmann v Minister of Justice*,[327] a case which found that martial law was justified in South Africa during World War II because war had been declared. This was despite there being hardly any prevailing or raging war, rebellion or insurrection in the country.

However, the finding in the *DF Marais* case above is contradicted by the finding of the court in *Dedlow v Minister for Defence*,[328] which rejects the view that the phrases

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[320] Ibid.

[321] See *Q v Bekker* 1900 SC 340; *Ex Parte Kotze* 1914 TPD 564; and *Tole v Director of Prisons* 1914 TPD 20.

[322] *Dedlow v Minister of Defence* 1915 TPD 543.

[323] The uncertainty in this regard is also confirmed by the court in *Krohn v Minister of Defence* 1915 AD 191. See also Devenish op cit (n167) 357.

[324] 1902 AC 109

[325] Devenish op cit (n167) 354.

[326] Supra (n321).

[327] 1940 TPD 242.

[328] Supra (n322).

'where war is actually raging' and 'where war actually prevails' are synonymous. The court's reasoning is that to say that war is actually raging means much more than that war actually prevails. Also, the case of *End Conscription Campaign v Minister of Defence*[329] contradicts the finding in the *Ex Parte Kotze* case and that of *Trümpelmann* by refusing to recognise that the existence of war (though it was not formally declared) between South Africa and its neighbouring country, Namibia, justified martial law in the Cape province, South Africa. The court in the *End Conscription Campaign*[330] case reasoned that 'a war, rebellion or civil uprising which does not actually threaten the Republic and its constitution is not such as can justify the state in disregarding the ordinary law and acting under martial law'.

Notwithstanding the conflicting authority, Devenish attempts to resolve the present impasse by submitting the following points pertaining to the conditions or circumstances which justify martial law. First, the geographical proximity to the theatre of war or military operations is no longer a decisive factor since modern technology is sophisticated to the point that even a state which is far from the war may be threatened.[331] Second, the absence of disorder and the normal functioning of the courts does not always mean that martial law is not justified.[332] Third, the fact that martial law has been proclaimed does not mean the state of martial law actually prevails because the courts can still find otherwise after examining the situation and surrounding circumstances.[333] Fourth, the fact that war has been declared does not necessarily mean the existence of martial law for martial law can exist even in the absence of a declared war.[334] In all instances, the courts must always be careful and not uphold martial law in situations where it would absurd to invoke martial law powers or where invoking martial law would be an abuse of power by the authorities.[335]

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[329] Supra (n190).

[330] At 196F-G.

[331] Devenish op cit (n167) 355.

[332] Ibid at 359.

[333] Ibid at 355 & 360.

[334] Ibid at 359.

[335] Ibid at 355.

The next unresolved controversy pertaining to martial law is in respect of whether or not the courts can review or test the legality of decisions taken by the military once martial law is established. The view expressed in *Ex parte DF Marais*[336] is that, during martial law occasioned by a state of war, actions of the military are not justiciable.[337] However, the court in *Ex parte Kotze*[338] held that, in cases of rebellion, the decision to invoke martial law and the extent of the powers available are justiciable. The court in *Q v Bekker*[339] was split on the issue, with the judges giving conflicting judgments.

In *Krohn v Minister of Defence*,[340] the court distinguished between places where there are military operations and where there are none, yet special powers of supervision still need to be exercised. It then found the review of military action undesirable in the former situation, but did not pronounce on the latter situation. In *Dedlow v Minister of Defence*,[341] the court found that where war actually prevails or the fact of the state of war is established, the ordinary courts do not have jurisdiction.

In *Halder v Minister of Defence and Provost Marshall of Pretoria*,[342] after having found that what needed to be established in the case was whether war prevailed in South Africa and not necessarily that war actually existed or was raging, the court proceeded to find that, since war was not prevailing in South Africa, the court had jurisdiction to decide whether internment was justified. It would appear that this was the first time that the court openly pronounced that the courts have jurisdiction if war is found not to be prevailing. This principle is praised by Devenish[343] as being the preferred view in the circumstances.

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[336] Supra (n324).

[337] What is unclear is whether this position applies only where war is raging or it applies also in places which are not the theatre of war (Devenish op cit (n167) 357).

[338] Supra (n321).

[339] Supra (n321).

[340] Supra (n323).

[341] Supra (n322).

[342] 1915 TPD 622.

[343] Devenish op cit (n167) 358.

In apparent acquiescence with the principle expressed in *Ex Parte DF Marais*,[344] *Krohn*[345] and *Dedlow*[346] cases, to the effect that the courts do not have jurisdiction to test the legality of actions of the military in situations where war prevails or is raging, Devenish[347] submits that the only qualification to this principle is that the actions of the military will be justiciable if these were undertaken *mala fide* (in bad faith) and outside the scope of the powers of the military. Even if indemnity is granted, that does not stop the courts from calling the military officials to account for their actions if they were taken *mala fide* and not for the suppression of war, insurrection or disturbance.[348]

The judgments handed down by the courts in attempting to answer the controversial questions pertaining to martial law raise a further question as to whether the courts, in adjudicating martial law cases, have been inclined to find in favour of the Executive or whether they have been prone to uphold and protect human rights and basic freedoms. Unfortunately, this question is not answered with certainty given the conflicting authority. However, the one positive aspect emanating from the existence of such conflicting authority is that some courts were still willing to protect human rights and basic freedoms at a time when the political conditions on the ground were such that it was a norm or it was becoming a norm, especially in martial law cases (and later the security and emergency cases), for the courts to side with the government. Put differently, this was a time when some judges of the courts were becoming executive-minded.[349]

The earliest martial law case in which the court demonstrated executive-mindedness of the highest order is the *Trümpelmann*[350] judgment. It will be recalled that the court in this case found that martial law was justified in South Africa during World War II

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[344] Supra (n324).

[345] Supra (n323).

[346] Supra (n322).

[347] Devenish op cit (n167) 357.

[348] Ibid at 360.

[349] Executive-mindedness can be described as being 'motivated by a conscious or subconscious desire, for whatever reason, to reduce limits on government power to a bare minimum' (J Lewis 'Executive-mindedness reinvented' (2005) 21 *South African Journal on Human Rights* 127 at 130).

[350] Supra (n327).

because the war had been declared,[351] and so the court deprived itself of jurisdiction to assess to its satisfaction that martial law was justified by the prevailing conditions on the ground. The court also deprived itself of jurisdiction to test the legality of the actions of the military. Devenish[352] also submits as evidence of executive-mindedness the fact that the court in *Trümpelmann* did not recognise the established principle that the actions of the military will be justiciable at least where their actions are taken in bad faith and outside the scope of their powers.

Blatant executive-mindedness on the part of the court in *Trümpelmann* can be argued to have manifested in the form of what is described in chapter 3 as judicial minimalism.[353] In terms of judicial minimalism, the court approaches legal questions in a minimalist fashion, limiting its interference to the minimum extent. It is submitted that, as we shall see in 4.5 below, executive-mindedness can also manifest in the form of the other principles and doctrines identified chapter 3, such as judicial deference,[354] as well as the non-justiciable political question doctrine.[355] Therefore, though unbeknown to the court in *Trümpelmann*, the judgment was a precursor to the culture of executive-mindedness that would characterise and dominate the apartheid-era judges, especially those who presided over security and emergency cases. More detail on the culture of executive-mindedness that was emerging will follow in the discussion in 4.5 below.

4.4 DRACONIAN SECURITY AND EMERGENCY LEGISLATION

It will be recalled that the discussion under subheading 2.2 in chapter 2 above placed the supremacy of Parliament at the centre of South Africa's legal and political system during apartheid. Therefore, although the jurisprudential development in respect of the draconian security and emergency legislation continued through legal interpretation in

[351] This was despite there being hardly any prevailing or raging war, rebellion or insurrection in the country.

[352] Devenish op cit (n167) 358.

[353] Refer to the discussion under subheading 3.5.2.5 in chapter 3 above.

[354] Also refer to the discussion under subheading 3.5.2.5 in chapter 3 above.

[355] Refer to the discussion under subheading 3.5.2.6 in chapter 3 above.

case law as well as in academic writings, parliamentary supremacy accounts for the subjection of this ancient tradition to the whim of Parliament, with the result that Parliament could, and actually did, pass laws limiting the freedom of academic expression, as well as ousting the courts' jurisdiction in adjudicating matters concerning security and emergency laws.

Although the restrictions imposed by the operation of parliamentary supremacy severely hampered the said ancient tradition, it (the said ancient tradition) was nonetheless never dispensed with. This becomes clear in the discussion under 4.5 below, where it can be deduced from the case law and academic texts cited therein that, despite the heavy restrictions, the development of the security and emergency jurisprudence was still being conducted through case law and academic writings.

Parliamentary supremacy also accounts for the shift away from the use of common-law security and emergency provisions to the introduction and use of draconian[356] security and emergency legislation passed by the then supreme or sovereign Parliament. Therefore, instead of relying on the common-law notion of martial law to counter the unrest occasioned by the defiance campaign in the 1950s,[357] the sovereign Parliament opted to enact the Public Safety Act.[358] Section 2(1) of the Act provided that the President[359] could declare by proclamation in the Government

[356] The reading of literature and other authority on security and emergency laws reveals that there is no uniform understanding of when a law is considered to be draconian. For present purposes, the thesis will treat draconian laws as referring to security and emergency laws (either in the form of legislation or subordinate legislation (i.e. regulations)) which provide for drastic powers (such as that of detention without trial, the vesting of far-reaching security and emergency powers in designated officials who are empowered to exercise such powers in their subjective discretion, the ousting of the courts' jurisdiction to hear matters concerning security and emergency laws, and the grant of blanket indemnity from criminal and civil liability in favour of government officials following their exercise of security and emergency powers). Other laws with less drastic provisions (such as provisions for reverse onus; banning orders against gatherings, processions, and meetings; the proscription of organisations; as well as the censorship and suppression of information etc.) will not be discussed as part of draconian security and emergency laws, though this is not being treated as suggesting that these provisions do not amount to draconian provisions.

[357] It is noteworthy that the native South Africans were not oblivious to the political developments which began taking place from 1910 and reached their zenith in 1948 when the policy of racial segregation (apartheid) was officially ushered in. Indeed, their war efforts had been successfully quashed by the white colonial government, but they soon after 1910 changed tactic and organised themselves politically under the banner of a political party that became the African Nation Congress (ANC). In the 1950s, the ANC led the defiance campaign which promoted peaceful/passive defiance of discriminatory laws, mainly the pass laws.

[358] 3 of 1953.

Gazette a state of emergency if, in his 'opinion', there was a serious threat to public safety or the maintenance of public order and the ordinary law was inadequate to enable the government to control the situation. Although the emergency was limited to 12 months, it could be extended by another proclamation in the discretion of the President.[360]

The President was also given a blank cheque when it came to the making of emergency regulations in terms of the Public Safety Act, as these were also subject to his opinion of what was necessary to overcome the emergency.[361] Of course, there were a few limitations,[362] but these were so insignificant that, in essence, the President virtually had unlimited power to make regulations.[363] The threatened use of the Public Safety Act was enough to bring the defiance campaign to an end without the declaration of a state of emergency.

However, in the early 1960s, a demonstration in the area known as Sharpeville against the carrying of passes resulted in the police opening live ammunition at the protesters, thereby killing 71 and injuring 180. A state of emergency was declared in terms of the Public Safety Act, and the emergency regulations, which notably went as far as to make provision for arrest without warrant and detention without trial, were proclaimed by the President.[364] In a variety of ways, the regulations effectively rendered the courts powerless,[365] they provided no right of appeal to an independent and objective body especially for those detained without trial,[366] and not a single body had the power to

[359] The Minister of Justice could also exercise the same powers that the President had during an emergency if he (the Minister) was of the opinion that it is urgently necessary to do so (s 4).

[360] Section 2(2). Also, the President could, in his discretion, withdraw the state of emergency (s2(3)).

[361] Section 3(1).

[362] See Mathews op cit (n118) 222-223

[363] The court in in *R v Maphumulo* 1960 (3) SA 793 (N) even remarked that the legislative powers of the President were equal to those of Parliament.

[364] For a discussion of these regulations, see Mathews op cit (n118) 225-226.

[365] This was achieved through methods such as the explicit exclusion of the courts' competency to hear certain emergency matters, the promulgation of regulations permitting certain officials to exercise certain powers subject to their opinion or discretion, and the promulgation of regulations and an Act of Parliament (the Indemnity Act 61 of 1961) indemnifying officials from civil and criminal liability which could have arisen following their actions during the state of emergency.

objectively assess whether the material conditions justified the declaration of the state of emergency.[367]

The Public Safety Act became South Africa's first post-Union emergency law which was not based on the common-law notion of martial law.[368] The Act applied throughout the apartheid era, and was invoked in 1960 and again in 1985 and in 1986.[369] The emergency system established by the Act was based on the Roman dictator model.[370] The series of *ex ante* controls on emergency power[371] coupled with the unrestricted power of the President to make regulations indeed suggest that the emergency system envisaged by the Public Safety Act was modelled on the Roman dictator model.[372] The Act also confirmed the continued rejection of the Business as Usual Model in South African law since there existed ordinary security laws (both common law and statutory) for ordinary security threats, and there also existed in the Public Safety Act a special emergency order for the time of crisis.

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[366] Where such bodies were appointed, these were under the full control of the Minister who appointed the members of that body.

[367] Dugard op cit (n15) 111.

[368] There also existed certain regional legal instruments that empowered the government to declare a state of emergency. For instance, Dugard (op cit (n15) 110-111) submits that in the 1960s the government declared a state emergency in one of South Africa's former homeland states, the Transkei, not through the Public Safety Act but under a number of the old Cape statutes which afforded the President the power to legislate for Transkei in the same manner as Parliament would do.

[369] AS Mathews *Freedom state security and the rule of law – Dilemmas of the apartheid society* (1986) 195.

[370] On the characteristics of the Roman dictator model, refer to the discussion under heading 3.2 in chapter 3 above. In view of the autocratic nature of the apartheid government, it is surprising that it did not opt for an extreme emergency system which places emergencies beyond the law or the Constitution, such as that which is based on the 'theory of the exception' (discussed fully in 3.5.2.3 in chapter 3 above). Even though the apartheid government may have fancied such a system (judging from the fact that it utilised all sorts of techniques to achieve virtually unlimited security and emergency powers), perhaps the reason for modelling the emergency system on the less extreme Roman dictator model is that the government wanted to maintain its democratic character based on the Constitution and the law. Indeed, that may have been the case but, at best, the democracy under apartheid was a 'militant democracy' (on this concept, refer to the discussion under subheading 3.5.2.2 in chapter 3 above) given that the supposedly democratic apartheid government did assume autocratic methods.

[371] Such as, *inter alia*, the restriction of a declaration of a state of emergency to no more than 12 months, and that Parliament had the power to nullify the declaration by rejecting the emergency regulations (s3(6)). See generally Mathews op cit (n118) 222.

[372] There are, however, some borrowings from English law traditions as well. For instance, the promulgation of regulations and legislation (the Indemnity Act (supra n365)) indemnifying government officials from liability for acts done during an emergency is an emergency tradition borrowed from English law, as reflected in the discussion under heading 3.4 in chapter 3 above.

What ensued after the use of the Public Safety Act following the Sharpeville massacre was the birth of emergency-type or draconian security legislation. The preference of draconian security legislation resulted from the adverse economic repercussions which came after the state of emergency of 1960.[373] Foreign investor confidence on South Africa's political stability was at an all-time low.[374] Government therefore sought alternative means to deal with political opposition without compromising economic stability, hence the draconian security legislation was resorted to.

The introduction of draconian security legislation happened gradually, with the government sort of testing the water by first introducing less drastic security measures and becoming bolder as time went by. For instance, following the acts of sporadic violence by *Poqo*, the militant wing of a political party called the Pan-Africanist Congress, the very first draconian security legislation was passed. This was section 17 of the General Law Amendment Act.[375] This Act, which was to remain in force for only a year subject to an extension by Parliament for no longer than 12 months at a time,[376] made provision for the 90-day detention without trial of those who were suspected on reasonable grounds to have committed or to have information about the commission of offences under the Suppression of Communism Act[377] or the Unlawful Organisations Act.[378]

The detainee was held in detention for purposes of interrogation for 90 days or until he/she had, in the 'opinion' of the Commissioner of the South African Police, replied satisfactorily to the questions.[379] The detainee was not allowed visitors, except by a magistrate and only on a weekly basis.[380] No court had jurisdiction to order the release

[373] Dugard op cit (n15) 112.

[374] Ibid.

[375] 37 of 1963.

[376] Section 17(4)(a). The Act ended up remaining in the law books for five years (Dugard op cit (n15) 113).

[377] 44 of 1950.

[378] 34 of 1960.

[379] Section 17(1).

[380] Section 17(2).

of such detainee.[381] The Act was also notorious for what became known as the 'Sobukwe clause', in terms of which the apartheid government justified the continued incarceration of one of the leaders of the 1960 Sharpeville defiance, Robert Sobukwe, even after completing his sentence of three years.[382] The Act therefore introduced what is known as a 'bill of attainder', a legislative provision imposing punishment without a judicial trial.[383]

After the withdrawal of the 90-day detention law, Parliament inserted section 215*bis* into the Criminal Procedure Act.[384] This section introduced a provision for the 180-day detention of any person who was likely to give evidence for the state in connection with certain political and common-law offences. Such detention could occur whenever the Attorney-General was of the 'opinion' that the witness in question might be intimidated, or might abscond, or that it was in the interests of such detainee or the administration of justice that he/she be detained. Only a state official could have access to the detainee, and the courts could not order the release from custody of the detainee.[385] The Act also gave the Attorney-General the power to withhold bail for 12 days after arrest in cases where he/she was of the view that public safety was threatened.[386] Unlike the 90-day detention law which was temporary and required extension by Parliament, this time the government was bolder and the 180-day detention provision was made permanent.

As per the foregoing, it is clear that South Africa was on a trajectory towards a permanent state of emergency. Despite the Public Safety Act[387] being modelled on the Roman dictator model, the country was no longer loyal to the essence of the Roman dictator model, which is that emergency measures must be of a temporary nature and must be aimed at returning the state to its normal order. To put the final

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[381] Section 17(3).

[382] Section 4 of the General Law Amendment Act supra (n375) .

[383] Dugard op cit (n15) 114.

[384] 56 of 1955.

[385] Dugard op cit (n15) 114.

[386] Dugard op cit (n15) 115. See also Mathews op cit (n118) 156.

[387] Supra (n358).

nail in the coffin, the Terrorism Act[388] made provision for the indefinite detention without trial of suspects of political crimes if the commissioned officer had 'reason to believe' that the suspect was a terrorist.[389] This was a step further than the 14-day detention of those suspected of terrorism before the Act was introduced.[390] The Terrorism Act also allowed the withholding of information pertaining to the identity of the detainee, the visits by a magistrate were no longer compulsory but discretionary, and this was a permanent piece of legislation in South African law.[391]

The Internal Security Act[392] was another draconian security law of the apartheid government. Although it mainly replaced the Suppression of Communism Act,[393] the 180-day witness detention provision of the Criminal Procedure Act[394] was notably transferred from that Act to the present Internal Security Act in respect of political offences.[395] In 1982, following the Rabie Commission Report into security laws and its recommendation to consolidate all security laws under one legislation,[396] the Internal Security Act[397] was passed.

There are a number of draconian provisions of the Internal Security Act of 1982. The first is section 28, which empowered the Minister of Law and Order to order the detention of any person if the Minister is of the 'opinion' that there are reasons to apprehend that such person will commit the offence of terrorism, subversion or sabotage; or if he (the Minister) is 'satisfied' that this person engages in activities which endanger or which are calculated to endanger the security of the state or the

[388] 83 of 1967.

[389] Section 6 of the Act.

[390] See s 22 of the General Law Amendment Act 62 of 1966.

[391] Dugard op cit (n15) 118.

[392] 79 of 1976.

[393] Supra (n377).

[394] Supra (n384).

[395] Dugard op cit (n15) 115.

[396] The Report is titled *Die verslag van die kommissie van die ondersoek na veiligheidswetgewing* RP 90/1981.

[397] 74 of 1982.

maintenance of law and order. The detainee was detained for the period stipulated in the order and, while so detained, no one was allowed to access the detainee unless the necessary consent was obtained. This detention provision therefore constitutes an example of preventive detention.[398]

Another form of preventive detention was introduced in section 50 of the Internal Security Act of 1982. This time it was detention for 48 hours, which could be extended to 14 days if there was a magisterial warrant to that effect. The basis for the detention was any police officer being of the 'opinion' that the actions of the person in question contribute to the state of public disturbance, disorder, riot or public violence, and that the detention would help combat or terminate such a state of affairs. Another basis was any police officer forming an 'opinion' that the detention will assist in the prevention or resumption of the aforementioned state of affairs.

The last preventive detention provision was section 50A of the Internal Security Act of 1982. It was introduced through an amendment of the Act effected in 1986, and made provision for 180-day detention. The basis for the detention was the senior police officer's forming of an opinion that the arrest and detention of any person will help combat, prevent or terminate various forms of unrest.

The detention provision in section 29 of the Internal Security Act of 1982 is an example of pre-trial detention.[399] It made provision for indefinite detention for purposes of interrogation, if the designated police officer had 'reason to believe' that certain acts (such as engaging in terrorist acts or withholding information from the police pertaining to the person who has committed or intends committing the offence of terrorism) have been committed by the individual to be so detained. The detainee was held in accordance with the directions issued by the Commissioner of Police until the Commissioner ordered his/her release after being satisfied that the detainee has replied satisfactorily to all questions and that the continued detention will serve no further purpose. Section 29(6) ousted the courts' jurisdiction in matters concerning the indefinite detention in section 29. Only certain state officials (i.e. the Minister of Law

[398] Preventive detentions are forms of detention used to detain allegedly dangerous individuals in order to remove them from society (Mathews op cit (n369) 79).

[399] Pre-trial detentions are methods used to obtain information or evidence from detained persons (Mathews op cit (n369) 79).

and Order or any persons acting under the authority of the Minister, the Inspector of Detainees, the magistrate and state district surgeon) were allowed access to the detainee and the official information obtained from such detainee.

Another pre-trial detention provision was section 30 of the Internal Security Act. Similar to the 'no bail' clause in section 215*bis* of the Criminal Procedure Act,[400] section 30 empowered the Attorney-General to issue an order preventing the courts from granting bail to a person arrested on a charge of having committed an offence in Schedule 3 of the Internal Security Act. The basis for issuing such an order was whether the Attorney-General considered the order necessary in the interests of state security or the maintenance of law and order.

The third and last form of pre-trial detention was section 31. It reintroduced the Criminal Procedure Act's [401] 180-day detention of potential state witnesses in connection with security crimes. The basis for the detention still remained the opinion of the Attorney-General that the detainee who is likely to give material evidence for the state in criminal proceedings relating to certain specified security offences may be tampered with or be intimidated or may abscond or that the Attorney-General deemed the detention to be in the interests of such a person or the administration of justice. Visits to section 31 detainees were subject to the consent of certain state officials, and the courts did not have jurisdiction to order the release of the detainee or adjudicate on incidental matters.

4.5 PREVENTION OF LEGAL CHALLENGES TO, OR BASED ON, THE APARTHEID SECURITY AND EMERGENCY LEGISLATION

This section considers what wittingly or unwittingly became the techniques or methods that were employed in order to prevent legal challenges to, or based on, the draconian apartheid security and emergency legislation, as well as the accompanying regulations.[402] This section also considers all that which aided or enhanced the

[400] Supra (n384).

[401] Ibid.

operation of the said techniques or methods. Lastly, as is the case with the other sections in this chapter, the contents of the present section coincidentally prove the centrality of legal interpretation in legal development, a fundamental premise of this thesis.

In no particular order, the first technique for preventing legal challenges to, or based on, the security and emergency legislation, as well as the regulations, was the use of statutory language that placed the exercise of security and emergency powers in the subjective opinion or discretion of particular designated official(s). Indeed, this was the strategy of the Public Safety Act,[403] the Criminal Procedure Act,[404] the Internal Security Act,[405] as well as the numerous regulations that accompanied the aforementioned Acts.

The above technique bore the result that there was no requirement of the production of objective evidence or facts that informed the government official's exercise of security and emergency powers granted in legislation and in the regulations. Thus, in *Stanton v Minister of Justice*,[406] the court held that it was not open to Miss Stanton to prove that an emergency was not objectively justified in her area as it was the opinion of the Minister, the magistrate or the commissioned officer that mattered. Owing to this technique, potential legal challenges based on some of the draconian provisions of security and emergency legislation were frustrated and ultimately prevented.

