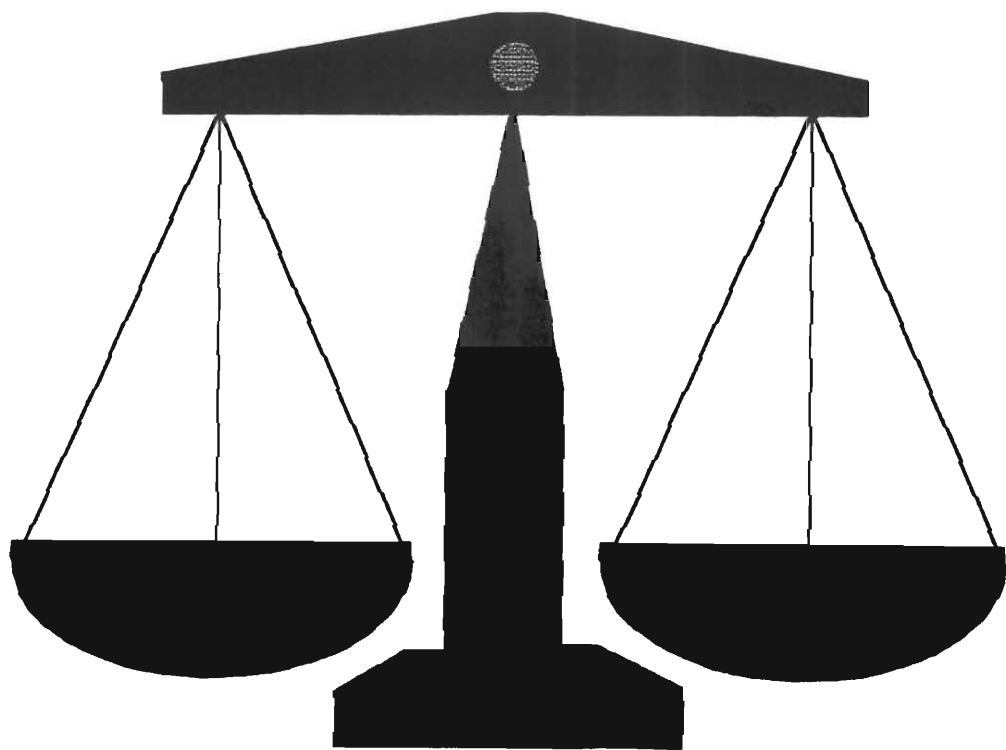


THE RULE OF LAW IN A STATE OF EMERGENCY



This dissertation, is submitted in partial fulfillment, of the requirements for the degree of Master of Laws, at the University of Natal.

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PREFACE:

In the last decades, the gravest violations of fundamental human rights, have occurred in states of emergency, where the emergency has been used as an excuse, for breaching basic human rights. Moreover, since the Second World War, states of emergency, however described, in different legal systems, have been a familiar feature of government, and have been resorted to, as much, as by States claiming adherence to the rule of law, as by others. One of the most important problems, in the international protection of these rights, is identifying the standards governing them.

The Rule of Law in a State of Emergency, inter alia, analyses the principles regulating this question, in international law and in South Africa.

In Section A, I try to explain the background, scope and purpose of the International Law Association's (ILA) research project, for developing certain minimum standards, for a rule of law, in a state of emergency. Thus, Section A deals with the *principle of exceptional threat*, in other words, with the question of the kind of emergency which the treaties, namely, The European Convention on Human Rights and Fundamental Freedoms (1950); the International Covenant on Civil and Political Rights (1966); and the American Convention on Human Rights (1968), foresee, as justifying the declaration of emergency.

Section B, refers to the *principle of proclamation*, that is, to the requirement of officially proclaiming the state of emergency, in the country, for the valid operation of the derogation clause. Moreover, Section B will study the *principle of notification*, that is, the obligation of the State, to notify the exercise of the right of derogation, all the derogating measures taken, and the reasons for them, to the other States, that are parties to the treaty. The essential *principle of non-derogability of fundamental rights*, will also be studied; this principle establishes that even in situations of emergency, there are some rights which can never be derogated from. The different lists of rights, under the three treaties, and the other provisions of the treaties, which are non-derogable by implication, will also be analysed. Furthermore, Section B, will examine the important principles, referring to the substantive conditions, required in order to derogate from human rights provisions. These conditions are: *proportionality*, *non-discrimination*, and *consistency* with other obligations under international law.

Section C, focuses on the systematic demolition of the rule of law by security-law measures, enacted during the numerous states of emergency, that were proclaimed in South Africa. In effect, these measures enthroned a system of state lawlessness, which was countered by growing anti-state lawlessness, and was responsible for a great deal of anarchic violence as well. The security establishment, undermined the rule of law, with methodical deliberation in the pursuit of its objectives. Thus, Section C, seeks to explain the institution of "government under law" that had been so disastrously destroyed in South

Africa. Section C, being also evaluative, applies the requirements of the rule of law to internal security enactments. The effect of the assessment, is to highlight the grossness of the South African deviations, from the rule of law, and to question the asserted law-and-order function, of the security system in South Africa.

Section D, focuses on a new, democratic South Africa, a system which entails that governmental power, will be exercised, only through a system of defined procedures and limits. The Constitution, not only embodies and expresses those limits; it serves as the founding charter of our nation, and as an expression of the nation's commitment, to the rule of law. The first part of the Section, outlines certain factors, that may determine how often a post-apartheid government, will need emergency powers, and other features, that may affect the magnitude of the risk, that these powers will be misused, as well as used. These factors, are not matters on which easy predictions are possible, but I will suggest, that it is safe to assume, both that South Africa will need emergency powers, and that it might abuse them. In the light of this prospect, it will be pointed out, that the drafters of the Constitution, have greatly minimized the risk of South Africa, abusing its emergency powers, by the creation of Section 37 of the Constitution, which effectively regulates the use of emergency powers.

ACKNOWLEDGEMENTS:

My dissertation, is dedicated to my family, who have provided tremendous support, and who have been pillars of strength to me, and to my supervisor, Professor G.E. Devenish, who has been a mentor and a great inspiration to me. I am especially grateful, for his invaluable comments, on the different drafts of this study, and the considerable kindness he has shown to me, during my years at the University of Natal.

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ABBREVIATIONS:

- ACHR**.....American Convention on Human Rights
- AFDI**.....*annuaire francais de droit international*
- AJIL**.....*American Journal of International Law*
- Australian YBIL**.....*Australian Year Book of International Law*
- BYBIL**.....*British Year Book of International Law*
- Can. YBIL**.....*Canadian Yearbook of International Law*
- CLP**.....*Current Legal Problems*
- ECHR**.....European Convention on Human Rights
- ECOSOC**.....Economic and Social Council
- EHRR**.....*European Human Rights Reports*
- German YBIL**.....*German Year Book of International Law*
- HR**.....Human Rights
- HRJ**.....*Human Rights Journal (Revue des droits de l'homme)*
- HRLJ**.....*Human Rights Law Journal*
- HR Quarterly**.....*Human Rights Quarterly*
- IACHR**.....Inter-American Commission on Human Rights
- IA Court HR**.....Inter-American Court of Human Rights
- ICCPR**.....International Covenant on Civil and Political Rights

ABBREVIATIONS:

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
<i>ICJ Reports</i>	Reports of Judgements, Advisory Opinions, and Orders of the International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ILA	International Law Association
ILC	International Law Commission
<i>ILM</i>	<i>International Legal Materials</i>
<i>Int. CJ Review</i>	<i>International Commission of Jurists Review</i>
Int. Commiss. Of Jurists	International Commission of Jurists
<i>Israel YBHR</i>	<i>Israel Year Book on Human Rights</i>
<i>NYIL</i>	<i>Netherlands Year Book of International Law</i>
OAS	Organization of American States
<i>Recueil</i>	<i>Recueil des Cours: Academie de droit international de la Haye</i>
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