The second technique was the outright ousting of the courts' jurisdiction in certain matters concerning state security and emergency laws. This technique went a step further than the first in that it explicitly denied the courts any role in certain security and emergency matters. The 90-day detention law,[407] 180-day detention law,[408]

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[402] The discussion under subheading 3.5.2.1 in chapter 3 above alludes to these techniques as well as that which aided or enhanced the operation of these techniques, but the detailed discussion of the foregoing was deferred to the present chapter.

[403] Supra (n358).

[404] Supra (n384).

[405] Supra (n397).

[406] 1960 (3) SA 354 (T).

[407] Supra (n375).

[408] Supra (n384).

Internal Security Act[409] and numerous regulations, had provisions ousting the courts' jurisdiction, thus preventing legal challenges.

What aided or enhanced the two techniques mentioned above was notably the grant of indemnity from criminal and civil liability in favour of government officials who exercised power in terms of security and emergency laws.[410] This must have helped to restrict legal challenges concerning those who exercised power in terms of security and emergency laws. What also aided or enhanced the two techniques mentioned above was the operation of the doctrine of parliamentary supremacy. It will be recalled that the operation of parliamentary supremacy had the effect of restricting rule of law to the formal/procedural conception.[411] This meant that the courts' power of judicial review could not be extended to testing the substance or content of legislation and regulations, as the courts were restricted only to testing whether the correct procedure was complied with in the making of legislation as well as the regulations.

Therefore, the operation of parliamentary supremacy shielded the draconian security and emergency legislation and regulations from legal challenges that would lead to proper and objective judicial scrutiny and which considered the substance of the legislation and regulations. The undesirability of a justiciable Bill of Rights was also an essential tenet of the doctrine of parliamentary supremacy. As a result, this tenet of parliamentary supremacy shielded the draconian security and emergency legislation and regulations from legal challenges and from being interpreted and tested in light of human rights.

In addition, what further aided or enhanced the techniques mentioned above is the notion of executive-mindedness on the part of the judges of the courts.[412] This is most unfortunate because even in the very limited instances where judges could intervene and interpret the far-reaching security and emergency provisions in a manner that upholds the rule of law, human rights and basic freedoms, they did not take up that

[409] Supra (n397).

[410] See note 372 above.

[411] For a full account of parliamentary supremacy and its effect on the rule of law and human rights, refer to the discussion under heading 2.2 in chapter 2 above.

[412] For a description of 'executive-mindedness', see note 349 above. Others refer to the phenomenon of executive-mindedness as 'conservative judicial positivism'.

opportunity. Instead, the judges preferred to stretch the interpretation of legal provisions and find in favour of the Executive.[413]

Executive-mindedness reflected in the judgments of the then top court, the Appellate Division, and was therefore propagated by the most senior judges.[414] Because the South African legal system works on a precedent system (*stare decisis*), in terms of which the higher courts hand down judgments which are binding and must be followed by the lower courts, it was conceivably easier for the culture of executive-mindedness to filter down to the lower courts. This way, executive-mindedness also shielded the security and emergency laws from proper judicial scrutiny and interpretation in light of the rule of law and human rights.

The earliest case in which the presiding officer has been observed to have been executive-minded is the martial law case of *Trümpelmann v Minister of Justice*.[415] The court in this case found that martial law was justified in South Africa during World War II because the war had been declared. This was despite there being hardly any prevailing or raging war, rebellion or insurrection in the country. The court then deprived itself of jurisdiction to assess to its satisfaction that martial law was objectively justified by the prevailing conditions on the ground. The court also deprived itself of jurisdiction to test the legality of the actions of the Executive (acting through the military).

In the context of security laws, executive-mindedness reflected for the first time in the case of *Rossouw v Sachs*.[416] This case concerned the question of whether a detainee

[413] The culture of executive-mindedness on the part of the judges during the apartheid era may be explained, and even be excused, on the basis that it (executive-mindedness) was a result of the subservience of the courts to the political branch of government (i.e. the Legislature). The subservience of the courts was enforced by the operation of parliamentary supremacy, which meant that the courts must apply whatever laws made by Parliament, and not question these laws. Indeed, a sovereign Parliament like that of apartheid South Africa preferred judges who enforced its will, not those who questioned it. As such, the apartheid government appointed pliable judges to the bench. However, the blame for the extremes to which judges took the subservience to the will of Parliament as expressed in legislation (and subordinate legislation i.e. regulations) has to be placed solely on the judges.

[414] For a critique of the performance of the courts, mainly the Appellate Division under each of the Chief Justices of that court, see Dugard op cit (n15) 325-360; E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38-75; and AS Mathews 'The South African judiciary and the security system' (1985) 1 *South African Journal on Human Rights* 199-209.

[415] Supra (n327).

[416] 1964 (2) SA 551 (A).

under the 90-day detention law[417] was entitled to reading and writing material. The legislation in question was silent on the matter, and so the intention of the Legislature had to be ascertained. Far from interpreting the impugned statutory provisions restrictively and in favour of liberty, the court opted for an unconvincing and strained interpretation imposing intent upon the Legislature which it (the Legislature) could have stated clearly if it so wished.[418] The strained interpretation in the present case operated in favour of the Executive.

When the question as to whether the court jurisdiction's ouster clause in the 90-day detention law[419] prevented the court from ordering the detainee to appear personally before court to give evidence as to the methods of interrogation used by the police, the majority of the Appellate Division in *Schermbrucker v Klindt N.O.*[420] adopted an interpretation which favoured the court's deprivation of jurisdiction from making such an order. This was in spite of the fact that the court could, and ought to, have held otherwise.

Also confirming executive-mindedness on the part of the judges of the court is the case of *Loza v Police Station Commander, Durbanville*.[421] This case overruled a convincing judgment in *Mbele v Minister of Justice*,[422] to the effect that the authorised officer in terms of the General Law Amendment Act[423] could not renew the detention of a suspect for a further period after the expiry of 90 days, except if such detention was in respect of a different offence or the possession of different information. The court in *Loza* inserted criteria such as that a further detention could be justified 'by a

[417] The General Law Amendment Act supra (n375).

[418] See Dugard op cit (n15) 333-336. For further commentary on this judgment, see Mathews & Albino op cit (n31) 22-29. This judgment is also comparable to the majority finding in *R v Halliday, Ex Parte Zadig* [1917] AC 260, in which the majority of the House of Lords interpreted an otherwise silent statute to empower the relevant authority to make detention (without trial) regulations.

[419] Supra (n375).

[420] 1965 (4) SA 606 (A).

[421] 1964 (2) SA 545 (A).

[422] 1963 (4) SA 606 (D).

[423] Supra (n375).

change in the situation upon which the suspicion or opinion is based' or by a 'change in respect of the particular offence'.[424]

Furthermore, the court in *S v Hlekani*[425] refused to uphold the principle that the admission obtained following the 90-day detention of a suspect was not admissible, though the court in *S v Ismail*[426] eventually did. It is therefore arguable that the court in *Hlekani* continued the culture of executive-mindedness. Even when there was authority[427] for the principle that the 180-day detention provision in the Criminal Procedure Act[428] permitted a generous interpretation in favour of individual rights because the Act did not deal exclusively with state security, some executive-minded judges of the courts still moved away from this position.[429]

Executive-mindedness also reflected in the judgments in cases concerning the Terrorism Act.[430] A significant change that had come with the Terrorism Act was that the basis for the indefinite detention of a person was no longer the subjective opinion of a designated official, but a designated official having 'reason to believe' that the suspect was a terrorist. Section 29 of the Internal Security Act,[431] as well as the various regulations in terms of that Act, used similar wording in respect of some of the provisions.

In non-security cases, provisions which turned on being 'satisfied' or having 'reason to believe' had long been authoritatively found to allow the courts to seek objective evidence for such satisfaction or belief.[432] However, for a while, the courts did not take up this invitation in security cases, and they either kept to the rhetoric of executive-

[424] Mathews op cit (n118) 136.

[425] 1964 (4) SA 429 (E).

[426] 1965 (1) SA 446 (N).

[427] See *S v Heyman* 1966 (4) 598 (A).

[428] Supra (n384).

[429] See *Gosschalk v Rossouw* 1966 (2) SA 476 (C); and *Singh v Attorney-General, Transvaal* 1967 (2) SA 1 (T).

[430] Supra (n388).

[431] Supra (n397).

[432] See *Brits Town Council v Pienaar NO* 1949 (1) SA 1n004 (T); and *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D). See also Mathews op cit (n369) 64; and Mathews op cit (n118) 147.

mindedness[433] or at least opted to interpret these phrases to mean that the official had discretion which could be set aside only if that official acted dishonestly, mindlessly or for improper purposes.[434] It is only in *Minister of Law and Order v Hurley*[435] that the court finally recognised even in security cases that the phrase 'has reason to believe' requires objective grounds for the belief, which grounds are justiciable.[436]

The cases discussed above are just some of the examples of executive-minded interpretations of security and emergency provisions. Therefore, the plethora of cases in which the provisions of security and emergency laws are challenged are not discussed in full here, albeit executive-mindedness can also be witnessed in these other cases.[437]

While the culture of executive-mindedness prevailed at the height of apartheid during the 1970s and the 1980s, judicial activism (in terms of which the courts did not only

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[433] See *Mnyani v Minister of Justice* 1980 (4) SA 528 (Tk); *Mbane v Minister of Police* 1982 (1) SA 223 (Tk); and *Matroos v Coetzee NO* 1985 (3) SA 474 (SEC). The position adopted in these judgments is comparable to the majority finding in *Liversidge v Anderson* [1942] AC 206. In this case, the court was confronted with the issue of whether to adopt a subjective or objective construction of a statutory provision that permitted the Minister to detain whoever he had reasonable cause to believe is a security threat. The majority of the court opted for a subjective construction which accepted the Minister's say-so, and justified this on the basis of the wartime emergency.
For a commentary on the above cases, see MY Cassim 'Detention and torture without trial: Section 29 of the Internal Security Act' (1987) 10 *National Black Law Journal* 200 at 206-207; and LJ Boulle 'Detainees and courts: New beginnings (1985) 1 *South African Journal on Human Rights* 251 at 253.

[434] Mathews op cit (n414) 204. This line of interpretation was in the same spirit as the principle that the basis for challenging legislative provisions and regulations which made the exercise of certain powers subject to the subjective opinion or discretion of a certain official, was that the official did not apply his/her mind or, that he/she acted *mala fide* or in bad faith (see *Nkwinti v Minister of Police* 1976 (2) SA 421 (E); *Dempsey v Minister of Law and Order* 1986 (4) (SA) 530 (C); and *Radebe v Minister of Law and order* 1987 (1) SA 586 (W)). The line of interpretation in question was also in the same spirit as the principle that the courts were bound by legislative provisions and regulations which ousted the courts' jurisdiction only if the non-justiciable act was done lawfully or *intra vires*, such as when the detention of suspects was undertaken lawfully in terms of legislation or the regulations (see *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A); *Radebe v Minister of Law and Order* supra; and *Dempsey v Minister of Law and Order* supra. See also D Basson 'Judicial activism in a state of emergency: An examination of recent decisions of the South African Courts' (1987) 3 *South African Journal on Human Rights* 28 at 29-31; and Mathews op cit (n369) 63-64).

[435] 1985 (4) SA 709 (D). This case was upheld on appeal in *Minister of Law and Order v Hurley* supra (n434)

[436] Other security cases in which this line of interpretation was invoked include *Katofa v Administrator-General for South West Africa* 1985 (4) SA 211 (SWA); *Dempsey v Minister of Law and Order* supra (n434); and *Radebe v Minister of Law and Order* supra (n434). For further commentary, see Boulle op cit (n433) 252-253.

[437] For an account of these cases, see N Haysom and C Plasket 'The war against law: Judicial activism and the Appellate Division' (1988) 4 *South African Journal on Human Rights* 303-333.

accept what the law was but also imagined what the law should be) gained momentum, and the courts started showing signs of slowly moving away from executive-mindedness, though there is no consistency in this regard.[438]

The last submission to make on executive-mindedness is that it (executive-mindedness) can manifest in a number of ways, and these keep evolving.[439] After all, even the criteria for executive-mindedness (i.e. the conscious or subconscious desire to reduce to a bare minimum the limits on government powers),[440] is in and of itself flexible. The obvious form in which executive-mindedness can manifest is the courts' resort to a strained interpretation of the law in favour of the Executive, as reflected in the cases cited above. Other forms could conceivably include judicial deference, judicial minimalism and a declaration of certain legal questions as non-justiciable political questions.

South African security and emergency case law does not make explicit references to judicial minimalism, judicial deference and the political question doctrine. Although that is the case, it does not mean that traces or remnants of these cannot be located at all in South African jurisprudence. Take, for instance, the judgment in *Trümpelmann v Minister of Justice*.[441] The point was made towards the end of the discussion in 4.3 above that executive-mindedness in this case can be argued to have manifested in the form of judicial minimalism because, after the court had found that war was prevailing as it had been declared, it limited its interference to the minimum extent (i.e. it deprived itself of jurisdiction to assess to its satisfaction that martial law was objectively justified and also deprived itself of jurisdiction to test the legality of the actions of the military).

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[438] For a compilation and overview of judgments in which judicial activism or the gradual shift of the courts away from executive-minded behaviour can be observed, see Dugard op cit (n15) 344-360; Basson op cit (n434) 28-43; Haysom & Plasket op cit (n437) 303-333; Cassim op cit (n433) 200-223; W. Le R. De Vos 'The role of the South African judiciary in crisis periods' (1987) 1 *Journal of South African Law* 63-74; and L Baxter 'A judicial declaration of martial law' (1987) 3 *South African Journal of Human Rights* 317-322.

[439] For a new form of executive-mindedness taking shape in South Africa, see Lewis op cit (n349) 130.

[440] Lewis op cit (n349) 130.

[441] Supra (n327).

Furthermore, the courts' adoption of a minimalist stance automatically means that the legal questions that the court was expected to resolve are effectively deferred to another branch, usually the Executive. By so deferring, these legal questions are indirectly rendered non-justiciable political questions which must be dealt with by the political branches of government. This concludes the discussion on the early development of South African security and emergency laws. The next chapter is concerned with the delineation of South Africa's post-apartheid emergency jurisprudence.

CHAPTER 5

THE DELINEATION OF SOUTH AFRICA'S POST-APARTHEID EMERGENCY JURISPRUDENCE

5.1 GENERAL

Now that chapter 4 has visited the early development of security and emergency laws, chapter 5 is then concerned with delineating and providing a comprehensive breakdown of the prevailing emergency jurisprudence. The main purpose of the delineation is to set out the content of the post-apartheid emergency jurisprudence so that it can be studied and analysed in order to unearth the detail that contributes to the establishment of the envisaged interpretation regime. As to precisely what the delineation in this chapter contributes to the envisaged interpretation regime will become clear in chapter 7 below when the interpretation regime is officially established.

5.2 DELINEATION OF THE EMERGENCY JURISPRUDENCE

5.2.1 Background

As can be imagined, the transition from apartheid to democracy came with significant changes to the legal system of South Africa. Chief amongst these was the abandoning of parliamentary supremacy in favour of constitutional supremacy. From the triumph of the doctrine of constitutional supremacy emerges South Africa's sovereign Constitution, which has a justiciable Bill of Rights and which is built on the foundation of the rule of law. Security and emergency laws must have ranked very high on the list of laws that required reform. This is made obvious by the fact that South Africa was transitioning from decades of draconian security and emergency laws which restricted the rule of law and human rights in the most extreme manner. The drafters of the

country's post-apartheid Constitution therefore had to confront the question of how security and emergency laws were to be regulated in the new South Africa.[442]

Guidance as to the regulation of emergencies was provided in advance notably by Ellman[443] and Haysom.[444] Ellman suggested that the drafters of the new Constitution had the option either to say nothing at all about emergencies in the Constitution (the 'textual silence' approach),[445] or have a provision explicitly dealing with emergencies (the 'textual explicitness' approach).[446] Eventually, the drafters opted for the explicit regulation of emergencies in the Constitution.

Having chosen to expressly regulate emergencies, the next question concerned the kinds of constitutional safeguards or standards that can be put in place in order to regulate derogations from human rights during an emergency. Once again, the eminent writers of the time advanced guidelines for the benefit of the drafters of the Constitution. Haysom[447] drew from the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* and put forth the following guiding principles:

(a) 'Derogations from political and civil rights must be concerned with maintaining the rights, freedoms, and institutions of a democratic society;

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[442] The developments in respect of security laws will be discussed in chapter 6 below.

[443] S Ellman 'A constitution for all seasons: Providing against emergencies in a post-apartheid constitution' (1989) 21 *Columbia Human Rights Law Review* 163-192.

[444] N Haysom 'States of emergency in a post-apartheid South Africa (1989) 21 *Columbia Human Rights Law Review* 139-162.

[445] Ellman op cit (n443) 171-179. There are two potential consequences for remaining silent on emergencies. Firstly, having opted to remain silent would have meant that, faced with the ever-present possibility of an emergency, derogations from rights in times of emergency would occur outside the law and without legal regulation and/or formal proclamation (Haysom op cit (n444) 143). Another possibility, however, is that the textual silence approach would have operated in the same manner as it does in the United States where there is no explicit provision for martial law or a state of emergency, but there are a few provisions in the Constitution which indirectly allow the use of martial law or emergency powers. The US Constitution is silent on emergencies or martial law in the hope that this will predicate or restrain the use of emergency powers (Ellman op cit (n443) 172). As Ellman (ibid) asserts, 'the meaning of the United States Constitution, after all, emerges only from its interpretation, and the silence of the text may have shaped that interpretation in ways that help engender a tradition of control of governmental authority'. For further justifications for why the textual silence methodology works, see Ellman op cit (n443) 174-179.

[446] Ellman op cit (n443) 179-182.

[447] Haysom op cit (n444) 151-159.

(b) Derogations from political and civil rights should take place only where there is an exceptional and imminent danger to the society, and the normal law of the land is inadequate for the purposes of dealing with the danger or securing the interest to be protected;

(c) Any derogation measures must be strictly necessary, and the necessity for such measures must be assessed on an objective basis;

(d) The derogations from civil and political rights should be constantly reviewed, especially by the legislature, in order to assess their continued necessity;

(e) Derogations should be duly enacted in a form in which they can be understood by ordinary citizens;

(f) A derogation from existing civil or political rights should not be capable of capricious application; nor shall it allow for discrimination solely on the grounds of race, colour, sex, language or social origins;

(g) The powers exercised under the limitation provisions must be compatible with the objects of derogation and strictly necessary to achieve the derogation;

(h) Derogation provisions should be strictly interpreted in favour of the rights upon which they seek to infringe;

(i) Every derogation shall be subject to the possibility of a challenge to and a remedy against its abusive application or imposition;

(j) Strict regulation of detention without trial;

(k) Derogation provisions should not infringe on non-derogable rights such as the right to life and freedom from torture;

(l) The parties relying on a state of emergency must take special precautions to ensure that neither official nor semi-official groups engage in a practice of arbitrary or extra-judicial killings or involuntary disappearances.

(m) In addition to these guidelines, emphasis is on the importance of the properly functioning courts during the emergency'.

Ellman's suggested guidelines can be summarised under three headings:

(a) Rules to be followed by the legislative and executive branches wielding emergency authority.[448]

Under this heading, Ellman suggests:

[448] Ellman op cit (n443) 182-184.

(i) ‘A sunset provision specifying that any existing proclamation of a state of emergency, and any existing legislation providing for emergency powers to abridge normal rights, lose all effect with the adoption of the new constitution;
(ii) A prohibition on invasion of rights except pursuant to statutory authorization;
(iii) A requirement that any declaration of a state of emergency lapse unless it is specifically approved by the legislature within a stated short period (such as fourteen days) after its proclamation. There can be a similar requirement for legislative approval of any emergency regulations adopted by the executive;
(iv) A requirement that legislative approval of the use of emergency powers be by super-majority vote;
(v) A requirement that any declaration of a state of emergency or emergency regulations lapse after a limited period of time (perhaps six months), subject to renewal by the executive and re-approval by the legislature; and
(vi) A further sunset provision for new emergency legislation, such that this legislation would have to be reconsidered and re-enacted on a periodic basis’.

(b) Substantive limits on the extent of the emergency powers available to the government.[449]

What is suggested under this heading are safeguards:

(i) ‘Permitting invasion of rights only in time of war or other public emergency threatening the life of the nation;
(ii) Permitting invasion of rights only to the extent strictly required by the exigencies of the situation; and
(iii) Forbidding derogation from certain rights’.

(c) Provisions for judicial review to enforce some or all of the foregoing requirements.[450]

The drafters of the South African Constitution embraced virtually all of Haysom and Ellman’s recommendations, and the end result was the enactment of section or clause 37 of the Constitution, which is the country’s emergency regime.

[449] Ellman op cit (n443) 184-187.

[450] Ellman op cit (n443) 187-189.

5.2.2 The state of emergency section or clause

As already indicated, South Africa has section or clause 37 in the Constitution for dealing with emergencies. Thus, the most drastic action in an emergency would be to invoke section 37 and declare a state of emergency. The less drastic response would be to simply rely on the state security apparatus of the country.

A few deductions can be made from the existence of section or clause 37 of the Constitution. Firstly, it suggests that, at the inception of democracy (like in the pre-apartheid or colonial era, as well as during the apartheid era), South Africa retained the Roman, Roman-Dutch and English law approach of having two sets of laws, one for the time of peace and the other for crisis situations.[451] Secondly, because the emergency section or clause entrenches a new legal order applicable during an emergency, this can be seen as the continued relegation of the obscure notion of martial law to the common law, as was the case even under apartheid.[452] Thirdly, the emergency section or clause also confirms South Africa's continued rejection of the Business as Usual model in South African law, as was the case during the pre-apartheid or colonial era, as well as during apartheid.[453]

Furthermore, it appears from the reading of section 37 that South Africa's prevailing emergency system, like that of apartheid (as indicated under heading 4.4. in chapter 4 above), is modelled on the Roman dictator model,[454] subject to some modifications which are identified below. The main characteristic of the Roman emergency system that is visible within South Africa's current emergency system is the existence of *ex ante* requirements for the exercise of emergency power, though these requirements are no longer exactly identical to those *ex ante* requirements of Roman law.[455] Thus,

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[451] For a discussion on the formation of South Africa's colonial and apartheid security and emergency laws, refer to the discussion under headings 4.2, 4.3 and 4.4 in chapter 4 above. The detail on the Roman, Roman-Dutch and English law security and emergency laws that came to influence the South African law is set out in chapter 3 under headings 3.2, 3.3, and 3.4.

[452] See further discussion under heading 4.4 in chapter 4 above.

[453] Once again, see further the discussion under headings 4.2 and 4.4 in chapter 4 above. On the Business and Usual model, refer to the discussion under subheading 3.5.1.1 in chapter 3 above.

[454] The detail of the Roman emergency system is set in the discussion under heading 3.2 in chapter 3 above.

[455] One notable difference which proves the point that the Roman and South African *ex ante* requirements are not identical is that, in terms of the apartheid and current South African emergency

there are *ex ante* requirements pertaining to the circumstances under which an emergency may be declared,[456] as well as the duration of an emergency.[457]

The modifications to the Roman emergency system which are now incorporated into the South African emergency system are as follows. Firstly, the South African emergency system does not strictly adhere to the Roman emergency model, but also incorporates other models, such as the Legislative Accommodation model.[458] This is clear from section 37(3)(c) of the Constitution which empowers the courts to decide on, *inter alia*, the validity of the emergency legislation enacted in consequence of a declaration of a state of emergency. Section 37(4) and (5) goes on further to regulate such emergency legislation.

Secondly, that the South African emergency system also borrows from Bruce Ackerman's escalating cascades of supermajorities model[459] is clear from the reading of section 37(2)(b) of the Constitution, thus adding another modification to the Roman emergency model seen in South African law. Subsection 2(b) of section 37 permits the National Assembly (i.e. Parliament) to extend the declaration of a state of emergency beyond the mandated 21 days for no more than three months at a time. The first extension must be by a resolution adopted with a supporting vote of the

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jurisprudence, the President recognises an emergency and also assumes the emergency powers. However, in Roman law, the Consuls recognised an emergency and the dictator exercised the emergency power. Thus, the body which recognised the emergency was separate from the body which exercised the emergency powers. Other *ex ante* requirements are still very much similar.

[456] According to s 37(1) of the Constitution, a state of emergency may be declared in terms of an Act of Parliament (presently the State of Emergency Act 64 of 1997), and only when: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.
More *ex ante* requirements are provided in s 1(1) of the State of Emergency Act. One such *ex ante* requirement is that it is the President who may declare by proclamation in the Government Gazette a state of emergency in the Republic (of South Africa) or in any area within the Republic. The reasons for the declaration shall be stated briefly in the proclamation, and the President may at any time withdraw the proclamation by like proclamation in the Government Gazette.

[457] In terms of s 37(2)(a) & (b) of the Constitution, a declaration of a state of emergency and any legislation enacted or other action taken in consequence of that declaration, may be effective only prospectively and for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration.

[458] For the content and other detail of the Legislative Accommodation model, refer to the discussion under subheading 3.5.1.2 in chapter 3 above.

[459] For the content and other detail of the escalating cascades of supermajorities model, refer to the discussion under subheading 3.5.1.5 in chapter 3 above. The supermajoritarian escalator is the only aspect of the escalating cascades of supermajorities model that is borrowed and incorporated into the South African emergency system. The rest of the features of this model are omitted.

majority of the members of the National Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60% of the members of the National Assembly. A resolution to extend the declaration may be adopted following a public debate in the National Assembly.

Another notable modification to the Roman emergency system is that, unlike in the case of the Roman model where the dictator exercised unlimited emergency powers, the powers exercised by the South African President (the equivalent of the Roman dictator) in lieu of an emergency are circumscribed in both section 37 of the Constitution and in the State of emergency Act.[460] Circumscribing the powers of the Executive in this fashion is a feature of the state of siege model, in terms of which the powers of the military were observed to have been determined in advance, and thereby circumscribed, by Parliament through legislation.[461]

There is also a further deduction to be made from the existence of the emergency section or clause in the South African Constitution. That deduction is that the section or clause reflects the continued importance of legal interpretation, thus also proving correct the fundamental premise of this thesis as stated in the discussion under subheading 1.1.3 in chapter 1 above. The argument here is that the mere establishment of the emergency regime in section or clause 37 of the Constitution provides an interpretative framework against which emergency laws and powers are to be read and interpreted. This line of reasoning is enunciated in the words of Woolman[462] to the effect that '[t]he language and structure of FC 37 must be read as a rejection of South Africa's emergency past'.

Indeed, it is possible for section 37 to be read in the sense envisaged by Woolman because, in its entirety, the regime is an embodiment of the legal principles, values, doctrines and dogmas held dearly by the society, and which should never be abandoned even in an emergency. Section or clause 37 is an expression of the South

[460] Supra (n456).

[461] For the content and detail of the state of siege model, refer to the discussion under subheading 3.5.1.3 in chapter 3 above.

[462] Woolman op cit (n66) 61-10

African society's views, as informed by the past political and legal experiences, on how it (society) and future generations would like to be governed in an emergency.

In the final analysis, a recognised emergency regime like section 37 becomes, in the emergency context, some sort of higher power or authority to which all emergency-related laws, powers, systems and procedures appeal for legitimacy. The regime is also the standard or yardstick against which the constitutionality of emergency laws is judged or measured. It further shapes the interpretation and ultimately the jurisprudential direction the judiciary must take in respect of emergency laws. Given the foregoing, it stands to reason that section 37 does indeed provide an interpretative framework for emergency laws.

5.2.3 The role of all the three arms of state

Continuing with the delineation of South Africa's post-apartheid emergency jurisprudence, it is noteworthy that South Africa's emergency system envisages there being a role played by each of the three arms of state during an emergency. The role of each arm of state is ventilated below.

5.2.3.1 The Executive

The roles of the Executive during an emergency appear in various provisions within the State of Emergency Act.[463] Section 1(1) of the Act vests in the President the power to declare, by proclamation in the Government Gazette, a state of emergency in the Republic or any area within the Republic. The declaration may also be withdrawn by the President by proclamation published in the Government Gazette.[464] Furthermore, in terms of section 2(1)(a) of the Act, the President may make such regulations as are necessary or expedient to restore peace and order. Section 2(1)(b) further provides that, in addition to the publication of the regulations in the Gazette, the President must attend to making the contents of the regulations known to the public by appropriate means.

[463] Supra (n456).

[464] Section 1(3) of the State of Emergency Act.

Without derogating from the generality of the power to make regulations, the regulations may make provision for: (a) the empowering of specified persons or bodies to make orders, rules and bylaws for any of the purposes for which the President is authorised to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or bylaws; and (b) the imposition of such penalties for any contravention of or failure to comply with the provisions of the regulations, which penalties may include the confiscation of any goods, property or instruments by means of which or in connection with which the offence has been committed.[465]

Furthermore, no provision of the regulations shall: (a) authorise the making of any regulations which are inconsistent with the State of Emergency Act or section 37 of the Constitution; (b) authorise the making of any regulations whereby: (i) provision is made for the imposition of imprisonment for a period exceeding three years, (ii) any duty to render military service other than that provided for in the Defence Act[466] is imposed, and (iii) any law relating to the qualifications; nomination; election or tenure of office of members of Parliament or a Provincial Legislature; the sittings of Parliament or a Provincial Legislature; or the powers, privileges or immunities of Parliament or a Provincial Legislature or of the members or committees thereof; is amended or suspended.[467]

To comment briefly, it transpires from the foregoing that gone are the days when the Executive used to enjoy unlimited emergency powers. Today, clear limits on emergency powers are set throughout section 37 of the Constitution and throughout the relevant sections of the State of Emergency Act. Also, the existence of the roles for each arm of state in an emergency contributes to dispensing with the subjective exercise of emergency powers[468] by Executive officials, in favour of objectivity and oversight over the exercise of such powers. The requirement that various decisions be publicised by appropriate means, including publication in the Government Gazette,

[465] Section 2(a) & (b) of the State of Emergency Act.

[466] 44 of 1957, now Act 42 of 2002.

[467] Section 2(3)(a) and (b) of the State of Emergency Act.

[468] Placing the exercise of emergency power in the subjective discretion of certain officials was a common feature of the apartheid security and emergency apparatus, as indicated in the discussion under headings 4.4 and 4.5 in chapter 4 above.

certainly bodes well for objectivity and transparency in the exercise of emergency powers.

5.2.3.2 The Legislature

The roles of the Legislature can be observed from various provisions within section 37 of the Constitution and the State of Emergency Act.[469] To begin with, section 37(1)(a) of the Constitution requires that the declaration of a state of emergency be done in terms of an Act passed by Parliament[470] in the event of the occurrence of certain specified conditions.[471] The Legislature is also enjoined to ensure that, if the state of emergency needs to be sustained longer than the first 21 days from the date of the declaration of a state of emergency, an extension must be granted by Parliament for no more than three months at a time.[472] The first extension beyond the stipulated 21 days requires a simple majority vote in Parliament, while any subsequent extension requires a 60% majority.[473] Extensions must also follow a public debate in the Legislature.[474]

Furthermore, section 3 of the State of Emergency Act provides for the supervision of the emergency regulations by Parliament. Section 3(1) of the Act requires that a copy of any proclamation declaring a state of emergency and of any regulation, order, rule or bylaw made in pursuance of any such declaration be laid upon the table in Parliament by the President as soon as possible after the publication thereof. The Legislature may disapprove or make any recommendation to the President in connection with any such proclamation, regulation, order, rule, bylaw or provision.[475]

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[469] Supra (n456).

[470] Presently the State of Emergency Act supra (n456).

[471] These conditions are set out in s 37(1) of the Constitution. In terms of this section, a state of emergency may be declared in terms of an Act of Parliament (presently the State of Emergency Act supra (n456)), and only when: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.

[472] Section 37(2)(b) of the Constitution.

[473] Ibid.

[474] Ibid.

It goes without saying that the foregoing checks and balances the emergency powers exercised by the Executive, thereby upholding objectivity, transparency and oversight over the exercise of emergency powers.

5.2.3.3 The Judiciary

The judiciary is also afforded specific roles and powers in an emergency. To begin with, the courts are empowered to test the validity of the declaration of a state of emergency,[476] the extension thereof, as well as any legislation enacted or other action taken in consequence of a declaration of a state of emergency.[477] Section 37(5)(a) of the Constitution further enhances the courts' jurisdiction in emergency matters as it provides that no legislation is authorised to indemnify the state or any person in respect of any unlawful act committed during a state of emergency.[478]

The role of the courts stated thus far, properly understood, render inappropriate and unconstitutional any practice, principle or doctrine which has the effect of hindering the courts from properly exercising jurisdiction in emergency matters. It therefore follows that, unlike during apartheid, the jurisdiction of the courts in respect of emergency matters may never be dispensed with or ousted through ouster clauses in emergency legislation or regulations.[479] Also, the legislative wording placing the exercise of emergency powers in the subjective discretion of particular designated officials can

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[475] Section 3(2)(a) and (b) of the State of Emergency Act. The powers of Parliament in connection with emergencies are also protected from interference, especially emanating from the regulations which the President is empowered to make in view of an emergency. Section 3(b)(iii) of the State of Emergency Act makes it clear that the regulations cannot amend or suspend any law relating to the sittings, powers, privileges or immunities of Parliament or a Provincial Legislature. The section also prohibits regulations from amending or suspending any law relating to the qualifications, nomination, election, or tenure of members of Parliament or a Provincial Legislature.

[476] To enhance this provision, s 1(2) of the State of Emergency Act supra (n456) requires that the reasons for the declaration of a state of emergency be briefly stated in the proclamation in which the President declares the state of emergency. These reasons must therefore be objective, and the courts are allowed to test their validity.

[477] Section 37(3)(a)-(c) of the Constitution.

[478] Contrast this legal position with the position regarding Acts of Indemnity during apartheid (which legal position is articulated in the discussion under headings 4.4 and 4.5 in chapter 4 above).

[479] Contrast the current legal position regarding court jurisdiction ouster clauses with the position on the same ouster clauses during apartheid. Refer to discussion under headings 4.4 and 4.5 in chapter 4 above.

never be countenanced in modern South African emergency jurisprudence. Executive-mindedness in whatever form or shape (i.e. whether in the form of judicial minimalism, judicial deference and/or the political question doctrine) is also frowned upon.

The courts are also anticipated to play a prominent role in the interpretation[480] and ultimate enforcement of the provisions in section 37 of the Constitution and in the State of Emergency Act. One obvious constitutional provision that would require interpretation and enforcement by the courts is section 37(5)(b). This section provides that any legislation enacted in consequence of an emergency may not permit or authorise any derogation from the whole of section 37, as well from the non-derogable rights mentioned in the Table in section 37(5)(c). Whether or not legislation derogates as envisaged in section 37(5)(b) will undoubtedly be interpreted and determined by the courts.

Another provision that would require interpretation by the courts is that which reads 'any legislation enacted in consequence of the emergency may derogate from the Bill of Rights to the extent that the derogation is strictly required by the emergency'.[481] The same applies to the provision that the legislation envisaged in the preceding sentence must be 'consistent with the Republic's obligations under international law'.[482]

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[480] The anticipation that the courts will have to interpret and enforce the emergency provisions further confirms that legal interpretation is still recognised as the preferred method of resolving conflicts in the law, of clearing ambiguities, of developing the law and of striking a balance between competing interests. This is a fundamental premise of this thesis as stated under subheading 1.1.3 in chapter 1 above.
The instances where interpretation is anticipated to play a significant role can be seen to be embracing one of the models of accommodation, i.e. the Interpretative Accommodation model (for the detail on the models of accommodation, refer to the discussion under subheading 3.5.1.2 in chapter 3 above). Indeed, the embrace of the interpretative accommodation model is visible from the provisions of s 37 of the Constitution that would undoubtedly require an emergency-sensitive interpretation by the courts. One should hasten to point out that, strictly speaking, the scope of the Interpretative Accommodation model is much greater than that which is probably envisaged by its founder, Oren Gross. Gross submits that the interpretative accommodation model operates by giving the 'ordinary law' an 'emergency-sensitive' interpretation for such law to be used effectively during an emergency. This description does not reflect that the functionality of virtually all the models of emergency systems and all the laws applicable in an emergency (not just the ordinary law) is dependent upon an emergency-sensitive interpretation by the courts. Therefore, the Interpretative Accommodation model underpins all the laws and models applicable during an emergency. As a result, it should be afforded such recognition or status.

[481] Section 37(4)(a) of the Constitution.

[482] Section 37(4)(b)(i) of the Constitution.

The courts' interpretative prowess will also be required in interpreting and enforcing the provisions applicable to those detained without trial. This is clear from the provision that a court must review the detention as soon as reasonably possible, but no later than 10 days after the date on which the person was detained,[483] and that the court must release the detainee unless it is necessary to continue the detention to restore peace and order.[484] Once again, it goes without saying that subjecting the exercise of emergency power to interpretation and scrutiny by the courts bodes well for upholding objectivity, transparency and oversight over the exercise of emergency powers.

5.2.4 Regulation of derogations from the Bill of Rights

While derogation from human rights is permitted during an emergency, there are, however, certain limitations.[485] For instance, in terms of section 37(4)(a) of the Constitution, legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency.[486] Section 37(5)(c) of the Constitution is more explicit about which rights are non-derogable and the extent to which these rights are protected. The provisions of this section can be summarised as follows:

5.2.4.1 The right to life; dignity; equality; slavery, servitude and forced labour; and freedom and security of the person

[483] Section 37(6)(e) of the Constitution.

[484] Ibid. Section 37(6)(f) of the Constitution goes on further to provide that a detainee who is not released in terms of section 37(6)(e) and (f) may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order. Section 37(6)(g) enjoins the state to present written reasons to the court to justify the continued detention of a detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews his/her detention.

[485] Contrast this to the apartheid legislation which gave the authorities unlimited security and emergency powers, which could be exercised without regard for human rights and freedoms (refer to the discussion under headings 4.4 in chapter 4 above.

[486] Other requirements with which the legislation must comply appear under s37(4)(b)(i)-(iii) of the Constitution. These include that the legislation must be consistent with South Africa's obligations under international law applicable to states of emergency; that it conforms with the further conditions in s 37(5) of the Constitution; and that the legislation is published in the national Government Gazette as soon as reasonably possible after being enacted.

The rights to life[487] and dignity[488] are notably non-derogable in their entirety. However, the right to equality[489] is non-derogable insofar as it prohibits, even during an emergency, any unfair discrimination based on the ground of race, colour, ethnic or social origin, sex, religion or language. Insofar as the prohibition against slavery, servitude and forced labour[490] is concerned, only slavery and torture is non-derogable in its entirety, and not forced labour. The right to freedom and security of the person[491] is non-derogable insofar as it prohibits torture; treatment or punishment that is cruel, inhuman and degrading; and/or being subjected to medical or scientific experiments without informed consent.

5.2.4.2 Children

Regarding the rights of children,[492] the non-derogable aspects include every child's right: (i) to be protected from maltreatment, neglect, abuse or degradation;[493] (ii) to be protected from exploitative labour practices;[494] (iii) not to be detained except as a measure of last resort and for the shortest appropriate period (in which case the child has the additional rights to be kept separately from detained persons over the age or 18, and to be treated in a manner, and kept in conditions, that take into account the child's age);[495] and (iv) not to be used directly in armed conflict, and to be protected in times of armed conflict[496] (this provision is made applicable only in the case of children of 15 years and younger).

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[487] Provided for in s 11 of the Constitution.

[488] Provided for in s 10 of the Constitution.

[489] Provided for in s 9 of the Constitution.

[490] Provided for in s 13 of the Constitution.

[491] Provided for in s 12 of the Constitution.

[492] Section 28 of the Constitution.

[493] Section 28(1)(d) of the Constitution.

[494] Section 28(1)(e) of the Constitution.

[495] Section 28(1)(g)(i)-(ii) of the Constitution.

[496] Section 28(1)(i) of the Constitution.

5.2.4.3 Arrested, detained and accused persons

There are also some non-derogable aspects of the rights of arrested, detained and accused persons.[497] These include the right of every arrested person to remain silent;[498] to be informed promptly of this right and the consequences thereof;[499] and not to be compelled to make any confession or admission that could be used in evidence against that person.[500] Regarding the rights of detained persons (including sentenced prisoners), the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released, remains non-derogable.[501]

The non-derogable aspects of the rights of accused persons include the right to a fair trial, which includes the right: to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to be present when being tried; to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be presumed innocent; to remain silent, and not to testify during proceedings; to adduce and challenge evidence; not to be compelled to give self-incriminating evidence; to be tried in a language that the accused person understands, or if that is not practicable, to have the proceedings interpreted in that language; not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; not to be tried for an offence in respect of an act or omission for which that accused person has previously been either acquitted or convicted; to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the

[497] Provided for in s 35 of the Constitution.

[498] Section 35(1)(a) of the Constitution.

[499] Section 35(1)(b) of the Constitution.

[500] Section 35(1)(c) of the Constitution.

[501] Section 35(2(d) of the Constitution.

offence was committed and the time of sentencing, and of appeal to, or review by, a higher court.[502]

A further non-derogable aspect is section 35(4) of the Constitution, which requires that whenever section 35 of the Constitution (this being the section in the Constitution that provides for the rights of arrested, detained and accused persons) calls for information to be given to a person, that information must be given in a language that the person understands. Furthermore, the last non-derogable aspect is section 35(5) of the Constitution, which provides that the evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair.

5.2.5 Regulation of detention without trial

It is evident from the preceding section that the non-derogable nature of the right to freedom and security of the person does not extend to prohibiting detention without trial. Section 37(6) of the Constitution then deals comprehensively with detention without trial. The section puts forth the following as conditions for such detention. One, an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained. Two, a notice must be published in the national government gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained. Three, the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

Four, the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative. Five, a court must review the detention as soon as reasonably possible, but not later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order. Six, a detainee who is not released in terms of a review under the previous point, or who is not released in terms of the present review, may apply to a court for a further review of the detention at any time after 10

[502] Section 35(3)(a)-(o) of the Constitution, excluding (d).

days have passed since the previous review, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order. Seven, the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention. The eighth and last condition is that the state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

Section 37(7) of the Constitution goes on further to provide that if a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.[503] That the above regulatory provisions in respect of detention without trial endorse the ethos of transparency cannot be disputed. These provisions dispense with the exercise of emergency powers in secret, and without oversight or supervision. Section 2(4) of the State of Emergency Act[504] further embraces transparency by making provision for international humanitarian organisations recognised in the country to visit detainees held without trial. These organisations can also monitor the conditions under which such detainees are detained. Furthermore, section 2(5) of the State of Emergency Act requires the detainee to be held in the same area in respect of which an emergency is declared, unless no suitable place is available within that area or the detention outside that area is reasonably necessary to restore peace and order.

5.2.6 Commitment to uphold and protect the rule of law and human rights

The study of the emergency jurisprudence also reveals certain indications of the commitment to uphold and protect the rule of law and human rights. To begin with, the mere fact that the entire section 37 is made up of procedural and substantive requirements which must be observed during an emergency translates into the

[503] Compare these new provisions dealing with detention without trial against the detention without trial provisions in the draconian apartheid security and emergency laws, as well as against the interpretation of those draconian provisions in the case law in point (refer to the discussion under headings 4.4 and 4.5 in chapter 4 above).

[504] Supra (n456).

recognition of the formal/procedural and substantive conception of the rule of law respectively.[505] Section 37(5)(b) of the Constitution then cements the recognition of the rule of law by prohibiting any derogation from section 37, which can be seen as the prohibition against the derogation from the rule of law itself.

An indication of the commitment to uphold and protect human rights can be observed from various provisions in section 37 of the Constitution. The first provision is section 37(4)(a) of the Constitution, which allows the emergency legislation to derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency, among other things.[506] Another provision which highlights the protection of human rights is section 37(5)(c) of the Constitution which provides that rights such as the right to human dignity and life, among others, are completely non-derogable, whereas other rights, such as the right to equality and the rights of arrested, detained and arrested persons, are protected to varying degrees.[507] The provisions in section 37(6) of the Constitution relating to persons detained without trial provide further protection for the rights of those held in detention.[508] This concludes the discussion on the delineation of South Africa's post-apartheid emergency jurisprudence. The next chapter delineates South Africa's post-apartheid state security jurisprudence.

[505] On the formal/procedural and substantive conception of the rule of law, refer to the discussion under heading 2.2. in chapter 2 above.

[506] Other conditions for the emergency legislation to derogate from the Bill of Rights are set out in s37(4)(b)(i)-(iii) of the Constitution.

[507] For a detailed discussion on the extent of the derogations from human rights, refer to the discussion under 5.2.4 above.

[508] Refer to the discussion under 5.2.5 above.

CHAPTER 6

THE DELINEATION OF SOUTH AFRICA'S POST-APARTHEID STATE SECURITY JURISPRUDENCE

6.1 GENERAL

Continuing with the delineation of South Africa's post-apartheid jurisprudence which started in chapter 5, this chapter delineates the post-apartheid state security jurisprudence. The main purpose of the delineation is to set out the content of the post-apartheid security jurisprudence so that it can be studied and analysed and eventually contribute to the establishment of the envisaged interpretation regime. As to precisely what the delineation in this chapter contributes to the envisaged interpretation regime will become clear in chapter 7 below when the interpretation regime is officially established.

6.2 DELINEATION OF THE STATE SECURITY JURISPRUDENCE

6.2.1 Background

The manner in which the apartheid government abused both security and emergency laws created an expectation that both would receive attention in the build-up towards the new Constitution. To the surprise of many, emergency laws received significant attention[509] in comparison to the security laws.[510] One development in respect of security laws that took place during the transitional period from apartheid to democracy

[509] For an account of the development of the post-apartheid emergency jurisprudence, refer to the discussion under subheading 5.2.1 in chapter 5 above.

[510] On a deeper analysis, the explanation for the apparent neglect of security laws could be that it was probably convenient to not delve into the security space as this was a very sensitive area of the law at the time. Thus, the discourse on security laws was being postponed to another time, while all the energy was perhaps being channelled towards the development of the emergency jurisprudence. Another explanation could be that the development of the then existing state security laws was simply left in the hands of the courts, without any intervention from political branches.

is the publication of an article by Labuschagne calling for the abolition of the crime of treason.[511] In the early days of democracy, the Justice Laws Rationalisation Act[512] was passed, and it had the effect of either extending, amending or repealing the then remaining apartheid security legislation. One previously draconian piece of security legislation the operation of which continued in post-apartheid South Africa was section 54(1) and (3) of the Internal Security Act,[513] which created the offences of terrorism and sabotage. The Internal Security Act was finally repealed in its entirety by the new holistic security legislation, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act.[514]

Another noteworthy development in respect of security laws is that the period 1994 to 1998 was characterised by a series of bombing incidents,[515] and there also emerged organised terrorist groups such as PAGAD and the Boeremag.[516] Given these occurrences, it came as no surprise that shortly thereafter the South African Law Commission, as it was then known, was tasked with exploring the possibility of establishing one holistic piece of legislation which would be the country's security legislation.[517] The process culminating in the passing of this legislation was very turbulent. It was heavily opposed by many on the ground that there were sufficient security laws already in force.[518] The proponents of the legislation argued that it was necessary because the security laws of that time were not sufficient to proscribe all forms of terrorism.[519]

The passing of the comprehensive security legislation was finally enhanced by Resolution 1373 of the United Nations Security Council, which compelled member

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[511] Refer to note 297 above.

[512] 18 of 1996.

[513] Supra (n397).

[514] Supra (n22).

[515] Refer to the South African Law Commission Discussion Paper op cit (n24) para 1.5.

[516] For a description of PAGAD and Boeremag, refer to note 25 and 26 respectively.

[517] Refer South African Law Commission Discussion Paper in note 24 above, as well as the South African Law Commission Final Report in note 72 above.

[518] South African Law Commission Report op cit (n72) 524-583.

[519] Ibid at 75.

states to put in place anti-terrorism laws following the 9/11 bombings in the United States. Eventually, South Africa's first post-apartheid security legislation, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act[520] (hereinafter referred to as the POCDATARA), was passed.

The POCDATARA was therefore added to the country's mix of ordinary security laws alongside the common-law crimes of treason and sedition.[521] Similar to these two crimes, the offence of terrorism created in the POCDATARA is also fraught with constitutionally suspect provisions which arguably violate the rule of law and some fundamental rights. It is at this point that it becomes prudent for the delineation in this chapter to consider the position regarding the courts' power of interpretation in post-apartheid security jurisprudence. Bear in mind that legal interpretation by the courts, supported by scholarly writings, has historically been regarded as the best measure for resolving conflicts in the law, for clearing ambiguities, for developing the law and for striking a balance between competing interests. This has also been the recurring theme from the discussion in 1.1.3 above and throughout this thesis.

6.2.2 The position regarding the courts' power of interpretation

In the context of state security laws, the courts' power of interpretation remains the ideal method for harmonising the relationship between security laws, on the one hand, and the rule of law as well as human rights, on the other. Even the significant improvements required to render the security laws compliant with the Constitution are ideally effected through legal interpretation and development by the courts.[522]

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[520] Supra (n22).

[521] For the detail on these crimes, refer to the discussion under subheadings 4.2.2 and 4.2.3 respectively in chapter 4 above.