ABBREVIATIONS:

UNGAOR..... United Nations General Assembly, Official Records

YBECHR..... *Year Book of the European Convention on Human Rights*

YBILC..... *Year Book of the International Law Commission*

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“ The 1980s were the years of the unaccountable, all-powerful “securocrats” and the permanent states of emergency. That was a time when the army smashed down your door in the middle of the night and left a sticker on the wall saying, “We are your friends.”¹

INTRODUCTION:

One of the most important problems in the protection of human rights is that of identifying the standards governing these rights in situations of emergency. Public emergencies present a grave problem for States: that of overcoming the emergency and restoring order in the country while at the same time respecting the fundamental human rights of individuals. The derogation clause of human rights treaties establishes a legal regime regulating this crucial problem. This clause problem has been described as the “cornerstone” of the entire system for protecting human rights, and as the most important provision of human rights treaties.²

Moreover, there are two additional reasons, which make this topic highly relevant. First, in the last decades the gravest violations of fundamental human rights have occurred in the context of states of emergency. In these situations, States, using the emergency as an excuse, frequently deny the application of basic standards and take derogating measures which are excessive and in violation of international treaties on human rights. Therefore, in order to know the exact extent of the protection afforded by these treaties, a detailed examination of the treaty standards, undertaken in the light of the jurisprudence of the international monitoring bodies, is of fundamental importance.

Secondly, almost half of the States of the international community are not parties to the international treaties on human rights, which establish a legal regime for emergencies, and therefore treaty standards are not applicable as such to these states. This fact, together with the notable absence of studies on this question, has created a dangerous uncertainty concerning the main criteria governing human rights in emergencies, in terms of general international law. This uncertainty can be seen in the practice of the UN monitoring organs. At the same time, some international treaties on human rights have no derogation clauses (that is, the African Charter, and some ILO Conventions); consequently the regime applicable in these cases also remains uncertain. For these reasons, a thorough analysis of the standards in general international law is of paramount importance.

In short, the main purpose of this study is twofold: to analyse the main principles regulating human rights in emergencies as contained in the derogation clause of the treaties; and secondly, to examine the principles governing the same question in South Africa.

SECTION A : EMERGENCY: DECLARATION, DURATION AND CONTROL:

(1.) PUBLIC EMERGENCY AND ALLIED CONCEPTS: A GENERIC TERM:

The expression “public emergency” is being used in a generic sense to embrace the central concept of a variety of legal terms in different legal systems to identify an exceptional situation of public danger permitting the exercise of crisis powers in a particular State. This terminology would therefore cover the status of different regimes known as states of emergency, of siege, of alert, of prevention of internal war, of suppression of guarantees, of martial law, of special powers etcetera.³

The expression would include, for instance, what is described as martial rule (which has a variety of pseudonyms, the most important being martial law) as it is known in the common law countries of the erstwhile British Empire and the USA, as well as the state of siege, as it is known in civil law countries of continental Europe and Latin America.

(1.1) *The distinction between a state of siege and martial law :*

A view has been expressed, not free from controversy, that “the state of siege and martial law are two edges to the same sword, and in action they can hardly be distinguished.”⁴ On the other hand, Charles Fairman draws the following distinction between martial law and a state of siege: “In contrast to the French state of siege, where the powers of the military authorities are somewhat precisely defined in advance, martial rule is provisional in character. The former is more certain, the latter more flexible.”⁵

Again, at the report review session of the Human Rights Commission, Columbia and Chile drew a distinction between some of these expressions in terms of the powers conferred on the executive. Columbia claimed that unlike martial law, the state of siege in Columbia was applied under strict control and did not affect the independence of the judiciary or the functioning of Congress or the holding of free elections.⁶ Chile distinguished between a state of siege and a state of emergency in that a state of siege was provided for in the 1925 Constitution while a state of emergency had been established by Congress through a law enacted in 1958; it was also pointed out that the much criticized concept of “latent subversion” applied only to a state of siege to determine whether certain cases should be tried by the peacetime or wartime military courts.⁷

(1.2) “Public emergency” as defined in the cases of *Lawless v Ireland and The Greek case (Denmark, Norway, Sweden, and the Netherlands v Greece)* under the *European Convention*:

The term “public emergency” as appearing in Article 15 of the European Convention on Human Rights (ECHR) has been interpreted according to the natural and customary meaning of the words by the European Court of Human Rights in the *Lawless* case as explained by the European Commission of Human Rights in the *Greek* case. In the *Lawless* case, the European Court interpreted a “public emergency threatening the life of the nation” according to the natural and customary meaning of the words in the French text, as:

“In the English text: an exceptional situation of crisis and emergency, which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.”

The European Commission in the *Greek* case observes that the notion of “imminent danger”, which is represented in the French but not directly in the English text of the judgement, must be given weight because it is the French text which is authentic. The Commission then described the four characteristics of a public emergency as follows:

- (a) It must be actual or imminent.
- (b) Its effects must involve the whole nation.
- (c) The continuance of the organized life of the community must be threatened.
- (d) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.⁸

(1.3) Other definitions of “public emergency”: for example *Questiaux, Stephen Marks, and the ILO Convention No. 29*:

Without excluding the foregoing definition, Mrs Questiaux has provided a workable but “somewhat oversimplified” definition of public emergency as : “a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community which forms the basis of the State.”

The crisis situation envisages exceptional circumstances. Such circumstances result from temporary factors of a generally political character, which in varying degrees involve extreme and imminent danger. The danger must be of sufficient gravity to threaten the organized existence of a nation, that is to say, the political and social system that it comprises as a state.⁹

Another workable definition by Stephen Marks states: "In short, an "emergency situation" will be understood here as one resulting from temporary conditions which place institutions of the State in a precarious position and which leads the authorities to feel justified in suspending the application of certain principles." ¹⁰ Further, a well-recognized definition of empirical importance can be found in international labour conventions (at least eight of which recognize an emergency situation). For instance, Convention No. 29 on Forced Labour, 1930, provides that the prohibition against "forced or compulsory labour" shall not include,

"any work or service exacted in cases of *emergency*, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insects or vegetable pests, and *in general any circumstance that would endanger the existence or the well-being of the whole or part of the population.*" (Emphasis added).¹¹

(2.) PUBLIC EMERGENCY ENVISAGED IN THREE DIFFERENT SITUATIONS:

Broadly speaking, emergency situations may be envisaged in three different circumstances resulting from:

- (a) *a serious political crisis* (armed conflict and internal disorder);
- (b) *force majeure* (disasters of various kinds); or
- (c) particular economic circumstances, notably those relating to *underdevelopment*.

The *travaux preparatoires* in the context of Article 4 of the International Covenant on Civil and Political Rights (hereinafter, referred to as the Covenant or ICCPR) cover the first two situations of public emergency (a serious political crisis and *force majeure*) but not the third situation (underdevelopment).¹² This was because the breadth of the question posed by underdevelopment would require a special study (which is the subject of profound, persistent research at the United Nations and other levels) and not because of any perception that underdevelopment has no linkage with public emergency.

Though the ILA study, like that of Mrs Questiaux, is mainly concerned with the situation of public emergency caused by a serious political crisis, a brief reference to the other two contemplated situations of public emergency – *force majeure* and underdevelopment – would be useful.

(2.1) *Force majeure*:

The concept of *force majeure* in both municipal and international law covers calamities like earthquakes, tidal waves, cyclones and other natural disasters. An emergency situation caused by such natural calamities, actual or imminent, requires the marshalling of relief and rehabilitation sources. These might necessitate the impositions of limitations or restrictions on the enjoyment of certain rights and freedoms, such as the freedom of movement and residence (forced evacuations from affected danger areas); the freedom of the press and other information media (to avoid panic and the need to inform the population of steps to be taken); freedom of employment (use of the labour force to build shelters, dykes etcetera); the right to property (requisitions); as well as other rights.