[522] This is evident from the discussion under heading 6.2.3 below whereby the approaches to interpreting and developing the common-law and statutory security laws are considered.
Note that the use of the terms 'interpreting' and 'developing' in the present chapter is informed by s 39(2) of the Constitution, which reads: '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Therefore, it is clear that s 39(2) is directing that the term interpretation be used with reference to legislation only, and that when it comes to the common law, the appropriate terminology is to say that it is being developed. Notwithstanding the foregoing, it is arguable that, upon careful scrutiny, developing the law inevitably involves interpreting the law and vice versa. To enhance the point, in so interpreting and developing the law, the courts are bound by the same constitutional

Therefore, the centrality of legal interpretation, which is an incident of the operation of the separation of powers doctrine and has been observed in South African jurisprudence throughout the colonial and apartheid era, remains intact even today. Notwithstanding the centrality of legal interpretation, there are shortcomings on the part of the courts in using the power of legal interpretation. These are however explored in 6.2.4 below. The discussion that follows next builds on the centrality of legal interpretation as a tool for bringing about harmony between security laws and the rule of law as well as human rights.

6.2.3 Approaches to interpreting and developing the security laws

6.2.3.1 Approaching the interpretation and development of the crime of treason

Towards the end of the discussion under subheading 4.2.2 in chapter 4 above, it was indicated that there have since arisen certain constitutionality concerns which threaten the very existence of the crime of treason. In short, these entail that the crime of treason is intractably vague so as to violate the rule of law or the principle of legality, and that the crime is anachronistic and inappropriate for a modern popular democracy as it is based on the notion of allegiance, a concept that is outdated and no longer consistent with the modern understanding of the relationship between the state and the citizen.[523]

For the above reasons, Labuschagne[524] submits that the crime of treason must be abolished. However, while the other writers concur with Labuschagne on the fact that the crime of treason is vague, they do not hold the view that the crime must be abolished altogether. Instead, they consider other possible methods of developing the

requirements. For instance, in interpreting and developing the law, the courts must observe the requirement in s 39(2) of the Constitution, which section is to the effect that the interpretation and/or development of the law must render the law consistent with the spirit, purport and object of the Bill of Rights. The courts must also be wary of the limits imposed by the principle of legality, most importantly that they (the courts) must not effectively make new law, as that is the role reserved exclusively for the Legislature. Therefore, to say legislation is being interpreted or the common law is being developed, is a mere difference of terminology, but actually means the same thing. We shall also see below that the techniques for interpreting legislation and for effecting the development of the common law actually overlap.

[523] Refer to note 297 above.

[524] Labuschagne op cit (n297).

crime in line with the Constitution. For instance, Snyman[525] agrees with the view that certain aspects of the crime of treason are vague, but still maintains that this does not mean that the crime no longer has a right of existence. He then suggests a certain change to the definition of the crime of treason.[526]

Currently, the definition of high treason as advanced by Snyman[527] is that: '[a] person commits high treason if, owing allegiance to the Republic of South Africa, she unlawfully engages in conduct within or outside the Republic, with the intention of (a) overthrowing the government of the Republic; (b) coercing the government by violence into any action or inaction; (c) violating, threatening or endangering the existence, independence or security of the Republic; or (d) changing the constitutional structure of the Republic'. Snyman then suggests that factor (c) in the definition be qualified by adding a proviso to the effect that violating, threatening or endangering the existence, independence or security of the Republic is treasonable only if '…the conduct is of such a nature that there is a real possibility that it will seriously violate, threaten or endanger the existence, independence or security of the Republic'.[528]

Burchell[529] also joins the debate and suggests that another approach to developing the crime of treason could be to establish a post-medieval form of the crime of treason that distinguishes between internal and external treason. Internal treason would encompass conduct that is equally punishable as sedition or public violence (and is perhaps better regarded as such in a democratic state in which the rights to freedom of expression and assembly envisage there being opposition to the government and the staging of protests to advance grievances or to advocate for change and reform).[530] External treason would arise in the event that the country is in a state of

[525] Snyman op cit (n129) 307.

[526] Ibid.

[527] Ibid at 299.

[528] Ibid at 308.

[529] Burchell op cit (n132) 840-841.

[530] Ibid at 841.

war or is invaded by alien forces and the perpetrator betrays his/her country to its enemies.[531]

It is submitted that developing the crime of treason in the manner proposed by Snyman and Burchell is analogous to invoking three techniques that are widely used in statutory interpretation. Therefore, since the suggested developmental approaches actually limit the wide scope of the crime of treason, it can be argued that this is analogous to invoking the technique of restrictive interpretation.[532] Furthermore, since the suggested developmental approaches also prevent the crime of treason from being declared unconstitutional (by enabling the interpretation of otherwise unconstitutional aspects of the crime in a manner that is consistent with the Constitution), the suggested developmental approaches are analogous to invoking the technique of reading-down. [533] Lastly, since the suggested developmental approaches entail adding words or conditions which, as part of remedying potential

[531] Ibid.

[532] Restrictive interpretation has its origins in the case of *Venter v R* 1907 TS 910 (see G Devenish 'Restrictive interpretation' (1992) 17 *Journal for Juridical Science / Tydskrif vir Regswetenskap* 1 at 12-13). It is often applied in view of the maxim *cum lex plus scripcit, minus* voluit, which means, 'when the law enacted more but intended less' (Devenish op cit 11) or when 'the words of a particular provision embrace more than its purpose' (C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2016) 167).
A further consideration which justifies the invocation of restrictive interpretation is the principle from the much-celebrated judgment of Innes CJ in *Dadoo Ltd and Others v Krugerdorp Municipal Council* 1920 AD 530 at 552, to the effect that: '[i]t is a wholesome rule of our law which requires a strict construction to be placed on statutory provisions which interfere with elementary rights…'. The meritorious judgment of Friedman J in *S v Ramgobin* 1985 (4) SA 130 (N) provides an excellent example of the application of the principle in the *Dadoo* case. In this case, Friedman J effectively found that, despite the unequivocal intention of the Legislature in incorporating the no-bail clause into the Internal Security Act (supra (n397)), the clause ought to have been interpreted restrictively because it interfered significantly with elementary rights.
There are various ways of effecting restrictive interpretation. The main way is through invoking maxims such as *iusdem generis and cessante legis, cessat ipsa lex* (on these maxims and how they operate see Devenish op cit 2). However, restrictive interpretation is not limited to these maxims as '[a]ny interpretation which restricts the broader ordinary meaning of the text in light of the purpose of the legislation is, by definition, restrictive interpretation' (A Singh *The impact of the Constitution on transforming the process of statutory interpretation in South Africa* (Unpublished PhD thesis, University of KwaZulu-Natal, 2014) 170).

[533] Reading-down is applicable in statutory interpretation, and it essentially entails interpreting an otherwise unconstitutional statutory provision in a manner that conforms with the Constitution (P De Vos, W Freedman, D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda, and L Stone *South African Constitutional Law in Context* (2014) 395). An important principle to be observed is that reading-down is limited to what the applicable text of the enactment is reasonably capable of meaning (*Moyo v Minister of Police* 2020 (1) SACR 373 (CC) at para 56). Furthermore, strictly speaking, unlike the techniques of reading-in and that of severance (which both constitute remedies after the courts have declared a statutory provision unconstitutional), reading-down is not a remedy but is rather a mandatory rule of interpretation which altogether prevents the potential unconstitutionality of a statutory provision (Singh op cit (n532) 81-82).

unconstitutionality, alter the existing treason principles, this can be seen as effectively invoking the technique of reading-in.[534]

6.2.3.2 Approaching the interpretation and development of the crime of sedition

One aspect of the crime of sedition that is constitutionally suspect is the principle that sedition can be committed by means of violent and non-violent conduct of a group of people, which is accompanied by the intention to defy or subvert the authority of the government. [535] This principle is potentially unconstitutional because the criminalisation of non-violent gatherings might infringe the right to freedom of expression and the right to gather and protest.[536]

Milton's suggested solution is to develop the crime of sedition by effectively interpreting non-violent gatherings as not constituting sedition.[537] This would mean that only the use of violence or the intention to use violence qualifies the gathering as seditious, whereas the absence of violence would mean that the gathering is not seditious.[538] Such a stance would also be consistent with the position in Roman law, which entailed that sedition is committed by the assembly of a mob that creates tumult and/or violence.[539]

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[534] Reading-in entails the insertion of words that alter the meaning of an impugned statutory provision, thus subsequently rendering the impugned provision consistent with the Constitution (Botha op cit (n532) 197. See also Currie & de Waal op cit (n66) 187). Put differently, reading-in is used where a legislative provision is unconstitutional because some words and phrases are omitted or if the words so inserted serve the purpose of narrowing the reach of a particular provision (De Vos et al op cit (n533) 398-399). It is therefore noteworthy that, as a general rule, reading-in is only effected after an impugned provision is found to be constitutionally invalid (see *Moyo v Minister of Police* supra (n533) at para 56. See also De Vos op cit (n533) 395). After all, reading-in is a remedy applicable in constitutional litigation after a legislative provision has been found to be unconstitutional (Currie & de Waal op cit (n66) 187-189).

[535] See note 313 above.

[536] Ibid.

[537] Milton op cit (n149) 51.

[538] Ibid.

[539] Refer to the discussion under heading 3.2 in chapter 3 above.

Milton's developmental suggestion in respect of the crime of sedition is another example of the use of restrictive interpretation,[540] as this suggestion limits the wide scope of the crime of sedition. The same suggestion can also be seen as being tantamount to the technique of reading-down, [541] more so as the suggested manner of development actually amounts to interpreting an otherwise unconstitutional aspect of the crime in a manner that conforms with the Constitution.

6.2.3.3 Approaching the interpretation of the offence of terrorism

(a) A lenient or rigid interpretation

The interpretation of the offence of terrorism in the POCDATARA[542] can conceivably be approached by the courts either with a lenient or rigid attitude, depending on whether or not what is proscribed is a scourge in society. Such an approach is adopted from the practice in the area of organised crime. What creates a relationship between organised crime and terrorism, such that the practices in the context of organised crime may be extended into the anti-terrorism space, is the fact that, in addition to Resolution 1373 (2001) of the United Nations Security Council instructing all member states to put in place anti-terrorism measures, it also recognised a connection between international terrorism and transnational organised crime, and so organised crime had to be criminalised alongside terrorism.[543]

South Africa's legislation against organised crime (the Prevention of Organised Crime Act[544] (POCA)), like South Africa's anti-terrorism legislation (the POCDATARA),[545] faces various constitutional challenges the resolution of which can be through interpretation by the courts. For instance, the POCA is notorious for creating offences

[540] For a description of restrictive interpretation, refer to note 532 above.

[541] For what reading-down entails, refer to note 533 above.

[542] Supra (n22).

[543] Powell op cit (n23) 105.

[544] 121 of 1998.

[545] Supra (n22).

which only require negligence instead of intention, thus reducing the fault standard.[546] Despite the low fault requirement, the offences in the POCA carry severe penalties.[547] The elevation of negligence to being the sufficient form of fault yet the penalty being so severe gives rise to the argument that the offences in the POCA violate the right not be deprived of freedom arbitrarily or without just cause.[548] Another argument is that the offences in the POCA comprise definitions that are so wide in scope that they are unconstitutional.[549] Another constitutionally suspect feature of the POCA is the provision for the forfeiture of assets connected to crime,[550] which is argued to infringe the right to silence in section 35(1) of the Constitution, the presumption of innocence in section 35(3)(h), the right not to be deprived of one's property in section 25, the right to privacy in section 14, and the right to dignity in section 10.[551]

In those cases where the courts have, directly and indirectly, dealt with the constitutional challenges to the provisions of the POCA, they have notably approached the interpretation of the impugned provisions with a lenient or sympathetic attitude.[552] So doing is justified by the courts on the basis of the important reasons for the Act's limitation of rights.[553] One reason as to why POCA is accepted as justifiably limiting

[546] Powell op cit (n23) 107.

[547] Ibid.

[548] Ibid at 108. The reasons for this argument will be explored in full when dealing with the low fault requirement in the context of the offence of terrorism under subheading (b) below.

[549] Powell op cit (n23) 107-108.

[550] Ibid at 108.

[551] Ibid at 110.

[552] Ibid at 111. See also C Oxtoby & CH Powell 'Terrorism and governance in South Africa and Eastern Africa' in VV Ramraj, M Hor, K Roach & G Williams *Global Anti-terrorism Law and Policy* 2 ed (2012) 578-579.

[553] The point is articulated clearly in CH Powell 'Anti-terrorism measures in Africa, the Middle East and Argentina' in VV Ramraj, M Hor and K Roach(eds) *Global Anti-terrorism Law and Policy* 1 ed (2005) 568-569. Further elaboration on the point can be found in Powell op cit (n23) 111-112, and in Oxtoby & Powell op cit (n552) 578-580. The cases in which the lenient or sympathetic interpretation can be observed include, in chronological order, *Director of Public Prosecutions, Cape of Good Hope v Bathgate* 2000 (2) SA 560 (C); *National Director of Public Prosecutions v Phillips* 2002 (4) SA 260 (W); *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SACR 128 (SCA); *National Director of Public Prosecutions v Mohamed* 2003 (2) SACR 258 (T); *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC); *Mohunram v National Director of Public Prosecutions* 2007 (4) SA 222 (CC); *S v Shaik* 2008 (5) SA 354 (CC).

constitutional rights is, as pointed out by Powell,[554] that organised crime is a particular scourge especially in South Africa and internationally.[555]

When it comes to the POCDATARA, it is difficult to say with certainty whether or not the interpretation of the impugned provisions will be approached leniently or rigidly.[556] Accepting that the criteria for a lenient or sympathetic interpretation is whether or not what is proscribed is a prevailing problem locally and internationally, it is submitted that it might well be that, since terrorism is, as recognised in the preamble to the POCDATARA, currently an international problem requiring international cooperation, the courts will most likely approach the interpretation of security laws dealing with terrorism sympathetically. After all, terrorism is a scourge from which no country is immune.

Whether or not a lenient or rigid interpretation is justified is, however, not final and definitive, for the courts still have to interpret the impugned provisions. The attitude of the courts towards the Act is but one of the factors playing a role in the process of reading and interpreting the security provisions in the POCDATARA. I now turn to explore the suggested approaches to interpreting the impugned aspects of the offence of terrorism in the POCDATARA.

(b) Interpreting the offence of terrorism

A leading point of attack on the constitutional validity of the offence of terrorism in the POCDATARA is that it is characterised by a sweepingly broad and vague definition, compounded by the reduced fault standard. To illustrate, section 2 of the POCDATARA creates the offence of terrorism. It provides that 'any person who

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[554] Powell op cit (n553) 569. Powell's view is also supported by the various statistics pertaining to organised crime (see Powell op cit (n23) 106), as well as various case law. For instance, in *National Director of Public Prosecutions v Mahomed* 2002 (4) SA 483 (CC), Ackerman J remarked that 'the rapid growth of organized crime, money laundering, criminal gang activities and racketeering has become a serious international problem and security threat, from which South Africa has not been immune'. In *Mohunram v National Director of Public Prosecutions* 2007 (4) SA 222 (CC) at para 118, the court described as 'worthy and noble' the objective of curbing serious crime served by the civil forfeiture of assets.

[555] In many cases on the POCA, the courts often point to the preamble to the Act to justify the extent to which organised crime is recognised as a significant scourge in South Africa and throughout the world.

[556] Powell op cit (n553) 569.

engages in a terrorist activity is guilty of terrorism'.[557] Terrorist activity is defined broadly in section 1(1)(xxv) to mean:

(a) any act committed in or outside the Republic, which –

(i) involves the systematic, repeated or arbitrary use of violence by any means or method;

(ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing of exposing the public or any part of it to –

(aa) any dangerous, hazardous, radioactive or harmful substance or organism;

(bb) any toxic chemical; or

(cc) any microbial or other biological agent or toxin;

(iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;

(iv) causes serious risk to the health or safety of the public or any segment of the public;

(v) causes the destruction of or substantial damage to any property, natural resource, or the environment or cultural heritage, whether public or private;

(vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to –

(aa) a system used for, or by, an electronic system, including an information system;

(bb) a telecommunication service or system;

(cc) a banking or financial service or financial system;

(dd) a system used for the delivery of essential government services;

(ee) a system used for, or by, an essential public utility or transport provider;

(ff) an essential infrastructure facility; or

[557] The maximum penalty which the High Court can impose for terrorism is a fine or life imprisonment, the Regional Magistrates' Court can impose a fine or the maximum of 18 years' imprisonment, and the District Magistrates' Court can impose a fine or the maximum of five years imprisonment (see s18(1)(a)(i) to (iii) of the POCDATARA).

(gg) any essential emergency services, such as police, medical or civil defence services;

(vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or

(viii) creates a serious public emergency situation or a general insurrection in the Republic,

whether the harm contemplated in paragraphs (a)(i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (vii) was committed by way of any means or method; and

(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly and indirectly, to –

(i) threaten the unity and territorial integrity of the Republic;

(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or

(iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or international organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,

whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.

The above definition can be broken down into three elements:[558] (a) the acts constituting terrorism; (b) the intent required; and (c) the motivation of the perpetrator.

(i) The interpretation of the first element

The first element (that of an act constituting terrorism) is covered under section 1(1)(xxv)(a)(i)-(viii) of the POCDATARA. The language employed in respect of the first element makes it clear that the contemplated act can either be violent or non-violent. The requisite act is also not limited to the typical acts associated with terrorism, such as those that endanger human life, bodily integrity as well as the health and safety of the public. Instead, the requisite act also includes the causing of substantial damage to public and private property,[559] the disruption of an essential service,[560] the causing of major economic loss[561] and the creation of any public emergency or general insurrection.[562]

The above-named acts broaden the scope of the offence of terrorism in the POCDATARA, especially in comparison to: (a) the offence of terrorism in the apartheid's Internal Security Act,[563] which notably required violence for the commission of terrorism; (b) the United States' offence of terrorism, which requires 'violent acts or acts dangerous to human life' in order for terrorism to be committed, and (c) the Canadian version of terrorism, which requires violent acts that must 'intentionally cause death or serious bodily injury'.[564]

[558] See J Dugard *International Law: A South African Perspective* 4 ed (2011) 166. See also A Cachalia 'Counter-terrorism and international cooperation against terrorism – an elusive goal: a South African perspective' (2010) 26(3) *South African Journal on Human Rights* 510 at 513.

[559] Section 1(1)(xxv)(a)(v).

[560] Section 1(1)(xxv)(a)(vi).

[561] Section 1(1)(xxv)(a)(vii).

[562] Section 1(1)(xxv)(a)(viii).

[563] Supra (n397).

[564] Cachalia op cit (n558) 513. See also K Roach 'A comparison of South African and Canadian anti-terrorism legislation' (2005) 18 *South African Journal of Criminal Justice* 127 at 133.

A challenge to the constitutional validity of the acts which constitute terrorism could be based on the principle of fair labelling of offenders, as well as the principle in the law of sentencing that punishment must fit the crime. This is because these acts can also be criminalised and punished as assault, murder, attempted murder, public violence, arson, malicious damage to property, intimidation, kidnapping, sedition and treason.[565] As such, the principle of fair labelling would not be adhered to should people be stigmatised as terrorists when the ordinary laws of the land could have been equally, if not more, appropriate.[566] Furthermore, it would not bode well for the imposition of punishment that fits the crime should the severe penalties prescribed for terrorism be imposed when there are other more appropriate crimes.[567]

Paragraph (a)(i) to (v) of section 1(1)(xxv) is even more extensive and far-reaching considering that the exemption from classification as terrorist activity granted to acts committed in pursuance of any advocacy, protest, dissent or industrial action, is not applicable if such advocacy, protest, dissent or industrial action causes the harmful results mentioned in paragraph a(i) to (v).[568]

The adverse effects of the rather broad acts constituting terrorism, as well as the possible constitutional challenges to these acts, can be addressed through requiring that these acts be committed intentionally.[569] Thus, what would reduce the wide scope of terrorist acts, set terrorism apart from other crimes, and also address the issue of fair labelling and that of appropriate punishment, is the requirement that the acts that amount to the offence of terrorism must have been committed intentionally. Put differently, the perpetrators must know and intend that their actions directly constitute terrorist acts. This is undoubtedly a much higher standard yet it is appropriate for the offence that is as serious as that of terrorism.

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[565] Cachalia op cit (n558) 514.

[566] Ibid.

[567] Ibid.

[568] Section 1(3) reads: '[f]or the purposes of paragraph (a)(vi) of the definition of **"terrorist activity"**, any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (a)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition'.

[569] See Roach op cit (n564) 134.

Even though the acts contemplated in section 1(1)(xxv)(a) can be interpreted restrictively or be read-down to require that they be engaged intentionally, for some reason, Roach[570] sees it best to suggest that the requirement of intent must be read-in.[571] Roach[572] also goes as far as to suggest that the phrase 'designed or calculated' in paragraph (vi) of section 1(1)(xxv)(a) should be read restrictively to require that the acts contemplated therein be engaged intentionally.

The requirement of intention as contemplated above can even be understood to be referring only to intention in the form of *dolus directus* (a form of intention that is applicable where the wrongdoer desires a particular result), to the exclusion of *dolus eventualis* (a form of intention where harm is not intended but is at least foreseen by the wrongdoer).[573] Support for this line of reasoning can also be found in the apartheid-era case of sabotage[574] in which *dolus eventualis* was excluded from the offence, as well as in Canadian jurisprudence on certain constitutional requirements of subjective fault.[575]

Regarding the broad and vague provision in paragraph (viii) of section 1(1)(xxv)(a), to the effect that the creation of a serious public emergency or a general insurrection amounts to a terrorist activity, Roach[576] further suggests as a solution the reading-down of this provision to require that its invocation follow a declaration of a state of emergency in terms of section 37 of the Constitution.

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[570] Roach op cit (n564) 134.

[571] What baffles the mind is why did Roach ignore the fact that a restrictive interpretation or the reading-down of s 1(1)(xxv)(a) to require intention could have been more appropriate compared to reading-in the same requirement? What makes a restrictive interpretation and reading-down more appropriate is that it altogether avoids having to declare the impugned provision as unconstitutional, whereas reading-in is a remedy applicable after the declaration of unconstitutionality (for explanations as to what restrictive interpretation, reading-down and reading-in entails, refer to notes 532, 533 and 534 above). Nevertheless, it is submitted that adding the requirement of intention (either by means of a restrictive interpretation, reading-down or reading-in) is definitely appropriate because the offence of terrorism is a serious offence which, in s 18 of the POCDATARA, even attracts a sentence of life imprisonment.

[572] Roach op cit (n564) 135.

[573] Roach op cit (n564) 135.

[574] *S v Nel* 1989 (4) SA 845 (A).

[575] Roach op cit (n564) 135.

[576] Ibid at 136.

(ii) The interpretation of the second element

The second element concerns the intent required for the offence of terrorism. While the wording of section 1(1)(xxv)(b) partly captures subjective intent as the form of fault required for the offence, the phrase 'by its nature and context, can reasonably be regarded as being intended' seems to suggest that a low fault standard (including that of negligence) also suffices for the commission of terrorism. This marks a departure from the subjective intent requirement in the case of apartheid's draconian Internal Security Act,[577] and from the requirement of subjective intent in the case of the law in Canada.[578]

By way of a solution, Roach[579] argues that, where the Legislature sought to create a negligence-based fault standard, it has done so by employing the phrase 'ought reasonably to have known or suspected'.[580] Therefore, only this phrase can be read by the courts to capture negligence as the sufficient form of fault. This opens way for the courts to reject the interpretation of the phrase 'by its nature and context, can reasonably be regarded as being intended' as referring to negligence-based fault. Instead, this phrase may be interpreted restrictively to require subjective intent in the form of *dolus eventualis,* at the very least.[581]

Certain provisions in section 1(1)(xxv)(b)(ii) and (iii) are also noted by Roach[582] to be so intractably broad and vague that he even questions if they should be forming part of an offence as serious as that of terrorism. Examples in point include references to 'feelings of insecurity', 'economic security' and others. One gets a sense that, had

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[577] Supra (n397).

[578] Cachalia op cit (n558) 514.

[579] Roach op cit (n564) 136-137.

[580] In terms of s 1(7) of the POCDATARA, 'a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both –

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
(b) the general knowledge, skill, training and experience that he or she in fact has'.

Roach (op cit (n564) 14) further observes that the fault standard contemplated above creates an expectation of a standard of behaviour which is above that of the common-law reasonable person, if the person has certain knowledge, skill and training.

[581] Roach op cit (n564) 137.

[582] Ibid.

Roach developed this argument further, he would effectively have suggested that, since the offence of terrorism can do without the impugned provisions, these can effectively be severed[583] from the rest of the Act.