Such restrictions must be strictly necessary and in compliance with the just requirements of general welfare (Article 29 of the Universal Declaration of Human Rights and the terms of the limitation clauses in international human rights treaties, such as the ICCPR). Thus, the ILO Committee of Experts on the Application of Conventions and Recommendations points out that “the length and extent of compulsory service, as well as the purposes for which it is used, should be strictly limited in accordance with the requirements of the situation.” The Committee compares this stipulation with the rule of proportionality in Article 4 of the ICCPR.¹³

The same Committee having noted the magnitude of the national catastrophe of the Nicaraguan earthquake and the difficulties arising for the normal fulfillment of the international obligations of the government, decided to suspend the examination of compliance with the conventions, and expressed the hope of a rapid return to normalcy which would enable the country “to give full effect to its obligations” under the ratified conventions.¹⁴

Again, in the report review session of Peru in 1983, the members of the Human Rights Committee wanted to know how the government justified the suspension of political rights in the event of an emergency caused by a natural disaster. The reply was that although a proclamation of emergency was usually prompted by terrorist activity, sometimes (as happened recently in Lima), it was also caused by a natural disaster, “in which case their purpose was to prevent any public disturbance which would make the situation even worse.”¹⁵

There are very few precedents arising from *force majeure* because such situations have been specifically provided for in the international instruments, notably in ILO Conventions 29 and 105. Accordingly, there is a greater chance of them being controlled by the competent organs.¹⁶

(2.2) UNDEVELOPMENT-EMERGENCY SYNDROME:

(2.2.1) *The Stephen Marks study:*

Stephen Marks in his seminal contribution makes three valid points. First, the “implications of the argument that underdevelopment constitutes an emergency situation” becomes clear when one sees that all human rights - civil and political rights on the one hand and economic, social and cultural rights on the other – are indivisible; consequently “the enjoyment of the former (civil and political rights) are not possible without that of the latter (economic, social and cultural rights).” Second,

“Whatever view one may have on the claims put forward by Third World countries, the fact remains that, for these countries, until a new international economic order is achieved, the economic and social conditions of underdevelopment will constitute an emergency situation making the implementation of at least some human rights difficult, if not impossible.”

Third, the Economic and Social Council (ECOSOC) has repeatedly affirmed its conviction that the early realization of economic, social and cultural rights cannot be achieved until all countries and people co-operate for global development.¹⁷

It is, however, clear that economic¹⁸ underdevelopment *per se* does not and cannot justify the declaration of a state of emergency for the simple reason that while civil and political rights are to be normally implemented with immediate effect, the process of development for the realization of economic, social and cultural rights, is naturally time-consuming and programmatic.

The ILA Sub-Committee was, however, of the view that there are five overriding limitations before any restrictions are placed on the exercise of the guaranteed rights even during an emergency.

- (a) Such restrictions can only be imposed by law.
- (b) Such a law must be the product of a democratic law-making process, namely, one in which the entire population will, through appropriate procedures, have participated.
- (c) No justification can be advanced for any restriction being imposed on the enjoyment of rights recognized as non-derogable even during an emergency under the current and developing norms of international law.
- (d) Restrictions imposed must be strictly required for general welfare by the exigencies of development.

- (e) Reasons of development can never justify the curtailment of those civil and political rights necessary for the establishment and functioning of fundamental democratic institutions, namely, representative, legislative and executive branches of government and an independent judiciary.

The “general welfare in a democratic society” – and what is required to promote it – can only be decided by people themselves, through representative institutions, and not by usurpers of political power by unconstitutional means. In each case there is a heavy onus cast upon the government in power to justify the imposition of any restriction for the purposes of development.¹⁹

(2.2.2) Underdevelopment as a pretext for impermissible derogations of human rights:

More serious is the third dimension. Very often underdevelopment is used as a pretext for the perpetuation of authoritarian regimes, particularly by military juntas, involving severe repression of popular civil and political rights. The problem was examined in some detail by the ILA Sub-Committee. Three serious aberrations were considered. It concluded thereafter: “Thus, the enjoyment of basic civil and political rights can be seen as a necessary condition for the progressive realization of economic, social and political rights: hence the importance of adopting an integrated approach to the realization of both sets of rights.”²⁰

The aberrations noticed by the Sub-Committee include the following:

- (a) Serious derogations on civil and political rights, particularly in the developing countries of Asia, Africa and Latin America, are sought to be justified by reference to the supposed exigencies of economic development. Authoritarian regimes in various states of emergency/exception seek to justify the curtailment of civil and political rights on the pretext that, given the economic backwardness and poverty in their societies, rapid economic development and the removal of poverty, demand a higher priority than the enjoyment of civil and political rights, and so the latter must be traded off, for the former. Upon analysis, however, such arguments are misleading and actually obscure the significant linkages between the civil and political rights on the one hand and the social and cultural rights on the other.²¹
- (b) Empirically, there is now a respectable body of evidence to show that derogation of civil and political rights in different types of states of emergency/exception, particularly in the Third World has, with very few exceptions, not resulted in a significant measure of economic development. In the few cases that it has, the benefits of such development have tended to accrue to privileged groups rather than to the bulk of the population in the countries concerned.

Economic investment takes unproductive forms, generating no development and leading to a serious waste of resources, which increases poverty, not welfare.²²

- (c) Examples abound of the waste and misallocation of resources of which authoritarian regimes in the developing world are guilty. A large majority of such regimes are dominated by the military elite – it was established in 1980 that nearly half of the Third World States are ruled by military forces. A common feature of military regimes is the diversion of resources to meet increasing military expenditure at the cost of economic development or general welfare coupled with the strengthening of the coercive instruments of the State to suppress popular protest. In sum, the ILA Sub-Committee found that in general, there was a negative correlation between military rule and economic advance, and a positive correlation between military rule and economic backwardness.²³ In the same vein, Professor Franck, tersely commented at the ILA Manila conference: “There is no correlation – indeed there is a negative correlation – between dictatorship and economic growth.”²⁴

Another serious danger is the tendency of an authoritarian regime to perpetuate the state of emergency, even when normalcy has returned, or on the pretext of underdevelopment. This has been highlighted by two distinguished international jurists, Judge T.O. Elias (Nigeria) and Judge Keba Mbaye (Senegal).²⁵

(3.) A PUBLIC EMERGENCY RESULTING FROM A POLITICAL CRISIS:

A political crisis may be caused by armed conflict or internal disorder of a serious nature. Armed conflicts may be of three types, namely: first, external aggression or war or international armed conflicts; second, wars of national liberation; third, non-international armed conflicts. The Questiaux study is, however, confined to serious political crisis arising out of a situation of internal disorder or internal tension.²⁶

Both the European Convention (ECHR) and the American Convention (ACHR) refer to “war”. But Article 4 of the International Covenant (ICCPR) makes no such reference. The *travaux préparatoires* indicate clearly that the omission was deliberate: “While it is recognized that one of the most important public emergencies was the outbreak of war, it was felt that the Covenants should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.”²⁷

But the omission of “war” was never intended to deny a permissible right of derogation in wartime, which is perhaps the most vivid paradigm of a threat to the life of a nation. The main concern of the draftsmen was to ensure that the Covenant “would not be open to abuse” and hence the wording emphasized “that the public emergency should be of such a magnitude as to threaten the

life of the nation as a whole.”²⁸

It remains to be seen how the expression “state of war” is construed in European jurisprudence; its existence was relevant only in the case of *de Becker v Belgium* where the measures were taken in wartime though their effects continued in peacetime. It would probably not make much difference because, as Higgins points out, the party invoking Article 15 of the European Convention may always rely, in the alternative, on a state of public emergency.²⁹

However, it is interesting to note that in some of the dissenting opinions in the *Lawless* case, a view was expressed which in effect means that the words “other public emergency” must be understood as covering a threat which has to be read *ejusdem generis* to a modern “war”. This is because the expression is preceded by the words “in time of war”. Thus, it has been said that a public emergency other than war must be “tantamount to war” or be analogous to the “case of war”.³⁰ This interpretation obviously cannot apply to the global pattern of the definition of a public emergency in Article 4 of the ICCPR which does not refer to “war” at all; this, however, in no way diminishes the magnitude of the internal political crisis, which will satisfy the test of a threat to justify, the proclamation of an emergency.

(4.) THE INTERNATIONAL LAW ASSOCIATION’S DEFINITION OF A PUBLIC EMERGENCY: FOUR BASIC ELEMENTS:

Analytically speaking, there are four basic elements in the definition:

- (a) territorial scope;
- (b) magnitude of threat;
- (c) provisional or temporary status of the public crisis and
- (d) official proclamation.

(4.1) Territorial Scope :

By definition, the crisis or public danger must be one, which poses a threat to the life of the nation. In other words, the emergency must be nationwide in its effect. Otherwise, however severe the local impact of the emergency, it will not be a “public emergency” within the meaning of Article 4(1) of the ICCPR. A mere local crisis cannot be converted into a national emergency. For instance, as Hartman puts it, problems such as localized labour unrest cannot justify the nationwide imposition of a state of siege.

An instance of such an impermissible declaration of a state of siege is that of Columbia in 1976 in response to a strike at the social security service. The

condition persisted with modifications until 1982. Hartman rightly suggests that even when the emergency is properly declared, “the principle of proportionality requires that measures be carefully tailored to the geographically confined emergency.”³¹

However, a threat to the nation may arise even if the immediate danger is perceived in certain limited geographic areas. This was the case in Northern Ireland. The European Court of Human Rights observed in *Ireland v United Kingdom*.³²

“Article 15 comes into play only “in time of war or other public emergency threatening the life of the nation.” The existence of such an emergency is perfectly clear from the facts summarized above (Paragraphs 12 and 29-75) and was not questioned by anyone before either the Commission or the Court. *The crisis experienced at the time by the six countries therefore comes within the ambit of Article 15.*” (Emphasis added.)

Relying upon the decision of the European Court in *Ireland v UK*, Buergenthal points out that a public emergency need not engulf or threaten to engulf the entire nation before it can be said to “threaten the life of the nation”. One must distinguish between the seriousness of a threat and the geographical boundaries in which the threat appears or from which it emanates.

A public emergency which threatens the life of a nation “could presumably exist even if the emergency appeared to be confined to one part of the country – for example, one of its provinces, states or cantons – and did not threaten to spill over to the other parts of the country.” A contrary interpretation, argues Buergenthal, would be unreasonable “since it would prevent a state party from declaring a public emergency in one of its remote provinces where a large-scale armed insurrection was in progress merely because it appeared that the conflict would not spread to other provinces.”³³

The definition of a public emergency adopted by the ILA clarifies the position by stipulating two conditions with regard to the territorial scope of a regime of emergency. First, the declaration of a state of emergency may cover the entire territory of the state or any part thereof, depending upon the areas actually affected by the circumstances motivating the declaration. Second, this will not prevent the extension of emergency measures to other parts of the country whenever necessary nor the exclusion of those parts where such circumstances no longer prevail.³⁴

(4.2) Magnitude of the threat :

The crisis or public danger, actual or imminent, must be exceptional in the sense that “the normal measures of restrictions, permitted by the (European) Convention for the maintenance of public safety, health and order, are plainly inadequate” as stated by the European Convention in the *Greek* case. In the context of ICCPR, it would mean that if the magnitude of the crisis is such that

it can be controlled or regulated by the normal measures with any or all of the six limitation clauses attached to some of the guaranteed rights, recourse to derogation measures under Article 4, is not permissible.

The six limitation clauses in Article 12 (freedom of movement and residence), 14 (right to a fair and public trial), 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (right of peaceful assembly) and 22 (freedom of association) should normally suffice to enable the public authorities to deal with even serious cases of public dissent or disorders, inherent in a democratic state.

To put it differently, the emergency does not have to be one in which the life of the nation “as such is threatened with extinction, but one in which there is such a breakdown of order or communications that organized life cannot, for the time being, be maintained.”³⁵

There has been a further refinement in Siracusa Principle 39 which provides, *inter alia*, that a threat to the life of the nation is one that:

- (a) affects the whole of the population and either the whole or part of the territory of the State; and
- (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State, or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

It would therefore follow that the public danger must be such as to imperil those institutions, which are essential for the proper functioning of a democratic government. Again, the danger must be a patent one and objectively demonstrable, not a latent one subjectively perceived or apprehended. The emergency regime of a preventive nature is impermissible. Equally impermissible is a state of emergency, which is declared or continued to protect the government in power and to delay the return of a popular government.

Internal political unrest has been identified as the primary basis for the imposition of states of emergency under the regime of the Covenant, for example derogations by Chile (“there continue to exist in Chile extremist seditious groups whose aim is to overthrow the established Government”); by the United Kingdom (“campaigns of organized terrorism related to Northern Irish Affairs”); and by Sri Lanka (widespread acts of terrorism).³⁶

The ICJ study has revealed that certain authoritarian governments have abused the doctrine of national security to maintain themselves in power contrary to the basic objective of Article 4.³⁷

(4.3) Provisional nature :

The concept of “emergency” is incompatible with a perpetual state of affairs and is necessarily limited in time and space.³⁸ No derogation is legitimate unless it is clearly aimed in good faith at the preservation of democratic institutions and the return to their full operation at the earliest opportunity.³⁹ The topic will be discussed in some detail later, while dealing with the problem of the duration of a state of emergency.

(4.4) Official Proclamation :

The requirement of an official proclamation is mandatory under Article 4(1) of the ICCPR, but is not mentioned in either the ECHR or the ACHR. Initially the European Court in the *Lawless* case observed that the European Convention “does not contain any special provision to the effect that the contracting state concerned must promulgate in its territory, the notice of derogation addressed to the Secretary-General of the Council of Europe.”⁴⁰ However, later on, the European Commission took the view, in the case of *Cyprus v Turkey* that in order to invoke the right of derogation prescribed in Article 15 of the Convention, the derogating state should justify this beforehand by an official proclamation.⁴¹

The *travaux preparatoires* indicate:

“Reference was made to the fact that in most countries a public emergency could be declared only under conditions defined by law, and that, that guarantee would be lost unless a requirement of public proclamation was maintained. It was emphasized that the Article should in no way imply that constitutional and legal limits imposed upon the powers of governments during an emergency could be derogated from or that the executive power was not responsible for taking measures which might conflict with national guarantees.”⁴²

Siracusa Principles 42 and 43 provide that an official proclamation in accordance with the procedures under national law “prescribed in advance of the emergency” is mandatory. In substance, it means that the proclamation must be made by some official having lawful authority to do so.⁴³

The ILA is of the view that the official proclamation of an emergency is an important safeguard and should be accepted as a legitimate international norm. The purpose behind an official proclamation is quite different from that of a notification of derogation under Article 4(3) of the ICCPR. The idea of a public proclamation seems to be to reduce the number of *de facto* emergency situations by encouraging the states to respect a certain formality of procedure in municipal law and thereby eliminating to some extent the possibility of arbitrary assumption or exercise of emergency powers.⁴⁴

One example of the importance of the need to comply with the constitutional formality of an official proclamation can be seen in Article 352(3) of the Indian

Constitution which provides that the President shall not issue a proclamation of emergency under Clause (1) of Article 352 “unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank, appointed under Article 75), that such a proclamation may be issued, has been communicated in writing.” This was introduced by the Constitution (44th Amendment) Act, 1978 to “exclude the possibility of a Prime Minister advising the issue of a Proclamation on his or her own initiative without the authority of the Cabinet – as Mrs Gandhi actually did, professing that a rule of business, enabled her to act, as she did.”⁴⁵

(5.) THE EXISTENCE OF AN EMERGENCY: EUROPEAN PRECEDENTS:

Having discussed the definition of a “public emergency” in its different aspects, it would perhaps be useful to examine the application of the definition to three concrete cases under the European Convention: the *Lawless* case, the *Greek* case and *Ireland v United Kingdom*. No discussion on emergency jurisprudence would be fruitful without a critical appraisal of these precedents under the European Convention.