(iii) The interpretation of the third element

The third element of the offence of terrorism is, as per section 1(1)(xxv)(c), the motivation of the perpetrator.[584] Thus, terrorist acts must be committed in advancement of the political, religious, ideological or philosophical motive. The unfortunate result of the existence of the third element is that the police will have to investigate the politics and religions of suspects, and it may encourage the targeting of people based on their political and religious associations and beliefs.[585] Furthermore, people's motives are notably 'too complex and obscure to determine criminal liability', and would thus create unnecessary prosecutorial difficulties and complicate terrorism trials.[586] Ultimately, the motive element infringes the right to

[583] Severance is the opposite of reading-in (on which, see note 534 above), and it entails the court attempting to rescue a provision from potential unconstitutionality by 'cutting out' the offending parts of that provision while leaving the rest of the (constitutional) text intact (Botha op cit (n532) 197). Two requirements must be met: (a) it must be possible to separate (sever or cut out) the unconstitutional (or bad) part of the provision from the rest (the good); and (b) what remains of the provision must still be able to give effect to the purpose of the legislation (Botha op cit (n532) 197). It is submitted that, just as Botha (op cit (n532) 196) submits that reading-down gives effect to the common-law presumption that 'legislation does not contain futile or meaningless provisions', the same can be argued in the case of severance.

[584] The motive element must be read subject to s 1(5) of the POCDATARA, which provides that '[n]otwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defence in respect of an offence of which the definition of terrorist activity forms an integral part'.
Section 1(4), which s 1(5) is made subject to, provides that '[n]otwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1)'.

[585] Roach op cit (n564) 138.

[586] Cachalia op cit (n558) 518; and Roach op cit (n564) 139.

freedom of religion, belief and opinion; freedom of expression; freedom of association; and the political right to campaign for any political cause.[587]

Even though the motive requirement is justified on the basis that it seeks to separate terrorism from other ordinary crimes, Roach[588] is of the view that the separation could have been achieved by simply stipulating that the offence of terrorism be intended to intimidate the civilian population or to compel the government and any organisation to act. Therefore, according to Roach[589] the third element should not even be forming part of the offence of terrorism or that the offence could do without the motive requirement.[590] It might also happen that the courts in South Africa will, as has happened in Canada, have to strike down the motive requirement as unconstitutional.[591]

(c) Interpreting the offences associated or connected with terrorist activities

The problem of overbreadth and vagueness is not limited to the offence of terrorism in section 2 of the POCDATARA. Various other offences related to terrorism suffer the same criticism. For instance, section 3 of the POCDATARA creates offences associated or connected with terrorist activities.[592] The section reads as follows:

(1) Any person who -
    (a) does anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise;
    (b) enters or remains in any country; or

[587] Cachalia op cit (n558) 518-519.

[588] Roach op cit (n564) 138.

[589] Ibid at 139.

[590] By making this suggestion, Roach came short of proposing that the third element be struck down as unconstitutional or at least be severed from the rest of the POCDATARA. For the detail on severance, see note 583 above.

[591] Cachalia op cit (n558) 519.

[592] Terrorist and related activities are defined in section 1(1)(xxvi) of the POCDATARA to mean 'any act or activity associated or connected with the commission of the offence of terrorism, or an offence associated or connected with a terrorist activity, or a Convention offence, or an offence referred to in sections 11 to 14'.

(c) makes himself or herself available,

for the benefit of, at the direction of, or in association with any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity, is guilty of the offence associated with a terrorist activity.

(2) Any person who –
(a) provides or offers to provide any weapon to any other person for use by or for the benefit of an entity;
(b) solicits support for or gives support to an entity;
(c) provides, receives or participates in training or instruction, or recruits an entity to receive training or instruction;
(d) recruits any entity;
(e) collects or makes a document; or
(f) possesses a thing,

connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such weapons, soliciting, training, recruitment, document or thing is so connected, is guilty of an offence connected with terrorist activities.

Evidence of the broadness and vagueness of section 3 is glaring. A person may be guilty of an offence in the event that he/she intentionally and/or negligently assists those engaging in a terrorist activity. The use of the phrase 'knows[593] or ought reasonably to have known or suspected'[594] in section 3 offences is a clear indication that the fault standard for these offences is both intent and negligence.

The concern here is that it is unfair, and even unconstitutional, to punish[595] and label as terrorists those who negligently partook in terrorist activities, ultimately treating

[593] In terms of section 1(6) of the POCDATARA, 'a person has knowledge of a fact if –
(a) the person has actual knowledge of that fact; or
(b) the court is satisfied that –
(i) the person believes that there is a reasonable possibility of the existence of that fact; and
(ii) he or she fails to obtain information to confirm the existence of that fact'.

[594] For a definition of the phrase 'ought reasonably to have known or suspected', see note 580 above.

these individuals in the same manner as those who intentionally engage in terrorist activities.[596] It is also noteworthy that the courts have interpreted the right in section 12 of the Constitution (the right not to be deprived of freedom arbitrarily or without just cause) to have a substantive component such that this right is violated if a person is imprisoned for negligence and the reason for which the state is depriving an individual of his or her liberty is insufficient.[597]

One solution to the foregoing might be to restrictively interpret the section and require a 'sufficiently substantial relationship between the assistance provided and the prohibited criminal activity'. [598] Furthermore, notwithstanding there being a clear reference to negligence as a sufficient form of fault, it might be necessary for the courts, in interpreting the provisions of section 3 of the POCDATARA, to strike down as unconstitutional the requirement of objective fault, or sever the requirement of objective fault and leave only subjective fault intact.[599]

Support for abandoning objective fault in section 3 offences may also be located in the judgment of O'Regan J in *S v Coetzee*[600] in which she suggests that '[i]t is only when the Legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge'. Roach [601] also advances two strands of Canadian constitutional law which, if adopted and incorporated into South African law, would be used to justify the courts' departure from the objective fault requirement.

The first strand comprises those principles of fundamental justice which require subjective fault for certain offences, owing to their stigma and the extent of punishment

[595] In terms of s 18(1)(b)(i) of the POCDATARA, punishment for s 3 offences is up to 15 years in the High Court as well as in the Regional Magistrates' Court. In the case of a District Magistrates' Court, the sentence is any penalty which a District Court may lawfully impose (see s18(1)(b)(ii)).

[596] Roach op cit (n564) 142.

[597] Powell op cit (n553) 570.

[598] Cachalia op cit (n558) 517.

[599] Roach op cit (n564) 143. For the detail on severance, see note 583 above.

[600] 1997 (1) SACR 379 (CC) at 443C-D.

[601] Roach op cit (n564) 142.

for those offences.[602] The second strand is also another principle of fundamental justice which states that those who cause harm intentionally should be punished more severely than those who cause harm unintentionally.[603] Ultimately, the restriction of the fault requirement in section 3 offences only to subjective fault 'preserves the intent of the legislation to criminalise terrorism offences insofar as that intent is consistent with the higher law of the Constitution'.[604]

Objective or negligence-based fault is prevalent not just in section 3 offences, but also in the offences provided for in section 4 of the POCDATARA (which concerns the financing of terrorism). Section 4 reads:

> (1) Any person who, directly or indirectly, in whole or in part, and by any means or method –
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> (a) acquires property;
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> (b) collects property;
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> (c) uses property;
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> (d) possesses property;
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> (e) owns property;
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> (f) provides or makes available, or invites a person to provide or make available property;
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> (g) provides or makes available, or invites a person to provide or make available any financial or other service;
>
> (h) provides or makes available, or invites a person to provide or make available economic support; or
>
> (i) facilitates the acquisition, collection, use or provision of property, or the provision of any financial or other service, or the provision of economic support,
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> intending that the property, financial or other service or economic support, as the case may be, be used, or while such person knows or ought reasonably to have known or suspected that the property, service or support concerned will be used, directly or indirectly, in whole or in part-

[602] Ibid.

[603] Ibid.

[604] Ibid at 143.

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(iii) for the benefit of a specific entity identified in a notice issued by the President under section 25,

is guilty of an offence.

(2) Any person who, directly or indirectly, in whole or in part, and by any means or method –

(a) deals with, enters into or facilitates any transaction or performs any other act in connection with property which such person knows or ought reasonably to have known or suspected to have been acquired, collected, used, possessed, owned or provided –

(i) to commit of facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(iii) for the benefit of a specific entity identified in a notice issued by the President under section 25; or

(b) provides financial or other services in respect of property referred to in paragraph (a),

is guilty of an offence.

(3) Any person who knows or ought reasonably to have known or suspected that property is property referred to in subsection (2)(a) and enters into, or becomes concerned in, an arrangement which in any way has or is likely to have the effect of –

(a) Facilitating the retention or control of such property by or on behalf of–

(i) an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(ii) a specific entity identified in a notice issued by the President under section 25;

(b) converting such property;

(c) concealing or disguising the nature, source, location disposition or movement of such property, the ownership thereof or any interest anyone may have therein;
(d) removing such property from a jurisdiction; or
(e) transferring such property to a nominee,

is guilty of an offence.

Objective or negligence-based fault is also prevalent in the section 11 offence of harbouring terrorists, as well as the section 13(1)(b) offence relating to hoaxes.

Section 11 reads:

'Any person who harbours or conceals any person, whom he or she knows, or ought reasonably to have known or suspected, to be a person who has committed a specified offence, as referred to in paragraph (a) of the definition of 'specified offence', or who is likely to commit such an offence, is guilty of an offence'.

Section 13 reads:

(1) (a) Any person who, with the intention of inducing in a person anywhere in the world a false belief that a substance, thing or device is, or contains, or is likely to be, or contains a noxious substance or thing or an explosive or other lethal device-

(i) places that substance, thing or device in any place; or

(ii) sends that substance, thing or device from one place to another, by post, rail or any other means whatsoever,

is guilty of an offence.

(b) Any person who, directly or indirectly, communicates any information, which he or she knows, or ought reasonably to have known or suspected, or believes to be false, with the intention of inducing in a person anywhere in the world a belief that a noxious substance or thing or an explosive or other lethal device is likely to be present (whether at the time the information is communicated or later) in or at any place, is guilty of an offence.

> (2) For the purposes of this section **'substance'** includes any biological agent and any other natural or artificial substance (whatever its form, origin, or method of production).

It would thus be well advised that, similar to the section 3 offences, the objective or negligence-based fault be struck down as unconstitutional and/or be severed such that only subjective fault is retained in respect of the offences in sections 4, 11 and 13. The requirement of only subjective fault becomes even more necessary given the prescribed sentences for each of these offences. For instance, for a section 4 offence, the High Court and Regional Magistrates' Court can impose a fine not exceeding R100 million or a maximum imprisonment term of 15 years, whereas the District Magistrates' Court can impose a fine not exceeding R250,000 or a maximum imprisonment term of five years.[605]

Section 11 offences are punished in the same manner as the section 3 offences.[606] Lastly, for the offence in section 13(1)(a) and (b), the High Court and Regional Magistrates' Court can impose a fine or a maximum imprisonment term of 10 years, whereas the District Magistrates' Court can impose any penalty which it may lawfully impose.[607] In addition to the foregoing penalty, section 18(2) of the POCDATARA empowers a court that is imposing a sentence for a section 13 offence to also order that the offender reimburse 'any party incurring expenses incidental to any emergency or investigative response to that conduct'.

The other offences in sections 5 to 10 of the POCDATARA correctly require subjective intent, which is certainly apt for the penalty that these offences attract.[608] Thus, section 5 deals with offences relating to explosive or other lethal devices, and provides that:

> Any person who intentionally delivers, places, discharges, or detonates an explosive or other lethal device in, into or against a place of public use, a state or government

[605] Section 18(1)(c)(i) and (ii) of the POCDATARA.

[606] Refer to note 595 above.

[607] S18(1)(d)(i) and (ii) of the POCDATARA.

[608] These offences are punished in the same manner as the offence of terrorism established in s 2 of the POCDATARA. See note 557 above.

facility, a public transport facility, a public transportation system, or an infrastructure facility, with the purpose, amongst others, of causing-

(a) death or serious bodily injury
(b) extensive damage to, or destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss,

is guilty of an offence relating to explosive or other lethal devices.

Section 6 is concerned with offences relating to hijacking, destroying or endangering the safety of a fixed platform, and reads:

Any person who intentionally –

(a) seizes or exercises control over a fixed platform by force or any other form of intimidation;
(b) performs an act of violence against a person on board a fixed platform, which act is likely to endanger the safety of that fixed platform;
(c) (i) destroys such a fixed platform; or

(ii) causes damage to it, which damage is likely to endanger the safety of that fixed platform;

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance, which is likely to destroy that fixed platform or likely to endanger its safety; or
(e) injures or kills any person in connection with the commission of any of the acts referred to in paragraphs (a) to (d),

is guilty of an offence relating to the hijacking, destroying or endangering of a fixed platform.

Section 7 is concerned with offences relating to taking a hostage, and reads:

Any person who intentionally –

(a) seizes or detains; and
(b) threatens to kill, to injure or to continue to detain,

any other person (hereinafter referred to as a hostage), in order to compel a third party, namely a State, an intergovernmental organisation, a natural or juridical person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage, is guilty of an offence of taking a hostage.

Section 8 is concerned with offences relating to causing harm to internationally protected persons, and reads:

Any person who, knowing that a person is an internationally protected person, intentionally–

(a) murders or kidnaps or otherwise violently attacks the person or liberty of that person; or
(b) executes a violent attack upon the official premises, the private accommodation or the means of transport of that person, which attack is likely to endanger his or her person or liberty,

is guilty of an offence relating to causing harm to an internationally protected person.

Section 9 is concerned with offences relating to hijacking an aircraft, and provides that:

Any person who intentionally, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft and with the purpose of –

(a) causing any person on board the aircraft to be detained against his or her will;
(b) causing any person on board the aircraft to be transported against his or her will to any other place other than the next scheduled place of landing of the aircraft;
(c) holding any person on board the aircraft for ransom or to service against his or her will; or
(d) causing that aircraft to deviate from its flight plan,

is guilty of an offence of hijacking an aircraft.

Lastly, section 10 is concerned with offences relating to hijacking a ship or endangering safety of maritime navigation, and it provides that:

> Any person who intentionally –
>
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
> (b) performs any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
> (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
> (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
> (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such acts are likely to endanger the safe navigation of a ship;
> (f) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship; or
> (g) injures or kills a person, in connection with the commission of any of the acts set forth in paragraphs (a) to (f),
>
> is guilty of an offence relating to hijacking a ship or endangering the safety of maritime navigation.

(d) Interpreting the provisions of the POCDATARA concerning the duplication of accomplice liability

Another problem in the POCDATARA is the duplication of accomplice liability. In this regard, Powell,[609] though commenting on the draft Bill which subsequently became the POCDATARA, argues that:

> 'The offences in clauses 4 to 10 fit comfortably into the main crime of terrorism, and the definition of terrorism incorporates the already existing South African crimes of murder,

[609] Powell op cit (n553) 566-567.

culpable homicide, assault, arson and malicious damage to property. However, it is in the area of accomplice liability that the duplication reaches ludicrous levels. Accomplice liability is provided for more than four times. To the extent that the offences are consequence and not circumstance crimes, the various forms of terrorism cover principal and accomplice liability already. Secondly, facilitation, participation, assistance, contribution and planning are expressly included within the crime of terrorism itself. Thirdly, clause 3 separately criminalises enhancing the ability of another to engage in terrorist activity, providing or offering a skill and providing weapons or other logistical support. The distinction between this form of accomplice liability and that contained within terrorism itself is that clause 3[610] creates liability for assistance negligently given. Fourthly, clause 14[611] creates the separate offence of conspiracy and inducing another to commit an offence. Fifthly, the offence of failing to report a suspected terrorist crime or person may be seen as another form of accomplice liability.[612] Finally, the convention crimes of financing[613] and harbouring[614] also codify forms of accomplice liability'.

Cachalia[615] also notes the problem with the establishment of 'guilt by association' or accomplice liability in sections 3, 4 and 11 of the POCDATARA. Concerned about the fact that a person can be found guilty of terrorism regardless of his/her intention, Cachalia[616] submits as a solution to the overbreadth of accomplice liability provisions, that the courts might have to construe the accomplice liability provisions narrowly to require a 'sufficiently substantial relationship between the assistance provided and the

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[610] Clause 3 remains clause or section 3 in the POCDATARA. The detail of this clause or section is set out under subheading (c) above.

[611] Clause 14 remains clause or section 14 in the POCDATARA, and it reads:
'Any person who –
(a) threatens;
(b) attempts;
(c) conspires with any other person; or aids, abets, induces, incites, instigates, instructs or commands, counsels or procures another person,
to commit an offence in terms of this Chapter, is guilty of an offence'.

The chapter being referred to is Chapter 2 of the POCDATARA, which sets out the various offences in the Act.

[612] This offence is now established in s 12 of the POCDATARA. For more detail, refer to the discussion under subheading (e) below.

[613] This offence is now established in s 4 of the POCDATARA.

[614] This offence is now found in s 11 of the POCDATARA.

[615] Cachalia op cit (n558) 517-518.

[616] Ibid at 517.

prohibited criminal activity'. This speaks to restrictive interpretation being the appropriate remedy in the circumstances.

(e) Interpreting the provisions of the POCDATARA concerning the duty to report acts of terrorism

Section 12 of the POCDATARA provides for the duty to report acts of terrorism. It reads:

(1) Any person who –
   (a) has reason to suspect that any other person intends to commit or has committed an offence referred to in this Chapter; or
   (b) is aware of the presence at any place of any other person who is so suspected of intending to commit or having committed such an offence,

   must report as soon as reasonably possible such suspicion or presence, as the case may be, or cause such suspicion or presence to be reported to any police official.

(2) Any person who fails to comply with the provisions of subsection (1)(a) or (b), is guilty of an offence.
(3) Upon receipt of a report referred to in subsection (1), the police official involved, must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgement of receipt of such report.
(4) (a) The National Commissioner must, at the commencement of this Act, publish the direction contemplated in subsection (3) in the *Gazette*.
   (b) Any direction issued under subsection (3) must be tabled in Parliament.
(5) A person required to make a report in terms of subsection (1) concerning a suspicion that any other person intends to commit or has committed an offence referred to in section 4, may continue with and carry out any transaction to which such suspicion relates, unless directed in terms of subsection (6) not to proceed with such a transaction.
(6) If a police official authorised thereto by the National Commissioner, after consulting with a person required to make a report contemplated in subsection (5), has reasonable grounds to suspect that a transaction referred to in that subsection may constitute an offence contemplated in section 4, that police

official may direct that person, in writing, not to proceed with the carrying out of that transaction or any other transaction in respect of the property affected by that transaction for a period as may be determined by that official, which may not be more than five days.

(7) For the purposes of calculating the period of five days in subsection (6), Saturdays, Sundays and proclaimed public holidays must not be taken into account.

(8) Subsection (6) does not apply to the carrying out of a transaction to which the rules of an exchange licensed in terms of the Stock Exchange Control Act, 1985 (Act No. 1 of 1985), or the Financial Markets Control Act, 1989 (Act No. 55 of 1989), apply.

The duty envisaged in section 12 is very broad as it is triggered by mere suspicion (not actual knowledge) of the intended commission of acts of terrorism or the location of the person who is suspected of intending to commit acts of terrorism or has committed the acts of terrorism. Such a duty effectively forces individuals to be informers, and its criminalisation provides the police with a powerful tool to effectively blackmail into submission any reluctant witness they are interviewing during terrorism investigations.[617] There is also no immunity from criminal and civil liability especially for those who *bona fide* report suspicions which turn out to be false, thus constituting a terrorism hoax (which is an offence under section 13(1)(b) of the POCDATARA).[618] There is also nothing in section 12 that protects against self-incrimination should a person make a report and that same report is used against the person to prosecute him/her for terrorism-related offences.[619]

The suggested solution to the foregoing is to read-in of the 'use indemnity' provision, in terms of which the information provided may not be used against the person who gave that information.[620] It is also open to the courts to read-down the duty to report, such that it does not apply if its operation would lead to self-incrimination.[621]

[617] Roach op cit (n564) 145.

[618] Ibid.

[619] Ibid.

[620] Powell op cit (n553) 569.

[621] Roach op cit (n564) 146.

(f) Interpreting the provisions of the POCDATARA dealing with the listing of terrorist groups

The provisions dealing with the listing of terrorist groups emanates from chapter 5 of the POCDATARA. Chapter 5 contains section 25 which envisages the Executive[622] declaration of certain groups as terrorist groups. There are numerous problems with the listing provision.[623] The most pertinent of these is that there appears to be no provision for challenging or reviewing the decision to list a particular group as a terrorist group.[624]

Thus, when, for instance, a person is charged with a section 4 offence of financing a terrorist group, his/her right to presumption of innocence may be violated because section 4 accepts the mere listing by the Executive as proof beyond a reasonable doubt that the group being financed is indeed a terrorist group.[625] Likewise, in the case of freezing orders under section 23 of the POCDATARA,[626] a court may make an order

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[622] Section 25 reads: '[t]he President must, by Proclamation in the *Gazette*, and other appropriate means of publication, give notice that the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations, has identified a specific entity as being –

(a) an entity who commits, or attempts to commit, any terrorist and related activity or participates in or facilitates the commission of any terrorist and related activity; or
(b) an entity against whom the Member States of the United Nations must take the actions specified in Resolutions of the said Security Council, in order to combat or prevent terrorist and related activities.

Section 26 goes on further to provide that: '[e]very Proclamation issued under section 25 shall be tabled in Parliament for its consideration and decision and Parliament may thereupon take such steps as it may consider necessary.

[623] See Roach op cit (n564) 148-149.

[624] Roach op cit (n564) 148. It is not possible to take the listing decisions on review before a court of law or on review by the Executive. It seems that much of the listing is envisaged to take place by means of the Proclamation published by the President in the Government Gazette when the United Nations Security Council has listed a terrorist group.

[625] Roach op cit (n564) 143-144.

[626] Section 23 reads:

(1) A High Court may, on *ex parte* application by the National Director to a judge in chambers, make an order prohibiting any person from engaging in any conduct, or obliging any person to cease any conduct, concerning property in respect of which there are reasonable grounds to believe that the property is owned or controlled by or on behalf of, or at the direction of –
    (a) any entity which has committed, attempted to commit, participated in or facilitated the commission of a specified offence; or
    (b) a specific entity identified in a notice issued by the President under section 25.
(2) An order made under subsection (1) may include an order to freeze any such property.
(3) A High Court may make an interim order under subsection (1) pending its final determination of an application for such an order.

freezing property which is believed on reasonable grounds to be controlled by an entity identified as a terrorist group, yet it is not possible to challenge the listing of that entity as a terrorist group.[627]

Executive determinations of terrorist groups also violate the separation of powers doctrine because the making of decisions as to the guilt or otherwise of any person or group vests in an independent judiciary after a rigorous and fair adversarial process.[628] Furthermore, the adoption of the United Nations Security Council's list of terrorist organisations could amount to an unconstitutional delegation of legislative power by Parliament.[629] It is even more unacceptable that such power is delegated to an international body with no democratic mandate from South Africans.[630] A solution to the foregoing might well be to read-in the right to challenge the categorisation by the Security Council of an organisation as a terrorist group.[631]

(g) Interpreting the provisions of the POCDATARA dealing with wide investigative powers

Another cause for concern are the wide investigative powers which are not subject to judicial authorisation. Section 22 of the POCDATARA makes provision for such investigative powers, and it reads:

(1) Whenever the National Director has reason to believe that –
  (a) any person may be in possession of information relevant to -
    (i) the commission or intended commission of an alleged offence under chapter 2; or
    (ii) any property which –
      (aa) may have been used in the commission, or for the purpose of or in connection with the commission, of an offence under this Act;

[627] See Powell op cit (n553) 564-565.

[628] Roach op cit (n564) 144.

[629] Powell op cit (n553) 570.

[630] Ibid.

[631] Ibid at 569.

(bb) may have facilitated the commission of an offence under this Act, or enabled any entity to commit such an offence, or provided financial or economic support to an entity in the commission of such an offence; or

(cc) may afford evidence of the commission or intended commission of an offence referred to in subparagraph (i);

(b) there may be in any building, receptacle or place, or in the possession, custody or control of any entity any property referred to in paragraph (a)(ii); or

(c) any entity may be in possession, custody, or control of any documentary material relevant–

(i) to an alleged offence referred to in paragraph (a)(i); or

(ii) in respect of any property referred to in paragraph (a)(ii) or (b),

he or she may, prior to the institution of any civil or criminal proceeding, under written authority direct that a Director of Public Prosecutions shall have, in respect of a specific investigation, the power to institute an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), relating to the commission or intended commission of an alleged offence referred to in paragraph (a)(i) or any property contemplated in paragraph (a)(ii), or to any property referred to in paragraph (b), or to the possession, custody or control of any documentary material referred to in paragraph (c).

(2) For purposes of subsection (1), a reference in the said chapter 5 to –

(a) the "head of the Directorate of Special Operations" or an "Investigating Director" shall be construed as a reference to a Director of Public Prosecutions authorised under subsection 1; Provided that for purposes of section 28(2)(a) of the said Act, a Director of Public Prosecutions may only designate a Deputy Director of Public Prosecutions;

(b) a "special investigator" shall be construed as to include a "police official".