In this section these three cases will be examined only in the context of the *existence of a public emergency*; in Section B the same cases will be examined to determine compliance with the requirement of the rule of proportionality in derogation measures.

In the *Lawless* case, the European Commission and the Court held affirmatively that there was in existence a public emergency on the facts of the case; in the *Greek* case, however, the Commission by a majority took a negative view. In *Ireland v United Kingdom*, although the existence of an emergency was not disputed, the Commission and the Court *suo motu* upheld the fact of the existence of an emergency.

All the three cases indicate that while there is a judicial consensus about the definition of emergency, its application to the facts of a concrete case is usually a highly controversial issue. This explains how different conclusions have been drawn, from identical evidence on record, by eminent jurists, under the European Convention.⁴⁶

In the *Lawless* case, the European Commission, following the natural and ordinary meaning of the term “public emergency”, came to a finding by a majority of nine to five that on 20 July 1957 there existed in Ireland a state of public emergency; an opposite view was taken by the minority, of five members. The analytical approach of the Commission was to examine the evidence in the light of three elements: the existence of illegal organizations in the Republic of Ireland; the activities of such organizations within and outside the territory of Ireland; and the threat which the existence of these organizations and their activities, constituted to the life of the Irish Republic, at the relevant time.⁴⁷ The evidence was examined with regard to the nature of

the acts both within and outside the Republic of Ireland. Five elements within the territory of Ireland were noted from an analysis of the evidence.

First, there had long existed in Ireland an illegal organization called the Irish Republican Army (IRA) which continued to operate as an illegal military organization with a view to the ending of partition by employing violent measures against the government and forces of Northern Ireland.

Second, from 1954 onwards the activities of the IRA took a serious turn. The recruitment and training of members and the planning of guerilla activity across the border of Northern Ireland were all performed within Irish territory.

Third, to control and regulate such illegal activity there had been a diversion of considerable police and security strength – at a considerable cost to the small and poor country.

Fourth, there were two successful armed raids by the IRA in December 1956 and July 1957 on a factory storehouse in the Republic to steal explosives for its sabotage operations.

Fifth, with regard to the administration of justice, while ordinary Courts functioned without interruption, in the trial of the IRA accused, there were attempts at intimidation of judges and witnesses. The majority, however, conceded that the application of criminal law to IRA members was not rendered wholly impossible by the action of the IRA. The majority was of the view that the activities made comparatively little impact on the daily life of the general public except perhaps in the area near the border of Northern Ireland and that the effect was primarily felt outside the Irish Republic.

However, the homicidal ambush in Northern Ireland on the night of 3-4 July 1957, just before 12 July (a day which for historical reasons is particularly critical in the preservation of public peace and order), the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and its associated groups, operating from the Irish State, justified the declaration of a public emergency, by the Irish State.⁴⁸

In the *Greek* case, the European Commission, by a majority of ten to five decided after a detailed examination of the materials on record, that there did not exist any public emergency in Greece on 21 April 1967. Starting with the proposition that the burden of proof lies upon the Respondent State which, in the instant case, came to power by overthrowing the constitutional regime, the evidence was evaluated under three heads: the threat of a communist takeover of government by force; the crisis of public order; and constitutional crisis.

With regard to the communist threat, the Commission observed that the two pieces of evidence produced by the government were so slender that no communist takeover of the government by force could be anticipated. The facts were that the arms caches found were described by the Sub-Commission as negligible in size and quality, which the so-called “general plan

of action” did not involve an imminent overthrow of the lawful government. In so far as the crisis of public order was concerned, the Commission was of the view that there was nothing to show that the street demonstrations, strikes and stoppages (only twenty-three strikes of short duration) could not have been dealt with by the police forces in the normal course; in fact earlier, on 11 April 1967, the police had cleared the University building in Salonica, of its illegal occupants.

Also, the prohibitory order against the Marathon March, scheduled to be held on 6 April 1967, had been fully effective. The Commission concluded that there was certainly no indication of any disorganization – let alone one involving the whole nation – of vital supplies, utilities or services, as a result of the strikes. That is to say, the organized life of the community was not disturbed by such strikes, which was a common feature in many countries in Europe over a similar period.

With regard to the constitutional crisis, the question was whether on 21 April 1967 there was any serious threat to the organized life of the community for the three reasons advanced by the Respondent State. First, that the elections in May 1967 would lead to the creation of a popular front government, dominated in effect by the communists and their allies committed to an ultimate takeover of the government. Second, that street demonstrations and disorders would increase to a point beyond the control of the police forces or the army. And, finally, that the army was infiltrated by communists and in the event of any massive popular demonstration it would refuse to fire on them; public order would thus break down.

On an evaluation of the evidence, the Commission held that there was no imminent threat of a constitutional crisis to justify an emergency for two reasons: it had not been shown that the formation of the popular front government after the May elections was certain or even likely. Second, there was no indication that the public disorder would be fomented to a point beyond police control.

In sum, the Respondent Government had not satisfied the Commission, on evidence, that there was a public emergency, threatening the life of the Greek nation, on 21 April 1967.⁴⁹

In *Ireland v United Kingdom*, there was no dispute that there was in existence a public emergency in Ireland at the relevant time; yet both the Commission and the Court came to an independent finding that such an emergency did exist. As the Commission had observed:

“The Commission is satisfied that there existed in Northern Ireland at all times material for the present case, a public emergency threatening the life of the nation within the meaning of Article 15. The degree of violence, with bombing, shooting and rioting, was on a scale far beyond what could be called minor civil disorder and it is clear that the violence used was in many instances planned in advance, by factions of the community organized and acting on paramilitary lines. To a great extent

the violence was directed against the security forces, which were severely hampered in their function to keep or restore the public peace.”⁵⁰

The existence of an emergency was not in dispute between the parties. As noted earlier, the European Court fully concurred with this view.

(6.) THE THRESHOLD ISSUE: THE LEGITIMACY OF A GOVERNMENT COMPETENT TO DECLARE AND MAINTAIN AN EMERGENCY:

Before dealing with the competency of the political organs in a democratic society to declare and maintain a state of emergency as provided for in ILA's reference model, an important issue arises at the very threshold: the legitimacy of a government competent to declare an emergency. Has any usurper of state powers the competency to declare an emergency?

The response of the ILA is categorical and unambiguous:

“A declaration of emergency by any authority other than the democratically constituted political organs is a departure from this basic norm, for example, the declaration of emergency by an authority which has come into existence by the usurpation of state powers by extra-constitutional means.”

The ILA has referred to with approval, the basic proposition of Daes, who had observed :”No really democratic system can entrust to military or police officers, the power to proclaim an emergency without violating the rule of law.”⁵¹

The observation by Professor Lauterpacht made forty years ago, even before the adoption of the Universal Declaration, is now firmly established as a principle of International law. According to him, since the right of man to government by consent is a part of the law of nations, recognition would be denied to a dictatorial regime that declines to submit its rule to the test of clearly expressed popular approval.⁵² The principle of self-determination and the right to a government by consent, as enshrined in the Preamble and Article 21 of the Universal Declaration and Articles 1, 2, 5 and 25 of the ICCPR, provide the basic foundation of the standard of legitimacy, which is essential for the enjoyment of the recognized human rights and freedoms. The fact that very often there is a departure from the standard of legitimacy of a democratic form of government does not in any way diminish its fundamental value; on the contrary, it provides a measure for the assessment of the nature, and extent of the derogation, by an undemocratic regime.

In the submissions of this writer, the following principles are relevant to the threshold question of legitimacy of the authority assuming or exercising emergency powers. First, a clear distinction exists between a state, which is

the party to the International Treaty, and the government, which purports to represent the particular state; the government in power is not a party to the Treaty. A state duly recognized in International Law may have a government, which lacks legitimacy.

Second, the ECHR, like the ACHR and the ICCPR, accepts the legitimacy only of a democratically elected constitutional government. Third, if therefore emergency powers are assumed or exercised by a revolutionary or unconstitutional government, it must be considered of a provisional and interim nature and, in the words of Professor Lauterpacht “a temporary adaptation to a transient period of political retrogression”.⁵³ Similar views in modern context, have been expressed by Questiaux and Hartman.⁵⁴

(7.) THE PARIS MINIMUM STANDARDS: THE DECLARATION, DURATION AND TERMINATION OF AN EMERGENCY:

With these observations relating to the threshold issue, it would be appropriate to examine the minimum standards formulated by the ILA for regulating the declaration, duration and termination of an emergency.

(7.1) The Organic Law to prescribe the Procedure :

The constitution of the organic law of every state “shall define the procedure for declaring a state of emergency”. The procedural requirement is mandatory. It provides a very important safeguard against abusive assumption or exercise of emergency powers by the executive branch. In a country with a written constitution, formalities prescribed, must be duly complied with, by the legislative and executive branches. However, with a view to avoiding the provisional proclamation of an emergency by the executive, it has been suggested that the constitution or *ad hoc* legislation may authorize the legislature to declare a public emergency “by the adoption of a simple resolution” instead of “the burdensome procedure of ordinary resolution.”⁵⁵

(7.2) The competence of the popular Legislature and the Executive :

In every democratic society, the declaration of a state of emergency is primarily a function of the political organs, namely, the legislature and the executive. These organs are the ones in a position to make an appropriate assessment of facts relevant to national security and the dimensions of public danger. Among the two political organs, the primary responsibility for the declaration of an emergency belongs to the legislature, which is expected to examine with meticulous care, the nature and extent of the public danger. However, in urgent cases the executive may be in a better position to take an immediate decision, for example,

“...that the dangers of survival of the nation such as arise from a sudden military challenge may call for urgent and drastic measures by the executive which by the nature of things are susceptible only to a *posteriori* legislative ratification and judicial review”,⁵⁶ or in situations in which the legislature may not be able to act “with the necessary speed” and “only the executive could properly and with adequate promptness respond to special circumstances, calling for swift action, in defence of the state and the community, at large.”⁵⁷

A declaration of emergency by the executive, however, must necessarily be of a provisional nature, always subject to the legislative approval at the earliest moment. The time factor has been variously described as “within the shortest possible time” (ILA); “as soon as possible” (Lagos conference); “immediately” (OAS); and “as soon as practicable” (Council of Europe). The Lagos conference concluded:

“In any other case, however, it is the Parliament duly convened for the purpose that should declare whether or not the state of emergency exists. Wherever it is impossible or inexpedient to summon Parliament for this purpose, for example, during Parliamentary recess, the executive should be competent to declare a state of emergency, but in such a case, Parliament should meet as soon as possible thereafter.”⁵⁸

By implication, the legislative authority competent to approve a declaration of emergency by the executive should equally have the power, *inter alia*, firstly, to revoke the proclamation of public emergency; secondly, to amend the period of its validity by a simple resolution.⁵⁹

An example of express power of revocation can be found in Article 352(7) of the Constitution of India which provides that a proclamation of emergency may be revoked at any time by a simple resolution of the House of the People in the manner prescribed.

(7.3) Temporary or Provisional Status:

The strict observance of the limited fixed period (both initial and extended) is a basic safeguard. The only exception is in a case of war or external aggression, the uncertain duration of which makes a timeframe constraint unreal and impracticable.

The International Commission of Jurists (ICJ) has recommended that the constitution should specify “that no state of emergency have legal force beyond a fixed period of time, which should not exceed six months” and that every declaration of emergency should specify the duration of the emergency.⁶⁰

The Questiaux study discloses that there are four different forms for fixing time limits:

- (a) the basic text does not include a time limit but stipulates that the proclamation of a state of emergency itself shall set such a limit;
- (b) a fixed time limit is expressly laid down in the basic text and cannot be extended (for example, in Costa Rica it is thirty days);
- (c) the time limit may be extended without any condition other than compliance with the requirement to renew the formalities of proclamation (which is the most frequent case); and
- (d) systems providing for limited extension, which amount to a compromise between the two previous systems: either the limit is expressly provided for in the text (for example, in El Salvador, it is thirty days and may be extended only once) or it depends upon the occurrence of some event.

Questiaux concludes from this analysis that the variation in the choice of the one or the other form depends less on the country than on the nature of the emergency regime in question: a state of siege will fall into the third category, while a state of emergency, will fall into the fourth.⁶¹

The ILA Sub-Committee in its Belgrade report considered the relevant provision of the Indian Constitution and observed that “the states parties to the International Treaty may find it useful to refer to the Indian experience while reconciling the emergency provisions in the constitutional framework of their respective countries, with the treaty obligations, under Article 4 of the Political Covenant.”⁶²

In the present context it would therefore be pertinent to refer to the relevant provisions in Article 352 of the Indian Constitution as amended by the Constitution (44th Amendment) Act, 1978. Under the previous provision, once the initial declaration by the President was approved by both Houses of Parliament by a simple majority, within a period of two months, the emergency could continue indefinitely. After the Amendment, unless approved by both Houses of Parliament (the Council of State and the House of the People) within a period of one month, the declaration will cease to be operative.

An important safeguard is that an emergency can be approved or confirmed, and continued for a further period of six months at a time, only by an enhanced majority of total membership and not less than two-thirds of the members present and voting in the two Houses of Parliament. This seems to be in conformity with the ICJ standard, which contemplates legislative approval of a declaration by the executive “preferably by an enhanced majority”.⁶³

Two other safeguards are relevant: first, if the House of the People is dissolved at the date of the issue of proclamation or within one month thereof (without approving the proclamation), in that event the proclamation may only survive until thirty days from the date of the first sitting of the reconstituted House, provided the Council has in the meantime approved of it; second, a

proclamation of emergency, may be revoked by a simple resolution, adopted by the House of the People.

(7.4) *The Democratic Control of an Emergency Regime : Four ILA Norms :*

The two parameters of the ILA norms with regard to the period and control of an emergency regime are: first, a renewed emphasis on the temporary or the provisional status of a state of emergency; second, democratic control of such a regime, without any structural changes, in the basic representative institutions of the country. This ensures that a vigilant popular legislature should be able to enforce strict accountability of the executive branch, which assumes or exercises emergency powers. The following four ILA norms are teleologically linked with a view to achieving the aforesaid twin objectives:

- (a) The duration of the emergency shall never exceed the period strictly required to restore normal conditions.
- (b) The duration of the period of emergency (save in the case of war or external aggression) shall be for a fixed term established by the constitution.
- (c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term (that is, with the prior approval of the legislature) for another period to be established by the constitution. A strict scrutiny of every extension of the period of emergency is imperative; prior approval is essential since the reason of urgency, which might have justified the initial declaration by the executive, is no longer relevant.
- (d) The legislature shall not be dissolved during the period of emergency but shall continue to function effectively; if dissolution of a particular legislature is warranted, (for example, the expiry of its term under the Organic Law), it shall be replaced as soon as possible, by a legislature duly elected, in accordance with the requirements of the constitution, which shall ensure that it is freely chosen, and representative of the entire nation.

The essence of the concept of emergency (with a right to take derogation measures) is its provisional or temporary status; it therefore follows that it should be terminated as soon as the circumstances which brought it into existence are reasonably controlled or no longer exist; or where the emergency situation (even if it exists) can be controlled by the normal powers under the Covenant, for example, the termination of the state of emergency in Northern Ireland, by the United Kingdom, on 22 August 1984.