(3) If any property, contemplated in subsection (1)(a)(ii), seized under any power exercised under subsection (1), consists of cash or funds standing to the credit of a bank account, the Director of Public Prosecutions who has instituted the investigation under that subsection, shall cause the cash or funds to be paid into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), and the Director of Public Prosecutions shall forthwith report to the Financial Intelligence Centre established in terms of section 2(1) of the Financial Intelligence Centre Act, 2001 (Act No.38 of 2001), the fact of the seizure of the cash or funds and the opening of the account.

As already mentioned, the exercise of the investigative powers in section 22[632] of the POCDATARA is not subject to prior judicial authorisation.[633] This is despite section 23 (which deals with freezing orders)[634] and section 24 (which deals with cordoning off, stop and search of vehicles and persons)[635] introducing the tradition of such prior judicial authorisation. There is however hope that, since section 22 incorporates Chapter 5 of the National Prosecuting Authority Act[636] (the NPA Act), which does require prior judicial authorisation for the exercise of the investigative powers provided in the Act, this might translate to the exercise of section 22 powers subject to prior judicial authorisation.[637]

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[632] It is noteworthy that South Africa parted with the detention-without-trial provision which was initially mooted in the draft Bill before the POCDATARA was enacted into law. This left s 22 the sole investigative mechanism available to the South African authorities. For a commentary and critique particularly on the detention-without-trial provision in the draft Bill, see E Steyn 'The draft anti-terrorism Bill of 2000: The lobster pot of the South African criminal justice system' (2001) 14 *South African Journal of Criminal Justice* 179-194; and M Cowling 'The return of detention without trial – some thoughts and comments on the draft anti-terrorism Bill and the Law Commission Report' (2000) 13 *South African Journal of Criminal Justice* 344-359.

[633] See also Roach (op cit (n564) 146) who makes the same observation.

[634] The provisions of s 23 are quoted in full in note 626 above.

[635] Section 24 reads:

(1) If, on written request under oath to a judge in chambers by a police official of or above the rank of director, it appears to the judge that it is necessary in order to prevent any terrorist or related activity, the judge may issue a warrant for the cordoning off, and stopping and searching of vehicles and persons with a view to preventing such terrorist or related activity, in a specified area, and such warrant applies for the period specified therein, which period may not exceed 10 days.
(2) Under such warrant any police official who identifies himself or herself as such, may cordon off the specified area for the period specified and stop and search any vehicle or person in that area, for articles or things which could be used or have been used for or in connection with the preparation for or the commission or instigation of any terrorist or related activity.
(3) The police official may seize any article or thing contemplated in subsection (2), and Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context in respect of any such article or thing.
(4) Section 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies in respect of the powers conferred upon police officials in terms of this section.
(5) The provisions of this section shall not be construed as affecting the rights of any police official or law enforcement officer to use any other power in any other law in respect of cordoning off, search or seizure.

[636] 32 of 1998.

[637] The advantage brought about by the invocation of chapter 5 of the NPA Act is the expanded power of search and seizure in that, while investigators do need to apply for a court order to search a suspect's property, they, however, need not specify the items they hope to find (Powell op cit (n553) 564).

Furthermore, it is noteworthy that the investigative hearings envisaged in section 22 of the POCDATARA can be conducted in private before a judicial officer.[638] Whether or not the courts will have the appetite to read-in a requirement that these hearings take place in public and be made subject to prior judicial authorisation is yet to be seen.[639] Roach is however of the view that the courts will most likely side with the state in such cases given the fact that these wide investigative powers are incorporated into legislation dealing with the serious scourge of organised crime.[640]

6.2.4 Shortcomings of the courts in using the power of legal interpretation

The last question which needs to be answered as part of the delineation of the post-apartheid security jurisprudence is whether the shortcomings of the courts in properly applying the power of interpretation still persist in post-apartheid South Africa. The first point to make in answering this question is that many of the factors which contributed to the courts' failure to properly utilise the power of legal interpretation have been done away with in the South African legal system.

As indicated in the discussion under subheading 5.2.3.3 in chapter 5 above, any practice, principle or doctrine which has the effect of hindering the role of the courts in an emergency (and, by implication, in security cases) is frowned upon.[641] Furthermore, gone are the days of using legislative wording that restricts the courts' power of interpretation with impunity.[642] The inclusion of court jurisdiction ouster clauses is also a thing of the past, and so is the operation of the doctrine of parliamentary supremacy, as well as the grant of blanket indemnity for any unlawful acts committed during an emergency and, by implication, during instances of a security breach.[643]

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[638] Roach op cit (n564) 146.

[639] Ibid at 147

[640] Ibid.

[641] For reasons as to why it is appropriate and justified to borrow principles from the emergency jurisprudence and extend their application to the ordinary security laws context, refer to note 64 above.

[642] We saw this happen a lot during apartheid. Refer to the discussion under heading 4.5 in chapter 4 above.

The path for the proper application of the power of legal interpretation seems clear in post-apartheid South Africa until one is reminded of the fact that there is always a lingering threat of the 'difficult to cure' condition of executive-mindedness on the part of the judges presiding over security matters.[644] Executive-mindedness may no longer be at the same level as it was under apartheid, but the problem is that it has a tendency to manifest when difficult security and emergency cases arise. The establishment of the interpretation regime proposed in this thesis becomes even more important in light of the ever-present likelihood of the rise of executive-mindedness. The interpretation regime provides indispensable principles which would ensure the proper use of the courts' power of interpretation, i.e. the interpretation of security laws in a manner that upholds and protects the rule of law and human rights.

There can be no doubt that, amid the exigency of a security breach in which the safety of the public, including judges, is not guaranteed, the demands of the rule of law and the protection of human rights are easily forgotten or ignored. The default outcome then tends to be deference to the Executive or Executive-friendly interpretations of the law, all to the detriment of the rule of law and human rights. The proposed interpretation regime will, amid the exigency of a security breach, serve to always remind the courts what they should do in order to always to uphold and protect the rule of law and human rights.

[643] We also observed this happening a lot during apartheid. Refer to the discussion under heading 4.5 in chapter 4 above.

[644] For a description of executive-mindedness, see note 349 above.

CHAPTER 7

THE PROPOSED SECURITY LAWS' INTERPRETATION REGIME

7.1 GENERAL

From the beginning up to the present point, this thesis has been engaged in the process of setting out the content underlying the South African security and emergency laws. A careful study and analysis of this content reveals that there are two broad techniques which are crucial for securing the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. These two techniques together form what in this thesis is called the security laws' interpretation regime.

For what could be the first technique of the interpretation regime, one has to turn particularly to the discussion under heading 4.5 in chapter 4 above.[645] In that discussion, the techniques used to prevent legal challenges to, or based on, the draconian apartheid security and emergency laws are set out. There is also an in-depth discussion of all that enabled these techniques to thrive. These techniques and its enablers therefore operated to exempt security and emergency laws from proper judicial scrutiny and ultimate interpretation in light of the rule of law and human rights. It is submitted that this gives rise to the first technique of the interpretation regime, which entails ensuring the proper and full enjoyment of the right of access to the courts in respect of security matters. The detail of this technique follows in the discussion under heading 7.2 below.

For what could be the second technique of the interpretation regime, regard must be had especially to the discussion under subheading 6.2.3 in chapter 6 above. That

[645] This point marks the beginning of the careful study and critical analysis of the content set out in the first six chapters of this thesis. Going forward, we shall see what the content in the first six chapters contributes to the interpretation regime that is being established.

discussion dealt with the suggested approaches to interpreting the impugned provisions of security laws. From these suggested approaches emerges the second technique of the interpretation regime, which entails the use of restrictive interpretation, severance, reading-down and reading-in. The detail of the second technique follows in the discussion under heading 7.3 below. I now turn to provide the detail of each of the techniques of the interpretation regime.

7.2 TECHNIQUE 1: ENSURING THE PROPER AND FULL ENJOYMENT OF THE RIGHT OF ACCESS TO THE COURTS IN RESPECT OF SECURITY MATTERS

Apart from being a logical starting point in having any law interpreted by the courts in light of the rule of law and human rights, the first technique of the interpretation is actually a lesson from apartheid history. As already mentioned, certain techniques and the enablers thereof operated to frustrate access to the courts and the rendering of justice in security and emergency matters.[646] To illustrate, the apartheid government's strategy of passing of security and emergency legislation and regulations which effectively deprived the courts of jurisdiction to hear and pronounce on certain security and emergency matters, frustrated the enjoyment of the right of access to the courts to have any matter adjudicated upon.

Furthermore, the technique of using legislative language that placed the exercise of security and emergency powers in the subjective discretion of various officials, left the courts with no jurisdiction to objectively assess the exercise of such powers, thus making a mockery of the little that remained of the right of access to the courts of justice at the time. As if the foregoing was not enough in making a mockery of access to the courts, the grant of indemnity from civil and criminal liability in favour of government officials who exercised power in terms of security and emergency laws added insult to injury, so to speak. Thus, where there might have been some appetite to exercise the right of access to the courts and bring criminal and/or civil lawsuits

[646] The techniques and enablers thereof are discussed in full in the discussion under heading 4.5 in chapter 4 above.

against those officials who exercised power in terms of security and emergency laws, the outcome was a foregone conclusion before a matter even began.

While access to the courts was being frustrated in the manner described above, the courts were at the same time obliged to implement the will of Parliament as per the doctrine of parliamentary supremacy.[647] The operation of parliamentary supremacy meant that the courts could not question the substance of the laws made by Parliament, especially through testing them against the rule of law and human rights. [648] As a result, accessing the courts and challenging the security and emergency legislation was a futile exercise as the courts' testing power was significantly constrained. This detracted significantly from the full enjoyment of the right of access to the courts. A further detraction from the full enjoyment of access to the courts was facilitated by executive-mindedness on the part of the judges of the courts during apartheid. Such executive-mindedness reflected in the judges' preference of strained interpretations of legal provisions which favour the Executive.

Given the foregoing, ensuring the proper and full enjoyment of the right of access to the courts in respect of security matters has an obvious starting point, which is to dispense with the aforementioned techniques and that which enabled these to operate effectively.[649] These techniques and its enablers are effectively barriers to the proper and full enjoyment of the right of access to the courts. Dispensing with them would create an enabling environment for the full realisation and enjoyment of the right of access to the courts, which is now guaranteed in section 34 of the South African Constitution.[650]

It is submitted that South Africa is on the correct path to eradicating the abovementioned barriers to the full enjoyment of the right of access to the courts. This

[647] For the detail on parliamentary supremacy in South Africa, refer to the discussion under heading 2.2 in chapter 2 above. Also see the discussion under heading 4.5 in chapter 4 above.

[648] On the impact of parliamentary supremacy on the rule of law and human rights, reference can once more be made to the discussion under heading 2.2 in chapter 2 above. A brief summary in point is located in the discussion under heading 4.5 in chapter 4 above.

[649] This, of course, is in addition to eradicating various other obvious factors which constitute a barrier to accessing the courts. Such other factors include, but are not limited to, socio-economic factors.

[650] Section 34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

can be observed from: (a) the developments taking place in the emergency context, (b) the treatment of doctrines that typically restrict access to the courts, and (c) the other developments that enhance access to the courts. Each of these are considered in detail below.

7.2.1 Developments taking place in the emergency context

The delineation of the post-apartheid emergency jurisprudence in chapter 5 above shows that the South African emergency jurisprudence (and, by implication, the state security jurisprudence)[651] no longer subscribes to the techniques which restrict access to the courts, as well as that which enabled the operation of these techniques. For instance, the ousting of the courts' jurisdiction can no longer be countenanced in modern South African emergency jurisprudence because so doing would be at odds with section 37(3) of the Constitution. Section 37(3) empowers the courts to test the validity of a declaration of a state of emergency, the extension thereof, as well as any legislation enacted or other action taken in consequence of a declaration of a state of emergency.[652] Furthermore, the provision in section 37(5)(a) of the Constitution, to the effect that no legislation is authorised to indemnify the state or any person in respect of any unlawful act committed during a state of emergency, confirms that the jurisdiction of the courts may not in any way be limited or ousted.

The whole of section 37 of the Constitution (which is South Africa's emergency regime), properly interpreted, extends to render inappropriate and unconstitutional any practice, principle or doctrine which has the effect of hindering access to the courts or which has the effect of hindering the courts from properly exercising jurisdiction in emergency and, by implication, security matters. [653] It therefore follows that legislative wording placing the exercise of emergency powers in the subjective discretion of particular designated officials cannot be permitted in modern South African jurisprudence. Executive-mindedness on the part of the judiciary, which can permeate

[651] For reasons as to why it is appropriate and justified to extrapolate from developments taking place in the emergency context the lessons which can be extended and applied in the context of the ordinary security laws, refer to note 64 above.

[652] For a full analysis, refer to the discussion under subheading 5.2.3.3 in chapter 5 above.

[653] Once more, refer to the discussion under subheading 5.2.3.3 in chapter 5 above for a full analysis.

in various forms or shape (such as judicial deference, judicial minimalism and/or the political question doctrine), is also frowned upon.[654] The foregoing can only bolster the proper and full enjoyment of the right of access to the courts.

7.2.2 The treatment of doctrines that typically restrict access to the courts

It is submitted that there are three main doctrines the operation of which typically restricts the proper and full enjoyment of the right of access to the courts. These include judicial deference, judicial minimalism and the political question doctrine.[655] On judicial deference, it is noteworthy that, even though deference is still being exercised by South African courts, since compliance with the separation of powers doctrine is sometimes achieved by deferring to the political branches of government, the operation of the doctrine of deference is nowadays significantly constrained. Gone are the days where South African courts would defer to other branches of government without merit. Today, deference is exercised only in limited constitutional and administrative law cases.[656] Suffice then to say that the doctrine of deference is circumscribed to the point that it does not mean total submission to the other branches of government. The point is clearly made by Hoexter[657] who submits that:

> 'Whatever deference means…it ought not to imply abstentionism or total submissiveness to the other branches of government, evoking old South African nightmares of judicial prostration to the dictates of the executive. Rather, the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact

[654] For an explanation as to how executive-mindedness on the part of the judges can manifest in the form of judicial minimalism, judicial deference, and/or the political question doctrine, refer to the discussion under heading 4.5 in chapter 4 above.

[655] More detail on these doctrines can be found in the discussion under subheadings 3.5.2.5 and 3.5.2.6 in chapter 3 above.

[656] See D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614-615. See also C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law (2008) 24 *South African Journal on Human Rights* 281 at 293.

[657] Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484 at 501.

> and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal' (footnotes omitted).

A very important point to remember in applying the deference doctrine is that it should not be done in a 'formalistic, heavy-handed or mechanical way'.[658] This means that there should be no fixed rules as to when deference is certain to be undertaken. Every matter must be decided on its own merits. As such, it cannot be said with certainty that there is or there is no possibility that the need for deference might arise in the context of security laws. However, given the wide right of access to the courts envisaged in the interpretation regime which is presently being established, there appears to be a very limited space for the possibility of any sort of deference on the part of the courts. Limiting deference as much as possible translates into the proper and full enjoyment of the right of access to the courts.

Turning to the doctrine of judicial minimalism, it is also noteworthy that the minimalist style of adjudication which South African courts do sometimes adopt is so circumscribed that South Africans can rest assured that it would never be at such a scale that the courts simply avoid politically-sensitive matters.[659] One example where South African courts are observed to be adhering to the doctrine of minimalism is when they prefer, as they usually do, incremental and theoretically modest legal development, which allows jurisprudence to grow on a case-by-case basis and with judgments being limited to nothing more than what needs to be said to decide a matter (and leave as much as possible undecided).[660]

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[658] Ibid at 503.

[659] See I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138-165.

[660] Ibid at 147-148. This is also known as 'decisional minimalism'.

Also, the 'avoidance' doctrines such as that of ripeness and mootness are all associated with minimalism,[661] as they can operate to limit the extent of judicial intervention. Also included in the list of the various forms in terms of which minimalism can manifest is the requirement that a party to litigation must have a 'sufficient interest in the outcome' (*locus standi*), as well as the principle that a court can choose not to hear a matter on the basis that it is not in the 'interests of justice' that the matter be heard.[662]

The foregoing examples constitute the few instances where modern South African courts justifiably exercise judicial minimalism. In any event, it is not always possible for South African judges to strive to be what in legal theory is referred to as a 'herculean judge'.[663] Visualised as a herculean judge is a mythical figure of a judge who has the time and talent to always produce comprehensive and substantive judgments which do not only answer specific cases, but also explain all the past and future cases.[664] This justifies the limited scope for judicial minimalism in any legal system.

Once again, there can be no fixed rule(s) as to when the exercise of minimalism in security matters is justified. However, what seems clear is that the rather wide right of access to the courts envisaged by the interpretation regime cannot be effected by a judge with a minimalist mind-set.

Lastly, on the political question doctrine, it is noteworthy that the denunciation of this doctrine is evident from the fact that the South African Constitution mandates the courts to review the exercises of public power and not hide behind what has become

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[661] Ibid at 147.

[662] Ibid. The operation of the interests of justice criterion can be observed in a number of instances in South African law, such as when superior courts decide whether to exercise their inherent power (in terms of s 173 of the Constitution) to set their own procedures and develop the common law, as well as when an appeal or direct access to the Constitutional Court (being the highest court in the land) is sought in terms of s 67(6)(a) and (b) of the Constitution.
The foregoing is in sharp contrast to the position in the United States where the United States' Supreme Court has the prerogative (i.e. 'control over its own docket' - to use the appropriate terminology) to choose the cases it wishes to hear (Ellman op cit (n40) 68). A case requires four of the nine members of the court to vote in favour of hearing the matter (ibid). Failing this criteria, the matter will not be heard.

[663] See Currie op cit (n659) 145-147, who cites Ronald Dworkin's conception of a Herculean judge.

[664] Currie op cit (n659) 143 & 145-147.

universally known as the 'political question' doctrine.[665] Writings that ponder on whether or not South African jurisprudence incorporates the political question doctrine also illustrate the precarious nature of this doctrine in South Africa.[666] The overall conclusion reached in academic literature refutes the applicability of the political question doctrine, as understood and applied in the United States.[667]

In actual fact, there is general consensus that the post-apartheid South African jurisprudence never adopted any doctrine which resembles the political question doctrine.[668] Further support for the denunciation of the political question doctrine is also located in the possibility that even in the United States, which has been very much familiar with this doctrine, the use of the doctrine is declining, and is perhaps nearing the point of extinction.[669]

7.2.3 Other developments that enhance access to the courts

An indication of the fruition of the full enjoyment of the right of access to the courts in South Africa can be observed from the possibility that an otherwise non-justiciable matter may nonetheless receive the attention of the court if so doing is in the interests

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[665] Ellman op cit (n40) 67-68. The author further notes that the South African Constitution creates an obligation on the courts to rule on matters before them (ibid at 67). This implies that the courts cannot hide under some legal niceties to avoid deciding cases. This includes doctrines such as that of minimalism, deference and that of political questions.

[666] See C Okpaluba 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 1)' (2003) 18 *SA Public Law* 331-348; and C Okpaluba 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 2)' (2004) 19 *SA Public Law* 114-131.

[667] It is noteworthy that South Africa has not had cases that call directly for the invocation of the political question doctrine. Instead, the South African cases which come close to requiring the invocation of the political question doctrine have been in the administrative-law context, particularly in cases where the courts had to decide whether particular conduct falls within the purview of the Legislature or the Executive and is therefore exempt from judicial review. Although decisions which are political in nature or which amount to policy decisions (i.e. the so-called executive and legislative decisions) are not subject to judicial review, it does not always follow that such decisions are always non-justiciable. This is because judicial review based on the principle of legality has since been recognised and utilised by the courts as the basis for reviewing such executive and legislative acts. The foregoing proves that even executive and legislative decisions are not, as a rule, non-justiciable political questions (see generally Okpaluba (part 1) op cit (n666) 333).

[668] Swart & Coggin op cit (n268) 363. See also Ellman op cit (n40) 67.

[669] Swart & Coggin op cit (n268) 362-363.

of justice.[670] Ellman[671] correctly observes that a matter that is not ripe for adjudication or is moot may nonetheless be admitted for adjudication if it is in the interests of justice to do so. This is in line with the inherent jurisdiction given to the superior courts in South Africa to regulate their own procedures in accordance with the interests of justice.[672]

Moreover, the Constitutional Court is enjoined to hear not just constitutional matters[673] (as was the case previously), but also 'any other matter if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court'.[674]

To further enhance access to the courts, the South African Constitution provides for flexible or wide *locus standi* (i.e. legal standing) requirements especially in constitutional matters.[675] The *locus standi* requirements in section 38 of the Constitution notably lower the threshold for accessing the courts by allowing the courts to hear a matter brought by a person acting on behalf of a class of persons or even in the public interest. Thus, section 38 extends *locus standi* to litigants beyond those with a direct and substantial interest in the subject-matter and outcome of the litigation.[676] Consequently, virtually any stakeholder or person with an interest in security laws, be it government, non-governmental organisations, pressure groups or any private

[670] On the notion of interests of justice generally, see note 662 above. For a critical engagement with the notion of the interests of justice criterion, see K Moshikaro 'Against the interests of justice: Ignoring distributive justice when certifying class actions (2015) 7 *Constitutional Court Review* 291-319.

[671] Ellman op cit (n40) 68.

[672] See s 173 of the Constitution.

[673] Section 167(3)(b)(i) of the Constitution.

[674] Section 167(3)(b)(ii) of the Constitution.

[675] See generally CF Swanepoel 'The judicial application of the interest requirement for standing in constitutional cases: A radical and deliberate departure from common law' (2014) 47 *De Jure* 63-84. See also E Hurter 'Class action: Failure to comply with guidelines laid down by courts ruled fatal 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 409 at 410. See further *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) 1065G-I; and *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (EC) 618I-619F.

[676] Ellman (op cit (n40) 67) contrasts the South African position regarding *locus standi* with that of the United States and concludes that the United States does not have such relaxed rules for standing, hence the lack of standing is typically a ground for the courts to decline to hear a matter.

person, has access to a platform that will objectively consider whatever security-related issue being raised.[677]

It would not be a strange occurrence in South Africa should organisations enter into litigation on behalf of their members, even in political cases. This happened during the tenure of the authoritarian apartheid regime, though in very limited cases. In *Wood v Odangwa Tribal Authority*,[678] the court took a rather bold and unprecedented step to grant church leaders an interdict against the future infliction of corporal punishment by tribal authorities on certain identified members or sympathisers of political parties on behalf of whom they (the church leaders) were acting. Such infliction of punishment by tribal authorities typically proceeded without there having been a trial and legal representation for accused persons. The court therefore preferred a wide [679] interpretation of the *locus standi* requirements in cases involving violations of life, liberty or physical intergrity.[680] Parties to cases that did not involve violations of life, liberty or physical integrity were however not afforded the benefit of a relaxed approach to *locus standi*.[681]

Continuing along the same line of reasoning as that of the court in the *Wood* case, the court in *African National Congress (Border Branch) v Chairman, Council of the State of the Republic of Ciskei*[682] granted *locus standi* to a political party acting on behalf of

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[677] C Loots 'Standing to enforce fundamental rights' (1994) 10 *South African Journal on Human Rights* 49.

[678] 1975 (2) SA 294 (A).

[679] Loots (op cit (n677) 49-51) also presents a compelling case of how the *locus standi* jurisprudence in India was also moving in the same direction adopted by the court in the *Wood* case.

[680] Loots op cit (n677) 51. The Rhodesian court (now Zimbabwean court) in *Deary NO v Acting President, Rhodesia*1979 (4) SA 43 (R) relied on the *Wood* case when it upheld the *locus standi* of applicants acting in the interest of those who would be subject to executions conducted under martial law. Clearly the violation of the right to life was a real possibility, and so the court deemed it proper to extend the *locus standi* principle emanating from the *Wood* case.

[681] See, for instance, *National Education Crisis Committee v State President of the Republic of South Africa* (W) unreported case no 16736/86 of 9 September 1986, a case which concerns the determination of the *locus standi* of a group representing the interests of black school children's right to education. See also *Cabinet of the Transitional Government for the territory of South Africa v Eins* 1988 (3) SA 369 (A) concerning the determination of the *locus standi* of a citizen in an application to have a piece of legislation declared unconstitutional. Loots (op cit (n677) 52) points out that the courts in both cases mentioned above could have bypassed the *locus standi* barrier by extending the application of the *locus standi* principle in the *Wood* case beyond its narrow limits.

[682] 1992 (4) SA 434 (Ck).

its members in claiming an order declaring certain security legislation unconstitutional and invalid. From then onwards, a relaxed approach to determining *locus standi*, which was propelled further by the adoption of the Interim Constitution with identical *locus standi* provisions as those presently in section 38 of the South African Constitution, was, and continues to be, openly acknowledged and embraced.[683] Consequently, it is prudent to claim that virtually any stakeholder with an interest in security matter can approach the courts.