(8.) ABERRATIONS FROM THE REFERENCE MODEL :

Frequent violations of the norm of temporality have led to a variety of pathological aberrations from the reference model, variously described as a *de facto* state of emergency, a permanent state of emergency, the institutionalization of an emergency regime and a complex state of emergency, etcetera.⁶⁴

(8.1) A De Facto State of Emergency :

A *de facto* state of emergency very often transforms itself into another equally serious aberration known as a permanent state of emergency. There are two important dimensions of what is known as a *de facto* state of emergency. First, there is no proclamation or termination of an emergency at all or it is one in which a state of emergency in fact subsists even after an officially proclaimed emergency had purportedly been terminated. Second, there is, in such a regime, derogation from, and suspension of, an increasing number of rights and freedoms which, according to law, can only be derogated from and suspended by virtue of a proper proclamation of a public emergency. An illustrative case will clarify the position.

In South Africa, although in some regions, a state of emergency had been declared, (for example, in Transkei on 5 June 1980 under Section 44 of the Transkei Public Security Act; Proclamation 252 of the Emergency Regulations of the Ciskei, September 1980), in all other cases, the applicable legislation producing similar effects, as those associated with emergency situations, without complying with constitutional legal norms, is fully in force, as ordinary laws. This was illustrated by Questiaux with reference to Namibia, "a country occupied by the South African military forces, and therefore, in a state of war."

In Namibia, the "ordinary laws" of a highly repressive nature and containing substantive rules characteristic of emergency legislation, have been applied: for example, the South African laws which carried the death penalty for political offences in peacetime and the repressive laws of detention without trial. These were made applicable in Namibia on account of the state of war. The danger of such repressive measures, was also highlighted by the UN *Ad Hoc Working Group of Experts*, on violations of human rights in Southern Africa.⁶⁵

(8.2) A Permanent State of Emergency :

The recent findings of the Commonwealth Eminent Persons Group (EPG) on Southern Africa have examined the status of the state of emergency in South Africa, *inter alia* from 1960 onwards (frequently proclaimed, terminated and then re-imposed). The EPG report reveals that increasingly enormous powers of repression were being conferred even on low-ranking members of the police

and security forces, which were being exercised with immunity and without accountability. In such a situation the proclamation of a formal state of emergency has become irrelevant. The EPG concluded that, although there had been a technical compliance with the Nassau Accord which called upon the government to “terminate the existing state of emergency”, yet “... in reality, however, South Africa was sliding even further into a permanent state of emergency, in terms of the ordinary laws of the land.”⁶⁶

It is ironic that the fear expressed by the EPG came true on 12 June 1986, the very day when its report was to be published. On that day, the South African government declared a nationwide state of emergency. This was one of the most drastic attempts at continuing repression by the racist regime, as was made clear from the enormous powers given to the security forces, which were widely enforced.⁶⁷

Questiaux concludes that in such cases where a state of emergency has become the rule, the common features are:

- (a) less and less account is taken of the imminence or otherwise of the danger;
- (b) the principle of proportionality is no longer considered to be fundamental; and
- (c) no time limit is envisaged.⁶⁸

(8.3) *Emergency Regime Institutionalized :*

This new pattern of deviation has emerged recently with a view to establishing an extended transitional emergency regime with a veneer of legitimacy by professing to return to some form of democracy – which may be variously described as “authoritarian”, “restricted” or “gradual” democracy. These processes, ostensibly meant for transition to new forms of democracy, are in reality intended to provide an institutional base for an extended transitional regime characterized by a hierarchization of powers in which the ultimate control rests with the military elites. There are variations with different techniques of refinement to conceal the substantive control of a military junta or an authoritarian regime giving the impression of a return to a civilian rule.

(8.4) *A Complex State of Emergency :*

A brief reference to this form of deviation exposed by Questiaux will also be relevant. In essence, it means an attempt to validate all decrees and laws enacted by authoritarian regimes of exception *pari passu* with the constitutional and normal legal framework. Two examples, (Turkey and Brazil), cited by Questiaux, clearly show, that the resultant complexity in the legal system, is not only destructive of the basic structure, of the normal constitutional regime, but also makes it impossible, for any lawyer to advise a client, about the nature and content, of the legal regime in force.⁶⁹

(9.) THE ROLE OF THE LEGISLATURE IN AN EMERGENCY REGIME:

As will have been observed, the legislature has a crucial role to play at every stage in a regime of emergency. In particular, the power and duty of the legislature to monitor with meticulous care, the declaration and duration of a state of emergency is of pivotal significance for the maintenance of a rule of law during a serious public crisis. It is for this reason that the ILA recommends:

- (a) In order to exercise effective control, it is essential that the legislature should be able to function throughout the period of the crisis.⁷⁰ For instance, not infrequently, taking advantage of the absence of Parliament, a *de facto* regime of emergency has been systematically extended.
- (b) Even if a member of the legislature is detained without trial, he shall be entitled to participate in, and vote on, any decision in connection with the declaration or confirmation or extension and termination of a state of emergency.⁷¹

This recommendation is important because, among the various patterns of violations, during an emergency, the most unusual one, is that the duly elected government, is replaced by an authoritarian regime, through a *coup d'etat*, violent or peaceful; the constitution is suspended; the duly elected Parliament is dissolved, and the country is governed by decrees promulgated, by an authority which has assumed power, by extra-constitutional means. In the process, the most important mechanism of government by consent, is destroyed.⁷²

(9.1) Article 16 of the French Constitution – an exception :

It will have been observed that effective Parliamentary or legislative control of a regime of exception is of the essence of the reference model of the Paris minimum standards. Where, however, the assumption or the exercise of emergency powers is virtually the exclusive monopoly of the executive branch, with little or no control by the legislative or judicial branches, such a regime represents a radical departure from the reference model. The Questiaux study has described the powers of such a regime as “emergency powers through self-empowerment by the executive”. The classic example of this type can be found in Article 16 of the French Constitution.

In the French case, emergency powers are concentrated in the hands of the executive except the power to amend the Constitution. Apart from the extreme case of trial for “crime against the Constitution” by the High Court (itself composed of members of Parliament), there is no direct control of emergency by the French Parliament. Parliament is powerless to judge the validity of the proclamation of emergency; equally powerless are the courts of law, and the

Council of State (*Conseil d'Etat*), to judge the validity of the proclamation of an emergency, or to review the special powers, or legislative measures pursuant thereto, taken by the executive.

With a view to preventing any scrutiny by the organs of implementation under the European Convention, France has entered a reservation to Article 15 of that Convention.⁷³ Again, in 1983, the representative of France informed the Human Rights Committee that its reservation applied to paragraph 1 only of Article 4 of the Covenant which, it was claimed, "was quite legitimate under the Vienna Convention". He also stated that "the President of the Republic was entitled, in a time of public emergency, to take both legal and administrative decisions, but that they were subject to review by the Council of State, which could annul them."⁷⁴

The French model has been adopted by a number of new Francophone states in Africa. The possibility of abuse of emergency powers in a country without the liberal tradition of France, with its in-built democratic structure, cannot be ruled out.⁷⁵

(9.2) The Role of the Legislature: Six Norms in the Paris Minimum Standards:

Apart from monitoring the declaration and the duration of a state of emergency, the continuing function of the legislature is equally, if not, more important for the protection of the individuals during the entire period of the crisis. Six important norms are recommended by the ILA:

- (a) There shall be no alterations but the fundamental functions of the legislature shall remain intact despite the relative expansion of the authority of the executive.
- (b) The prerogatives, immunities and privileges of the legislature shall remain intact.
- (c) As far as practicable, norms to be applied during an emergency shall be formulated when no emergency exists.
- (d) All emergency measures adversely affecting the rights of the individuals, shall be supported by the authority of law, duly enacted by the popular legislature.
- (e) Since delegated legislation by the executive during a period of serious public danger often becomes necessary to meet the exigencies of the situation, the legislature by enacting enabling statutes shall provide clear and appropriate guidelines to regulate executive discretion in respect of permissible measures of delegated legislation.