In addition to the flexible rules of standing, the full enjoyment of the right of access to the courts is also bolstered by the possibility of *amicus curiae* participation in litigation. By definition, '[a]n *amicus curiae* ('friend of the court') is a non-litigious party that joins the litigation to assist the court to reach its decision'.[684] Therefore, interested third parties who probably do not have *locus standi* have the option of joining the litigation as *amici curiae*.[685] Traditionally, an *amicus* was a neutral friend of the court who assisted it not to err.[686] Indeed, this was the understanding based on which the court in *Connock's (SA) Motor Co Ltd v Pretorius*[687] incorporated *amici curiae* into South African law.

However, today, *amici curiae* often intervene on the basis of their own interest and that of the public.[688] Thabane[689] further observes that the role of an *amicus* is shifting

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[683] See Loots op cit (n677) 56-59.

[684] A Spies 'Reconsidering the *amicus curiae* participation in *S v Zuma*: Lessons for future participation' (2015) 28 *South African Journal of Criminal Justice* 59 at 62. Other definitions can be found in T Thabane 'Stacking the odds against the accused': Appraising the curial attitude towards *amici* participation in criminal matters' (2011) 24 *South African Journal of Criminal Justice* 19.

[685] JC Mubangizi and C Mbazira 'Constructing the *amicus curiae* procedure in human rights litigation: What can Uganda learn from South Africa' (2012) 16 *Law, Democracy and Development* 199 at 203. For reasons as to why not all third parties would have *locus standi* to join as parties or why it may be inappropriate to admit every interested third party as a party to the litigation, see C Murray 'Litigating in the public interest: Intervention and the *amicus curiae* (1994) 10 *South African Journal on Human Rights* 240 at 240-241.

[686] Thabane op cit (n684) 25.

[687] 1939 TPD 355. The court (at 357) expressed that an *amicus curiae* is:
'a bystander – someone who is present in court and not concerned with the matter in hand, who may be counsel or may not. He is a person who, if he observes the judge in doubt about something, or likely to fall into error through failure to recollect a fact of which he ought to take cognizance, such as a legal decision or a statute, asks leave to come to his assistance and to mention it, and thus help the judge by pointing out what appears to be in danger of being overlooked'.

[688] See generally Spies op cit (n684).

from that of being a friend of the court to that of being a friend of the party to the litigation, thus clearly illustrating the partisanship of an *amicus* today. Be that as it may, *amici curiae* are very useful 'where the parties inadvertently, deliberately or due to want of expertise, do not address some of the most significant legal questions or angles of a case'.[690] They can 'provide contextual evidence to a court to ensure that it is aware of the point of view of those who will be affected by its judgment'.[691]

Because security matters are typically complex such that counsel is normally required, the participation of *amici curiae* in security matters could well result from the courts' use of its discretion to appoint *amici curiae* in the case of an unrepresented litigant.[692] Where the accused is well-represented, the courts could also invite an *amicus curiae* to appear and present argument if so doing is deemed necessary.[693] Furthermore, security matters typically require the participation of an *amicus* because generally there would be a need for the court to assess the impact of the decision on the lives of citizens, and an *amicus* can advise the court in that regard.[694]

A lesson from history could well be that institutions such as the Centre for Applied Legal Studies (CALS), the Legal Resources Centre (LRC), as well as the allies of these institutions (in the form of various community-based organisations) would be the typical third parties with an interest in security matters, as was the case under

[689] Thabane op cit (n684) 23 & 25-27

[690] Thabane op cit (n684) 24.

[691] Spies op cit (n684) 62.

[692] Murray (op cit (n685) 241-243) details the various other instances where the participation of *amici curiae* is typically observed. One of these instances is when a matter raises complex issues and the court, in its discretion, facilitates the appointment of a legal representative in the case of an unrepresented litigant. Indeed, the Constitutional Court in the case of *S v Okah* 2018 (1) SACR 492 (CC) at para 15 took it upon itself to open up the matter to interested third parties with expertise in international law. Two *amici* (namely, the Institute for Security Studies and the Southern African Litigation Centre) applied and were duly admitted, and the court expressed its gratitude for their contributions.

[693] One example of the case where arguments of the *amicus* were requested at the behest of the Chief Justice was in the case of *S v Molimi* 2008 (2) SACR 76 (CC). See further Thabane op cit (n684) 31.

[694] On the role of an amicus in advising the court on the impact of its decision on the rights of citizens, see Thabane op cit (n684) 22-25).

apartheid.[695] The aforementioned institutions notably organised legal representation or funded the legal representatives of detainees under the old apartheid security laws.

The challenge that interested third parties in security matters face should they wish to litigate in security matters is therefore no longer that of *locus standi*, as there is the option of joining as *amici curiae*. Indeed, the Rules of the various superior courts in South Africa accommodate the participation of *amici curiae*. However, the position regarding the admission of *amici curiae*, especially in criminal law matters, is still rather controversial. The difficulty with admitting *amici curiae* in criminal matters arises when the *amici curiae* supports the case for the state, and, in so doing, prejudices the free trial rights of the accused person who, after the admission of *amici curiae*, must answer the state's case which is strengthened by the submissions of *amici curiae*. [696]

Notwithstanding the foregoing, fortunately, future challenges to South Africa's post-apartheid security laws are, as seen under subheading 6.2.3 in chapter 6 (during the discussion of the various approaches to interpreting the impugned security provisions), most likely to raise a constitutional issue[697] and, as a result, the participation of *amici curiae* would not be controversial even in the High Court.[698] Furthermore, as some security matters would, in one way or another, end up in the Supreme Court of Appeal

[695] See S Golub 'Battling apartheid, building a new South Africa' in S Golub & M McClymont Many Roads to Justice: The Law Related Work Of Ford Foundation Grantees Around The World (2000) 23. For an account of the public interest litigation which the LRC and CALS engaged in during apartheid, see S Golub op cit 25-33.
As reflected under note 692 above, other *amici* with an interest in security matters include the Institute for Security Studies and the Southern African Litigation Centre.

[696] For a full discussion of the complex issues involved, see Spies op cit (n684) and Thabane op cit (n684).

[697] There are various ways through which a constitutional issue might arise in the context of South Africa's security laws. The most obvious is the fact that some of the current security provisions violate certain fundamental rights. A constitutional issue can also arise from the fact that each of the suggested approaches to interpreting security provisions test the limits of the principle of legality to the extent that it might well be that, on a deeper analysis, they might be in violation of the legality principle or the rule of law, and thus unconstitutional. The possibilities are indeed endless.

[698] Note that Rule 16A of the Rules applicable in the High Court permits the participation of *amici curiae* only in matters that raise a constitutional issue. This however is not the requirement in the Supreme Court of Appeal and in the Constitutional Court (see J Brickhill 'The intervention of *amici curiae* in criminal matters: *S v Zuma* and *S v Basson* considered (2006) 123 *South African Law Journal* 391 at 392).

and/or in the Constitutional Court, fortunately, the Rules of these courts allow *amici curiae* participation in any matter, and not just constitutional matters.[699]

In closure, given that the first technique of the interpretation regime eliminates whatever external obstacles there may be to having security matters come before court and to having them subjected to proper constitutional scrutiny and interpretation in light of the rule of law and human rights, it follows that this technique is therefore the procedural component of the interpretation regime. Indeed, none of the methods for ensuring the proper and full enjoyment of access to the courts in security matters have any bearing on the actual substance of security laws.

7.3 TECHNIQUE 2: THE USE OF RESTRICTIVE INTERPRETATION, SEVERANCE, READING-DOWN AND READING-IN

The second technique of the interpretation regime follows naturally after the first technique has been fully observed (i.e. after access to the courts has been fully realised). This second technique emerges from the suggestions (made in the discussion under subheading 6.2.3 in chapter 6 above) as to how best the courts can approach the interpretation of security laws, bearing in mind the need to uphold and protect of the rule of law and human rights in the process. In analysing the said interpretative suggestions, it is observed that all the suggestions made boil down to the use of restrictive interpretation,[700] severance,[701] reading-down[702] and/or reading-in.[703] These then become tools that work best in the context of the interpretation of security laws.

To understand the operation of restrictive interpretation, severance, reading-down and reading-in in the context of legal interpretation, it is important to note the ordinary rules

[699] Note that Rule 16 which is applicable in the Supreme Court of Appeal as well as Rule 10 applicable in the Constitutional Court allow the admission of *amici curiae* if they are 'interested in any matter before court'. See also Brickhill op cit (n698) 392.

[700] For what restrictive interpretation entails, refer to note 532 above.

[701] The detail on severance can be found under note 583 above.

[702] For an explanation of what reading-down entails, see note 533 above.

[703] For a description of reading-in, see note 534 above.

of interpretation expounded in the recent judgment of the Constitutional Court in *Cool Ideas 1186 v Hubbard and another*,[704] to the effect that:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)'.

The pursuit of the ordinary grammatical meaning of security provisions would undoubtedly lead to absurd results, the worst of these being the unenviable infringement of the rule of law and some fundamental human rights and freedoms. The interpretation of apartheid security and emergency legislation (detailed in the discussion under heading 4.5 in chapter 4 above), which was driven by executive-mindedness on the part of judges of the courts and the literal interpretation of legal provisions, is a glaring example of the absurd results the pursuit of ordinary grammatical meaning of words in security and emergency legislation can give rise to. However, through restrictive interpretation, severance, reading-down and reading-in, the courts are able to formulate constitutionally sound interpretations which salvage the absurd results stemming from the ordinary grammatical meaning of security provisions.

The foregoing shines light on restrictive interpretation, severance, reading-down and reading-in, and makes these the vital tools for use in the interpretation of the substantive content of security laws. Because the second technique has a bearing on the actual substance of security laws (i.e. it directs how the impugned provisions of security laws must actually be interpreted), it becomes the substantive component of the interpretation regime.

[704] 2014 (4) SA 474 (CC) para 28.

Ultimately, the interpretation regime in its entirety guides the courts towards interpreting security laws in a manner that is cognisant and respectful of the rule of law and human rights, thus achieving the necessary balance and preserving the constitutional validity of security laws.

7.4 FURTHER JUSTIFICATIONS FOR THE INTERPRETATION REGIME

The discussion which follows in 7.4.1 to 7.4.3 below presents other justifications for the interpretation regime, which justifications are in addition to the fact that the regime has the ability to facilitate the interpretation of security laws in a manner that is consistent with the rule of law and human rights.

7.4.1 Argument for the interpretation regime based on the judicial policy

It is submitted that the strength of the security laws' interpretation regime lies in its ability to give effect to a transformative, liberal, purposive and substantive interpretation of security laws, as desired by the South African 'judicial policy'[705] as well as the values, ideologies and ethos encapsulated therein.[706] Although the South

[705] The notion of a judicial policy is an unacknowledged but existing policy underpinning the judiciary in all of its tasks, which includes legal interpretation. It came to the fore in the mid-1980s through the writings of Cora Hoexter who motivated for the recognition of the fact that judges, too, have their own judicial policy which they should be allowed to pursue (C Hoexter 'Judicial policy in South Africa' (1986) 103 *South African law Journal* 436 at 442). In justifying the existence of the judicial policy, Hoexter (in C Hoexter 'Judicial policy again' (1990) 6 *South African Journal on Human Rights* 412 at 415) argued that the judicial policy is:

> '…rooted in self-defence; for, while judges have honourably kept their promise not to meddle in politics, politicians have steadily encroached on the common law and on legal and judicial autonomy. Judicial policy offers a means of defending that autonomy, and of regaining lost ground'.

During apartheid, judicial policy became a solution to the dilemma faced by liberal and conscientious judges when they had to apply the manifestly unjust and immoral apartheid laws, as it provided justification for the judges' choice of liberal rather than repressive values when deciding cases (Hoexter (2008) op cit (n656) 283). Therefore, judicial policy allowed judges to 'break out of the constraints of parliamentary sovereignty and realise their own power to do good in a repressive legal system' (Hoexter (2008) op cit (n656) 286).

[706] Hoexter openly acknowledges that the concept of a judicial policy is a term she uses for what others call legal ideology or legal ethos (Hoexter (1986) op cit (n705) 442). Therefore, encapsulated within South Africa's judicial policy are liberal legal ethos or values, such as freedom, dignity, equality, the rule of law, the independent judiciary, and the legitimacy of judge-made laws, to mention but a few (Hoexter (2008) op cit (n656) 283; and Hoexter (1986) op cit (n705) 442). Ultimately, what lies at the heart of the judicial policy is simply the rendering of justice by the judiciary, especially when interpreting legal provisions. Enabling the rendering of justice might even entail acknowledging the political role of judges,

African judiciary has not openly acknowledged its observance of, or adherence to, a judicial policy when deciding cases, remnants of the existence of a judicial policy and adherence thereto by the courts are nonetheless visible and have been identified by legal scholars and jurists.[707]

The prevailing judicial policy currently goes by the name of transformative adjudication.[708] It operates mainly by bolstering the judiciary to prefer transformative, liberal, purposive and/or substantive interpretations of the law, instead of the conservative, mechanical, artificial and/or technical interpretations associated with legal formalism.[709] To arrive at a transformative, liberal, purposive and/or substantive interpretation of the law, judges must be creative or constructive in their interpretation of the law, they must look beyond existing authority and factor in the prevailing moral, social, political and economic conditions on the ground, and must ultimately strive for an interpretation that promotes justice to be done.

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and that legal adjudication goes beyond the mere consideration of legal authority to the consideration of moral values or ideas.

[707] Refer to the work of scholars and judges cited throughout Hoexter's 1986, 1990 and 2008 articles.

[708] Hoexter (2008) op cit (n656) 286. Transformative adjudication is a natural adjunct to transformative constitutionalism, which is a pillar of the South African Constitution. As Hoexter (in Hoexter (2008) op cit (n656) 284) correctly submits:

> 'The transformative project of the interim Constitution was made especially obvious by the 'bridge' metaphor used in its epilogue. The 1996 Constitution is a little less explicit about it, perhaps, but there is no mistaking the transformative aim of provisions that require the state to act positively to realise rights (s 7), that uphold a substantive conception of equality (s 9(2)) or that envisage the inexorable transmutation of the common law (s 39(2)). In view of these and other such provisions, there can be no doubt that our Constitution 'offers a vision of the future'. Its transformative purpose has indeed been affirmed by the Constitutional Court on a number of occasions'. (footnotes omitted)

Brand (op cit (n656) 622) further adds:

> 'I subscribe to the notion first put forward by Karl Klare and later developed by many others that the South African Constitution is a transformative document in that it has a certain political character; in short that it embodies a certain vision of society and requires positive action on the side of all agencies of the state toward the attainment of that vision. This transformative duty **-** the duty to work toward the achievement of the constitutional vision of society **-** is one that rests also on courts. Courts must also, in both the outcomes they generate in their judgments and the manner in which they reach their judgments (their reasoning and judicial "method"), to the extent that it "innovate[s] and model[s] intellectual and institutional practices" for the rest of society, work toward the achievement of the society envisaged in the Constitution'. (footnotes omitted)

The judicial policy of transformative adjudication is therefore the judiciary's vehicle for achieving the Constitution's transformative agenda. What this means is that all facets of the judiciary in South Africa (from judicial mind-set, to legal culture, to legal procedure, to legal philosophy, to legal reasoning and to legal interpretation) are underpinned by the ideal of transformative adjudication, the end goal of which is to give effect to the Constitution's ideal of transformative constitutionalism.

[709] Hoexter (2008) op cit (n656) 287.

It is at this point that we see both techniques of the interpretation regime being the practical manifestation of the ambitious aim of the judicial policy of transformative adjudication, which is to preach to the uninitiated judges with the view to convert them away from the indoctrinated culture of formalistic legal reasoning to being judges with fortitude and zeal for true justice resulting from constructive and liberal interpretations of the law informed by, or cognisant of, the prevailing moral, [710] social, political and economic conditions.[711]

Therefore, owing to the existence of the interpretation regime, judges now have a proper yardstick guiding them towards a transformative, purposive and/or substantive interpretation of security laws, in accordance with the dictates of the prevailing judicial policy. Even more advantageous to the judges is the availability of suggested approaches to interpreting some of the impugned security provisions, [712] which suggestions are endorsed by the interpretation regime and are also consistent with the prevailing judicial policy. These suggestions are also cognisant and respectful of the rule of law and human rights.

[710] This point is also recognised by researchers in the interpretation of law field. Singh (op cit (n532) 165) makes this clear when she submits:

> 'It is submitted that in a transformative Constitution, as alluded to, the function of the judge has to be a moral function. What is therefore required in the process of interpretation, is that judges need to embrace the challenge to give effect to social justice, by paying particular attention to the ethical and moral considerations in the process of legal reasoning and analysis of cases before them'.

[711] Compare the interpretation advanced by the interpretation regime with the interpretation preferred by the majority of the Appellate Division, as it was then known, in a matter decided during a state of emergency and on the brink of the end of apartheid. In *S v Toms; S v Bruce* 1990 (2) SA 802 (A), the notoriously executive-minded appeal court was asked to determine whether the penalty in the Defence Act 44 of 1957 was mandatory and therefore deprived the court of its usual discretion to impose a lesser sentence. The court therefore had to make a difficult choice between a liberal interpretation which vests the court with sentencing jurisdiction or a repressive interpretation depriving the court of jurisdiction. To the surprise of many, the majority of the court opted for a liberal interpretation and found that the court could impose a lesser sentence. This case marked a significant departure from the executive-minded approach typically characteristic of the appeal court during apartheid, to a more liberal approach to statutory interpretation (for an in-depth commentary on this case, see Hoexter (1990) op cit (n705)).

[712] Refer to the discussion under 6.2.3 in chapter 6 above.

7.4.2 Argument for the interpretation regime based on its ability to facilitate the interpretation of security provisions that is consistent with the text, context and purpose of the POCDATARA[713]

It further bodes well for the interpretation regime that it is capable of facilitating the interpretation of security provisions that does not lose sight of, or that is consistent with, the text, context and purpose of the POCDATARA. As such, in the case of security provisions in the POCDATARA, the interpretation regime cannot be disregarded on the basis that it (especially through its second technique of using restrictive interpretation, severance, reading-down and reading-in) facilitates an interpretation that unduly strains the text or language of the legislation, or that extends the meaning of the words in the legislation beyond what they are reasonably capable of meaning.[714]

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[713] Supra (n22).

[714] A recent example of a case where the interpretation arrived at in reading-down the impugned provisions was found to unduly strain the text of the enactment is the case of *Moyo v Minister of Police* supra (n533). In this case, a constitutional challenge was brought against, *inter alia*, the broad offence of intimidation in s 1(1)(b) of the Intimidation Act 72 of 1982. The said challenge was on the basis that s 1(1)(b) unjustifiably infringed the right to freedom of expression in s 16 of the Constitution. The Supreme Court of Appeal (SCA) had attempted to cure the potential unconstitutionality by reading-down the section in conformity with the Constitution. Thus, it added into the provisions of s 1(1)(b) the requirements of fault (*mens rea*) and unlawfulness, and that the intimidatory conduct complained of must induce an objectively reasonable fear of imminent harm (and not just a subjective fear of harm to the safety of another or the subjective fear of harm to one's own safety, property and security of livelihood) (paras 14 – 19).
When the matter came before the Constitutional Court, the court took the view that the requirements of fault (*mens rea*) and unlawfulness were not read into the legislation as alleged by the SCA, instead reading a statute (such as the Intimidation Act) as incorporating fault and unlawfulness was a recognised canon of construction of criminal statutes, and so doing formed part of a permissible manner of reading criminal statutes (para 61). The court reasoned further that the interpretative approach of the SCA fell outside the reasonable construction of the text of the legislation, such that it was a strained interpretation of the language or text of the statute. Therefore, it was found that the SCA's 'imminent harm' requirement could not have been contemplated by the text, context and purpose of s 1(1)(b) (para 67). The Constitutional Court then concluded that s 1(1)(b) was unconstitutional.
The decision in the *Moyo* case seems to have long been awaited given that various other restrictive interpretations of the Act (similar to those of the SCA) had long been questioned and rejected as not being appropriate (see S Hoctor 'The intimidatingly broad crime of intimidation: *S v Cele* 2008 JDR 0123 (N)' (2008) 29 *Obiter* 283-290). Notwithstanding the foregoing, it must be pointed out that the court in *Moyo* did not generally outlaw the use of reading-down and other similar techniques. Instead, the court rejected the manner in which reading-down was undertaken by the SCA in the matter, i.e. to use the reading-down method to interpret s 1(1)(b) in a manner that is inconsistent with text, context and purpose of the Act, thus ultimately rewriting the section and/or contributing to rendering the section so vague that the person who is charged would not understand the charge against him or her. Therefore, it is perhaps too much a stretch of the finding of the court in *Moyo* to claim that the court found that 'the overbreadth of criminal prohibitions cannot be cured by interpretation because people will inevitably be deterred into not engaging in constitutionally protected speech, erring on the side of caution – the so called "chilling effect" of speech prohibitions' (J Botha 'Constitutional Court declares draconian

In showing that the interpretation regime facilitates the interpretation of security provisions in the POCDATARA that is consistent with the text, context and purpose of the legislation, the reasoning process must mirror that of the Constitutional Court in post-apartheid South Africa's recent terrorism case, that being the *S v Okah*[715] case. In this case, the Constitutional Court had to interpret the jurisdiction clause in the POCDATARA in order to dispose of the issue as to whether the South African court had jurisdiction to try the bombing acts planned and financed in South Africa but executed elsewhere. The court's reasoning process entailed interpreting the actual text of the relevant section or clause[716] and thereafter proceeding to show that the interpretation so adopted does not strain the text or language of the legislation and that it is justified by the context and purpose of the Act, as derived from the short title, long title, preamble and the entire legislative scheme.[717]

For many of the provisions in the POCDATARA, the need for the interpretation thereof would typically arise in the event of a constitutional challenge which results in some special interpretation being needed to preserve the constitutional validity of the impugned provision. Thus, in the event of a constitutional challenge to the overly broad provisions of section 1(1)(xxv) of the POCDATARA (the definition of terrorist activity), the interpretative approach (suggested by Roach[718] and also supported by the

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Intimidation Act section unconstitutional: Plus, lessons in statutory interpretation (October 2019) *e-Mantshi Newsletter* (issue 158) available at *http://www.justiceforum.co.za/JET-LTN.ASP*).

[715] Supra (n692).

[716] See paras 18-33.

[717] See paras 34-43. This approach is in fact a standard approach in the interpretation of statutes. It was, for instance, observed by the court in *Moyo* (supra (n533)) in its process of interpreting the impugned provisions of the Intimidation Act (supra (n714)), and it has been the standard approach in interpreting the provisions in the POCA (supra (n544)). Note that the Intimidation Act and the POCA are similar to the POCDATARA in that all these pieces of legislation comprise provisions that are worded broadly. Some of the leading POCA cases in which the courts the adopted the same reasoning approach as in *Okah* include *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA); *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SACR 128 (SCA); *National Director of Public Prosecutions v Mohamed NO* 2002 (4) SA 843 (CC); *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA); *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC); *National Director of Public Prosecutions v van Staden* 2007 (1) SACR 338 (SCA); *S v Shaik* 2008 (5) SA 354 (CC); and *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC).

[718] Roach op cit (n564) 134.

interpretation regime) which would preserve the constitutional validity of the section entails reading-in the requirement of subjective fault into the provisions of this section.[719] The question that follows is whether the text, context and purpose of the POCDATARA permits this reading of section 1(1)(xxv).

It will be recalled that the Constitutional Court in the *Moyo*[720] case found that to read criminal statutes as incorporating the elements of fault (*mens rea*) and unlawfulness is a recognised and permissible rule of interpreting criminal statutes. The same can be applied to section 1(1)(xxv) of the POCDATARA. Consequently, the only justification needed in the case of the suggested reading of section 1(1)(xxv) is for the preference specifically of subjective fault or intention, and not any other form of fault. This point is all the more crucial because there are a number of instances in the POCDATARA where the low fault standard (i.e. objective fault or negligence) is clearly the envisaged fault standard.

A low fault standard contributes to having a wide offence of terrorism and related activities. In turn, such a wide offence enables South Africa to comply with its obligation to combat terrorism and any activity related to it, in whatever form or shape, thereby protecting the country's constitutional democracy as per the Act's short title. The wide offence of terrorism and related activities also propels South Africa towards fulfilling its international law obligations, as reflected in the long title and preamble to the POCDATARA.

Notwithstanding the sound reasons for the Legislature's desire for a wide offence of terrorism, the reality of the matter is that the POCDATARA is 'anything but a paragon of clear or deft drafting'[721] and the courts cannot, through lenient interpretation, come to the aid of the Legislature when it (the Legislature) could have made its intentions clear. As is the norm, the courts are bound to interpret criminal statutory provisions restrictively and in favour of maximum individual liberty. As such, it is justified to

[719] It is submitted that, in addition to Roach's suggestion, even the restrictive interpretation or reading-down of the provisions of s 1(1)(xxv) to require subjective fault could be just as effective in maintaining the constitutional validity of this provision. For a full account of the suggested approaches to interpreting the impugned provisions of s 1(1)(xxv), refer to the discussion under heading 6.2.3.3 in chapter 6 above.

[720] Supra (n533) at para 61. A summary of the case appears in note 714 above.

[721] *Okah* supra (n692) at para 25.

impose a strict reading of the extremely wide provisions of section 1(1)(xxv) by adding the requirement of subjective fault.

A strict reading of the wide provisions of section 1(1)(xxv) would also lead to the acceptance of the argument by Roach,[722] to the effect that where objective fault is the envisaged fault standard in the POCDATARA, clear indications to that effect are made.[723] Consequently, any doubt as to the envisaged fault standard can be decided in favour of a stricter standard of subjective fault. This would certainly be an interpretation which maximises the liberty of an individual.

Furthermore, incorporating the requirement of subjective fault would justify and render contextually appropriate the severe penalties prescribed for the offence of terrorism, which, in terms of section 2 of the POCDATARA, is committed by engaging in a terrorist activity as defined in section 1(1)(xxv). [724] Lastly, incorporating the requirement of subjective fault would also address the concerns around the issue of fair labelling, as no-one would be held liable for terrorism without having subjectively intended to commit this offence.[725] Therefore, the text, context and purpose of the POCDATARA permits the reading of section 1(1)(xxv) as incorporating subjective fault or intention.

A further constitutional challenge might arise in the case of the rather broad provision in section 1(1)(xxv)(a)(viii) of the POCDATARA. This provision makes it a terrorist act to create a serious public emergency or a general insurrection. The constitutional invalidity of this provision could however be avoided if, as per Roach[726] and in accordance with the interpretation regime, it is read-down to mean that the creation of such serious public emergency or general insurrection can only amount to a terrorist

[722] Op cit (n564) 135.

[723] There are many instances in the POCDATARA where there is specific reference to objective fault or negligence if that is what the Legislature intended. For instance, the use of the phrase 'ought reasonably to have known or suspected' in ss 3, 4, 11 and 13 of the POCDATARA, is a clear indication that the Legislature envisaged objective fault. Section 1(7) of the POCDATARA even defines this phrase, thus confirming its objective fault standard.

[724] Cachalia op cit (n558) 514

[725] Ibid.

[726] Roach op cit (n564) 136

activity if there has been a declaration of a state of emergency in terms of section 37 of the South African Constitution.[727]

Of course, the text in paragraph (viii) of section 1(1)(xxv)(a) only mentions the creation of a serious public emergency or a situation of general insurrection, and does not mention the declaration of a state of emergency. However, sight must not be lost of the fact that paragraph (viii) creates a platform for dealing with events that ordinarily constitute a state of emergency without declaring a state of emergency. Such an approach is similar to that of the Disaster Management Act[728] which, during the COVID-19 crisis, appears to have given the government extensive powers similar to those applicable during an emergency, but without having to declare a state of emergency and be subject to the stringent controls available during an emergency.

Avoiding having to declare a state of emergency is generally justified. Indeed, there are serious social, political and economic implications for so doing. However, there is even more of a danger if the legal instruments used to bypass having to declare a state of emergency give similar powers to those that would have been applicable during an emergency, but without putting in place the controls that come with a declared state of emergency. This invites the courts to approach the reading of legal instruments such as the POCDATARA and the Disaster Management Act having the limitations applicable in an emergency in mind.

Turning to the section 3 offences associated or connected with terrorist activities, it is noteworthy that, in wording the prohibitions, section 3 employs the phrase 'knows or ought reasonably to have known or suspected', which clearly implies both subjective and objective fault. Notwithstanding the clear and unambiguous wording, the ordinary meaning of the phrase employed leads to an absurd result, which is that those who negligently partake in terrorist activities and those who intentionally engage in terrorist activities are treated the same.[729]

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[727] Note that the conditions for the declaration of a state of emergency in terms of s 37 of the Constitution include, among other things, the existence of a public emergency and a general insurrection.

[728] 57 of 2002.

[729] Roach op cit (n564) 143.

The foregoing impacts on the principle of proportionality between the offence committed and the sentence imposed.[730] Disproportionality of this nature further impacts negatively on one's right to dignity and the right not to be subjected to cruel and inhumane punishment. The courts have also interpreted the right in section 12 of the Constitution (the right not to be deprived of freedom arbitrarily or without just cause) to have a substantive component, such that this right is violated if a person is imprisoned for negligence and the reason for which the state is depriving an individual of his or her liberty is insufficient.[731]

A remedy to the unconstitutionality of labelling and punishing as terrorists those who negligently partake in terrorist activities, which remedy is also endorsed by the interpretation regime, might well be to restrictively interpret section 3 to require a 'sufficiently substantial relationship between the assistance provided and the prohibited criminal activity'.[732] Another option might be to either strike down as unconstitutional the requirement of objective fault or negligence, or sever this requirement leaving only subjective fault intact.[733]

The same remedy mentioned above would apply to the offences in sections 4, 11 and 13(b) of the POCDATARA, as these also employ the phrase 'knows or ought reasonably to have known or suspected', yet the prescribed sentence for the offences in these sections are too severe for offences committed negligently.[734] This suggested

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[730] In terms of s 18(1)(b)(i) of the POCDATARA, punishment for s 3 offences is up to 15 years in the High Court and in the Regional Magistrates' Court. In the case of a District Magistrates' Court, the sentence is any penalty which a District Court may lawfully impose (see s 18(1)(b)(ii)).

[731] Powell op cit (n553) 570.

[732] Cachalia op cit (n558) 517.

[733] Roach (op cit (n564) 142-143). Roach (ibid) also advances two strands of Canadian constitutional law which, if adopted and incorporated into South African law, would be used to justify the court's departure from the objective fault requirement. The first strand comprises those principles of fundamental justice which require subjective fault for certain offences, owing to their stigma and the extent of punishment for those offences. The second strand is also another principle of fundamental justice which states that those who cause harm intentionally should be punished more severely than those who cause harm unintentionally.

[734] For s 4 offences, the High Court and Regional Magistrates' Court can impose a fine not exceeding R100 million or a maximum imprisonment term of 15 years, whereas the District Magistrates' Court can impose a fine not exceeding R250,000 or a maximum imprisonment term of five years (s 18(1)(c)(i) and (ii)).
For s 11 offences, the punishment is the same as that of s3 offences, which is 15 years maximum in the High Court as well as in the Regional Magistrates' Court (s18(1)(b)(i), and any penalty which a District Court may lawfully impose (see s 18(1)(b)(ii)).

remedy complements the entire legislative scheme of the POCDATARA, the content of which is gradually being exposed to be better served by the requirement of subjective fault rather than objective fault. This submission is also supported by the fact that the offences in sections 5 to 10 correctly require subjective fault, which is certainly apt for the penalties that these offences attract.[735]

Regarding the wide and potentially unconstitutional accomplice liability or guilt by association provisions in sections 3, 4 and 11, the suggested interpretative solution entails the restrictive construction or the reading-down of the said sections to require a 'sufficiently substantial relationship between the assistance provided and the prohibited criminal activity' [736] before a person is held liable. This manner of interpretation (and that which follows in the few remaining paragraphs of this section) is endorsed by the interpretation regime, and it certainly complements the entire legislative scheme, text, context and purpose of the POCDATARA.

Reading-down is also an interpretative solution that is supported by the interpretation regime when it comes to preventing the unconstitutionality occasioned by the lack of protection against self-incrimination should a person, in compliance with section 12 of the POCDATARA, make a report and that same report is used against the person making it. In such instances, the broad section 12 duty to report acts of terrorism has to be read-down so that it does not apply if its operation would lead to self-incrimination.[737] Alternatively, there may be the reading-in of the 'use indemnity' provision, in terms of which the information provided may not be used against the person who gave that information.[738]

The offence in s 12 attracts a fine or an imprisonment term not exceeding five years in the case of the High Court and the Regional Magistrates' Court, whereas the District Magistrates' Court can impose any penalty which it may lawfully impose (s 18(1)(e)).
For the offence in s 13(1)(a) or (b), the High Court and Regional Magistrates' Court can impose a fine or a maximum imprisonment term of 10 years, whereas the District Magistrates' Court can impose any penalty which it may lawfully impose (s18(1)(d)(i) and (ii)).

[735] The maximum penalty which the High Court can impose for these offences is a fine or life imprisonment, the Regional Magistrates' Court can impose a fine or the maximum of 18 years' imprisonment, and the District Magistrates' Court can impose a fine or the maximum of five years imprisonment (see s 18(1)(a)(i) to (iii)).

[736] Cachalia op cit (n558) 517.

[737] Roach op cit (n564) 146.

[738] Powell op cit (n553) 569; and Roach op cit (n564) 146.

A further interpretative solution recognised and supported by the interpretation regime is advanced in response to the constitutional challenges to section 25 of the POCDATARA. This section empowers the Executive to designate certain groups as terrorist groups. In most instances, the Executive simply adopts the listing by the United Nations Security Council of certain groups as terrorist groups. The difficulty here is that there is no provision which allows a legal challenge to the Executive listing of groups as terrorist groups.[739] Also, the determination by the Executive as to which group is a terrorist group might violate the separation of powers doctrine, which vests the making of decisions as to the guilt or otherwise of any person in an independent judiciary after a rigorous and fair adversarial process.[740]

Furthermore, the adoption of the United Nations Security Council's list of terrorist organisations could amount to an unconstitutional delegation of legislative power by Parliament.[741] It is even more unacceptable that such power is delegated to an international body with no democratic mandate from South Africans.[742] To salvage the potential unconstitutionality of section 25, the solution might well be to read-in the right to challenge the categorisation of a group as a terrorist group.[743]

The wide investigative powers provided for in section 22 of the POCDATARA, which powers can be exercised without judicial authorisation, also stand to be read-down to require prior judicial authorisation, in order to avoid the far-reaching effects and potential unconstitutionality of this provision.

[739] This could be unconstitutional on various grounds. One instance could be when, for example, a person charged with a s 4 offence of financing a terrorist group has his/her right to be presumed innocent violated because s 4 accepts the mere decision of the Executive as proof beyond a reasonable doubt that the group being financed is indeed a terrorist group (Roach op cit (n564) 143-144.). Likewise, in the case of freezing orders under s 23, a court may make an order freezing property which is believed on reasonable grounds to be controlled by an entity identified as a terrorist group, yet it is not possible to challenge the listing of that entity as a terrorist group (Powell op cit (n553) 564-565).

[740] Roach op cit (n564) 144.

[741] Powell op cit (n553) 570.

[742] Ibid.

[743] Ibid at 569.

7.4.3 Argument for the interpretation regime based on its ability to facilitate the development of common-law security crimes within the limits of legality

In the discussion under subheadings 6.2.3.1 and 6.2.3.2 in chapter 6 above, an observation was made to the effect that the approaches to developing the common-law security crimes of treason and sedition, as suggested by Snyman,[744] Burchell[745] and Milton,[746] all boil down to the use of restrictive interpretation, reading-down and reading-in. This coincides with the second technique of the interpretation regime, and so the suggested ways of developing these crimes definitely enjoy the backing of the interpretation regime. The one point of contention, however, could well be whether the interpretation regime endorses or facilitates the development of common-law security crimes in a manner that is permitted by the principle of legality.

The requirements of the principle of legality are neatly summarised by Hoctor:[747]

> 'These are *inter alia* that a court may convict an accused only if the act performed by him or her is recognised by the law as a crime (*ius acceptum*); that a court may convict an accused only if the act performed by him or her was already recognised as a crime at the time of its commission (*ius praevium*); that there should be strict construction of penal statutes, as a device to preclude analogical extension of the language of penal provisions (*ius strictum*) and; that the definitions of common-law and statutory crimes should be reasonably precise and settled (*ius certum*)'.

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[744] Recognising the vagueness and possible unconstitutionality of that aspect of the definition of treason that makes it treasonable to violate, threaten, or endanger the existence, independence or security of the Republic, Snyman (op cit (n129) 307-308) suggests qualifying this aspect by inserting the proviso to the effect that such acts are only treasonable if '… the conduct is of such a nature that there is a real possibility that it will seriously violate, threaten or endanger the existence, independence or security of the Republic'.

[745] Also recognising the possible constitutional invalidity of the crime of treason, Burchell (op cit (n132) 840-841) suggests that another approach to developing the crime of treason may be to establish a post-medieval form of the crime of treason that distinguishes between internal and external treason. Internal treason encompasses conduct that is equally punishable as sedition or public violence (and is perhaps better regarded as such in a democratic state in which the rights to freedom of expression and assembly envisage there being opposition to the government and the staging of protests to advance grievances or to advocate for change and reform). External treason arises when the country is in a state of war or is invaded by alien forces and the perpetrator betrays his/her country to its enemies.

[746] Milton (op cit (n149) 51) recognises that having the crime of sedition being committed by means of non-violent conduct may be unconstitutional because that would most likely infringe the right to freedom of expression and the right to gather and protest. He then suggests that the crime of sedition should be developed by effectively interpreting non-violent gatherings as not constituting sedition.

[747] Hoctor op cit (n126) 81.

Two of the requirements of legality (namely, the *ius strictum* and *ius certum*) have historically rendered the process of developing the common-law crimes extremely controversial.[748] As a result, even today there are conflicting views as to the extent of the courts' power to develop the common law, particularly the common-law crimes.

One view on the extent of the courts' power to develop the common-law crimes is that the development thereof historically 'did not entail extending the proscribed ambit of crimes, but entailed extending the applicability of existing definitions to new factual situations as necessitated by social changes'.[749] Put differently, the correct exercise of the courts' inherent power to develop the common-law crimes entails extending the applicability of an existing definition of a common-law crime, but without altering that definition.[750]

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[748] For cases in which the development of the common-law principle concerned was refused by the courts on the basis that such development violates the *ius strictum* and *ius certum* principles, see *R v Sibiya* 1955 (4) SA 247 (A); *S v Smith* 1973 (3) SA 945 (O); *S v Augustine* 1986 (3) SA 294 (C); *Ex parte Minister van Justisie: in re S v J en S v Von Molendorff* 1989 (4) SA 1028 (A); and *S v Mintoor* 1996 (1) SACR 514 (C).

[749] R Ramosa 'The limits of judicial law-making in the development of common-law crimes: revisiting the *Masiya* decisions' (2009) 22 *South African Journal of Criminal Justice* (2009) 353 at 367. For concurring views, see K Phelps 'A dangerous precedent indeed – a response to CR Snyman's note on *Masiya*' (2008) 125 *South African Law Journal* 648 at 651.

[750] One example in point is the development of the common-law crime of rape, which Ramosa (op cit (n749) 367-368) observes to have historically maintained its exact definition but has been developed by applying its definition to new situations. To illustrate, the development of the crime of rape to no longer recognise the 'marital rape exemption' (which simply entailed that a husband could never rape his wife) was done without changing the definition of the crime though the crime was applied to a novel situation (Ramosa op cit (n749) 368-369). Ramosa (ibid at 368) also points out that consent in respect of the crime of rape was at some point understood to be vitiated only by physical force, but, as time went by, the courts developed the crime to the extent that it was recognised that even non-violent conduct could also vitiate consent. Examples of non-violent conduct that vitiates consent include instances where consent is obtained through fraud or threat of violence, or where consent is not valid because the victim was mentally incapable of giving consent, or the victim was sleeping, or was intoxicated, or was by law incapable of giving consent.
Furthermore, the development of the common-law crime of theft to cover other factual situations without changing the definition is observed in cases where the definition of theft was extended to cover the threat of credit by manipulating cheques and credit cards (see *R v Solomon* 1953 (4) SA 518 (A); and *S v Graham* 1975 (3) SA 569 (A)). In respect of the development of the crime of defeating or obstructing the course of justice without changing its definition, see *S v Burger* 1975 (2) SA 601 (C) and *S v Greenstein* 1977 (3) SA 220 (RA).

In a subtle acquiescence with the foregoing, Snyman[751] goes a step further and submits that:

> 'To clear up existing points of doubt in the definitions of crimes, to hold that certain conduct is not punishable in terms of existing definitions of crimes, or perhaps even to fill an obvious lacuna in the definition of a crime, are all examples of how courts may apply the provisions of s 39(2) to 'develop' the common law'…However, it is an accepted principle of our law that a provision of criminal law defining the outer limits of liability should not, without very good reason, be extended by means of analogy (*R v Oberholzer* 1941 OPD 48 at 60; *S v Smith* 1973 (3) SA 945 (O) at 947). The use of analogy to the advantage of the accused (so-called interpretation in *bonam partem*), that is, the use of analogy in order to limit the field of operation of a criminal definition, is something different, and may be admissible. The use of analogy to create a new defence is also admissible (*S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 561 (A)), but that is not the form of analogy used in this judgment. In this case analogy was used to the opposite effect, namely to broaden the legal definition of a crime'.

The foregoing views capture what the development of common-law crimes embraces. Although there may be some resistance from Hoctor[752] who perhaps regards some of the above-mentioned views on the proper development of common-law crimes as reflecting the case law position dating back to some thirty years ago, thus flying in the face of the principle of legality in the Constitution, the weight of opinion nonetheless overrules his stance.

Controversy in respect of the development of common-law crimes only arises in the case where there is change being introduced to the existing definition of a crime, such as in *Masiya v Director of Public Prosecutions, Pretoria*[753] where the Constitutional Court extended the definition of the common-law crime of rape to cover not only the non-consensual vaginal penetration of a female by a penis (this being the traditional position), but also the non-consensual anal penetration of a female. This judgment

[751] CR Snyman 'Extending the scope of rape – a dangerous precedent' (2007) 124 *South African Law Journal* 677 at 679.

[752] Hoctor op cit (n126) 81.

[753] 2007 (5) SA 30 (CC).

sparked a debate between those in support of the extension of the definition of rape and those against it.[754]

Fortunately, the suggested ways of developing the common-law security crimes of treason and sedition (which suggestions are endorsed by the interpretation regime) fall within the uncontested terrain of judicial development of common-law crimes, as it is clear that developing a crime by limiting its scope is acceptable. This is exactly what Snyman, Burchell and Milton proposed in respect of the crimes of treason and sedition.

It is therefore futile to enter the contested terrain raised by cases such as the *Masiya* case. However, it suffices to merely mention that the judicial policy of transformative adjudication discussed in 7.4.1 above could well demand the manner of development adopted by the court in *Masiya*, instead of the restraint and formalism that would have been shown by the refusal to extend the definition of the crime of rape.

[754] For commentary in support of the court's extension of the definition of rape, see K Phelps and S Kazee 'The Constitutional Court gets anal about rape – gender neutrality and the principle of legality in *Masiya v DPP*' (2007) 20 *South African Journal of Criminal Justice* 341-360; SA Dersso 'The role of courts in the development of the common law under s 39(2)' (2007) 23 *South African Journal on Human Rights* 373-385; T Maseko 'The impact of separation of powers on the development of common law and the protection of the rape victim's rights' (2008) 29 *Obiter* 53-68; and Phelps op cit (n749). For commentary against such extension, see Hoctor op cit (n126), Snyman op cit (n751) and Ramosa (op cit n749).

CHAPTER 8

OVERVIEW AND CONCLUSION

This thesis has made good its promise to study and analyse the South African security and emergency laws,[755] and thereafter show that there evolve two broad techniques that can be relied upon to secure an interpretation of security laws that upholds and protects the rule of law and human rights, thus striking a balance between security laws, on the one hand, and the rule of law and human rights, on the other. The two techniques constitute what in this thesis is referred to as the security laws' interpretation regime.

This interpretation regime becomes necessary in light of the fact that the role of ordinary security laws is expanding significantly,[756] yet security laws still face the problem of comprising the overly broad and vague provisions which stand in violation of the rule of law and some fundamental rights. Hastening to declare the impugned security laws as unconstitutional on the basis of their non-compliance with the rule of law and human rights should be resisted, as neither the rule of law and human rights can guarantee their existence in the absence of security laws, nor can security laws do the same without being consistent with the rule of law and human rights.[757] What is therefore required is to strike a balance between security laws and the rule of law as well as human rights.

The preferred method for striking the necessary balance is the use of the courts' power of interpretation (as dictated by the separation of powers doctrine).[758] Be that as it may, the courts have been shown not to have a consistent record when it comes to

[755] For reasons as to why emergency laws are studied alongside the security laws, refer to note 64 above.

[756] Refer to the discussion under subheading 1.1.1 and 1.1.2 in chapter 1 above.

[757] For a further discussion on the point, refer to the discussion under heading 2.3 in chapter 2 above.

[758] Refer to the discussion under subheading 1.1.3 in chapter 1 above. The point is also illustrated throughout chapters 4, 5 and 6.

interpreting security laws in a manner that upholds and protects the rule of law and human rights.[759] It is at this point that the proposed interpretation regime becomes relevant as it operates to bolster the courts' interpretation of security laws in a manner that is cognisant and respectful of the rule of law and human rights.

As mentioned at the beginning of this chapter, the interpretation regime is made up of two broad techniques that can be relied upon in seeking to secure the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. These two techniques are identified in chapter 7 above, and they include: (a) ensuring the proper and full enjoyment of the right of access to the courts;[760] and (b) the use of restrictive interpretation, severance, reading-down and reading-in, as the techniques suitable for interpreting the impugned security provisions.[761]

The two techniques constituting the interpretation regime can be observed emerging or evolving from the already existing South African security and emergency jurisprudence, which is highlighted in chapters one to six of this thesis.[762] Thus, all that this thesis has done is to extract and bring together the two techniques under the banner of what is called the security laws' interpretation regime. The collection of these techniques under a single interpretation regime has the advantage of eliminating the the practices, principles and doctrines that prevent proper judicial scrutiny of security laws (as demonstrated in the discussion on the first technique under heading 7.2 in

[759] Refer to the discussion under subheading 1.1.3 in chapter 1 above, as well as the discussion under heading 6.2.4 in chapter 6 above.

[760] The evolution of the first technique of the interpretation regime takes shape in chapter 4 when the techniques which were used to prevent legal challenges to, or based on, the draconian apartheid security and emergency laws are laid bare and are also shown to have a common feature, which is to exempt the security and emergency laws from being subjected to judicial scrutiny and interpretation in the light of the rule of law and human rights. Reversing this old stance and subjecting security laws to judicial scrutiny and interpretation in light of the rule of law and human rights has an obvious starting point, which is to do away with the known barriers to accessing the courts. This opens way for the courts to properly execute their interpretative task.

[761] The second technique of the interpretation regime evolves from the discussion under subheading 6.2.3 in chapter 6, which discussion outlines the suggested approaches to interpreting the impugned provisions of security laws. The dominant theme in the suggested approaches is that restrictive interpretation, severance, reading-down and reading-in, is suited for the interpretation of security laws.

[762] Chapters one to six of the present thesis set out the content underlying the security and emergency laws of South Africa with the view to enable a careful study and critical analysis thereof. The said study and analysis eventually culminates in the emergence of the two techniques which are argued to be crucial for enabling an interpretation of security laws in a manner that upholds and protects the rule of law and human rights, thus constituting the security laws' interpretation regime.

chapter 7), and of facilitating the transformative, liberal, purposive and substantive interpretations of security laws (as demonstrated in the discussion on the second technique under headings 7.3 and 7.4 in chapter 7).

To the extent that the interpretation regime reflects the practice in South Africa when it comes to the interpretation of security laws, what the interpretation regime does uniquely is, for the first time, to formalise what is being practiced by organising it into a regime, model or theory that can be readily consulted by the courts when it is necessary to do so, and can be studied further by legal scholars and practitioners in the state security field, for the benefit of the democracies from which they emerge. After all, it is a common practice in the state security and emergency field to study and analyse good practices in certain jurisdictions and thereafter formulate a model, theory, or, as in the present case, a regime embodying those practices.

The foregoing occurred a lot in the aftermath of the 9/11 bombings era, with many scholars studying and analysing good practices in various jurisdictions and fashioning new models or theories of emergency systems.[763] Some scholars advanced models or theories drawn from their reading of the work of Albert Venn Dicey. Other models or theories were premised on the study of the Roman law approach to regulating emergencies. Others can be traced back to the Roman-Dutch and English law notion of martial law. Other models and theories emerge from the study of the practice during emergencies in various jurisdictions, mainly the advanced democracies such as that of the United States and the United Kingdom.

Through the establishment of the interpretation regime based on the study and analysis of existing security and emergency laws in South Africa, there is no doubt that South Africa is indeed a precedent of good practice when it comes to the availability of techniques for the interpretation of security laws in a manner that upholds and protects the rule of law and human rights. The interpretation regime is also a precedent of transformative, liberal, purposive and substantive interpretation of security laws expected to be undertaken by judges of truly democratic states in seeking to strike an appropriate balance between security laws and the rule of law as well as human rights.

[763] See chapter 3 above.

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