The absence of such guidelines would result in the effacement or abdication of legislative function, which is impermissible even during an emergency. The legislature will further have the necessary power to ratify with retrospective effect, if it deems fit, emergency measures having the effect of law, introduced by the executive to cope with a critically urgent situation.

It would be interesting to compare this standard of legislative supervision with some of the forms described by Mrs Questiaux in her comparative law analysis of emergency legislation in different municipal systems.⁷⁶

- (f) Last but not least, it is for the legislature to ensure that from time to time there is an impartial and objective review of the derogation measures (legislative or executive) with a view to upholding reasonable guarantees to every individual on a continual basis against abusive exercise of emergency powers.⁷⁷ The effective functioning of a legislature through debates and popular participation in the exposure of abuses of power, is an important guarantee for the protection of the individuals in a state of emergency. There are instances of legislatures functioning successfully in a time of civil war.⁷⁸

(10.) THE ROLE OF THE EXECUTIVE IN AN EMERGENCY REGIME:

Control of the executive occupies a central place in most studies of the rule of Law. In the words of a distinguished Austrian judge, “[the] demand that the executive be subject to the laws was the main postulate of the rule of law state”.⁷⁹ The phenomenon of the growth of executive power in the twentieth century explains the continued preoccupation of studies of the rule of law with this organ of government.⁸⁰ One of the most important causes of increased executive power is the assumption by government, in this century, of vast planning and welfare responsibilities. The problem of the control of government in the exercise of these new powers is, beyond the scope of this work.

The first principle, established by deduction from the above introduction, is that the executive organ of government, (and all who act under the authority of the executive), must be subject to law, in the sense that its actions, (especially those which touch upon the freedoms protected by the rule of law), are limited and controlled, by specific provisions of the law. There are two facets to this principle: The actions of the executive must be within its legal powers and must correspond to clearly formulated legal standards. It follows that delegation to an officer of power to invade an individual’s basic liberties without the enactment of “specific provisions controlling his actions”,⁸¹ would be directly contrary to the most fundamental requirement of the rule of law.

As part of an attempt, to give more specificity to this requirement, it has been

suggested, that laws which authorize the exercise of a discretion, must be drawn in such a way, that it is possible to pass judgement on the question whether, in an individual case, the discretion has been exercised, within the "meaning of the law".⁸² The salient point of this suggestion is that legislative delegation of authority to the executive or its officers, must be accompanied by detailed standards against which the exercise of the authority can be measured. This applies equally to the delegation of legislative authority.

The second principle, which may be deduced from the rule of law, is the principle that in general, the executive should not be given power to enact inroads into the fundamental freedoms even if its regulations lay down detailed standards. The grounds upon which a citizen's liberties may be interfered with in normal times are well established and the executive should not be empowered to extend them, except in times of compelling urgency.⁸³ A delegation of legislative power to the executive must not, therefore, include authority to limit or abolish the freedoms protected by the rule of law. The limitation of these liberties is a broad question of policy more suitable for legislative action than for decision by a subordinate rule-making authority. This necessary principle, was adopted as a specific recommendation, of the Lagos Conference of the International Commission of Jurists (ICJ), where it was declared that, "legislation should as far as possible, be delegated, only in respect of matters of economic, and social character, and that the exercise of such powers, should not infringe upon, fundamental human rights".⁸⁴

An independent body (preferably the ordinary courts) acting in accordance with appropriate judicial standards, must be entrusted with the power to determine the legal competence of the actions of the executive and its officers. On the necessity of independent judicial control of the executive, there is almost complete unanimity; in fact, some authorities make judicial control of the executive *the* identifying feature of the rule of law state.⁸⁵

The principle of judicial control was adopted as part of the conclusions of the Delhi Conference in 1959, and was reaffirmed after intensive exploration of the problem in Lagos *supra*, in 1961 and Rio in 1962. Of course, judicial control should be supplemented by legislative control of executive action (especially of executive rule making); but it is judicial control, which is vital in the protection of the basic freedoms. Legislative supervision has a special relevance to the economic and social activities of government.

For the purposes of giving effect to the rule of law, the individual, should have a right of action, for unlawful infringement of any of his or her basic freedoms, and an effective remedy, in the nature of the *habeas corpus* writ, for securing his or her release, from unlawful detention or arrest.⁸⁶ In appropriate cases, the courts should have power to make a declaratory order or to issue a mandamus.

Any consideration, of the problem of judicial control, of the executive in present times, must pay particular attention, to a claim of the executive, which tends to defeat that control, and which is nowadays, asserted with increasing frequency and success, namely, the claim of the executive, to be virtually

exempt from supervision and control, during a state of emergency. This claim, presents a dangerous threat to the rule of law and therefore calls for more extensive treatment.

The claim by an executive of the right or power to set up an emergency rule is essentially a demand to govern without law. The danger of power unchecked by law is an old lesson, which needs to be learned anew by each generation: "Where laws end, tyranny begins." The prevention of an unjustified resort to emergency government is therefore crucial to the maintenance of the rule of law in any society. The central and most difficult problem is that of restricting the government to the use of emergency powers during periods of true emergency only.

A problem of only slightly less importance, is the difficulty of putting some limits, to the exercise of emergency power, during times of crisis for, though emergency is government without the restraint of the law, it would be disastrous, to fix no bounds whatsoever, for its exercise; law may be pushed into the wings during emergency rule, but need not be totally banished from the house. Each of these two questions needs separate treatment.

If the executive is constitutionally or legally bound to exercise exceptional powers during strictly limited periods of time when crisis actually occurs or threatens, the need for setting legal limits to its crisis powers is not as great. Nevertheless, though an executive, acting in a time of genuine crisis, obviously must have the power to act swiftly and effectively, it remains important to fix certain outer limits, to its capacity, which may prevent abuse, or unnecessary injury whilst freeing it of those normal, peacetime restrictions, which stand directly in the way of remedial action.

It must be remembered that some emergencies, such as war unaccompanied by invasion, do not involve internal disorder or upheaval and may be successfully controlled without a total suspension of rights and procedures. Even where disorder prevails, a government should not be free to resort to any kind of barbarity that may seem efficacious in controlling the situation. In short, the controls of law must be considerably slackened in times of crisis but they need not disappear entirely.

The enlargement and concentration of power in the executive's hands during an emergency, necessarily means a reduction of individual liberty. In fact, emergencies necessarily involve, to a greater or lesser degree, a breach of all the requirements of the rule of law already outlined. The government may find it necessary to detain, or otherwise restrict freedom, without charge – a procedure, which infringes the legality principle, and the right to personal freedom. It may also decide to restrict or even abolish the liberties of speech and association and to set up special courts applying special procedures to try persons for emergency offences.

Though these invasions of the rule of law may be lamentable necessities in a time of crisis, they must not be allowed to degenerate into excesses and abuses. The first and most important safeguard against a danger of that kind

is the institutionalization of emergency procedures and powers in a constitutional instrument or ordinary statutory enactment. Clinton L Rossiter has formulated this requirement in the following terms:

“If a state decides that an emergency institution is to be provided for in law, then the purpose, powers, effects and limitations of that institution ought to be clearly qualified.”⁸⁷

As he argues elsewhere, the emergency should be foreseen and methodized in detail.⁸⁸ The conclusions of the Rio conference on this point were almost identical:

“The conditions under which an emergency may be declared should be formulated in a law which determines the authority capable of proclaiming it, as well as the relevant procedures, duration and appropriate methods of control.”⁸⁹

The institutionalization of emergency powers must not be a blanket transfer of authority to the executive to legislate and to act. Thus, it is provided in Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that only measures “strictly required by the exigencies of the situation” may be taken during an emergency. The question of the kind of limitation, which should be imposed on the exercise of emergency powers, is one which cannot be answered in general but only in relation to each separate power.

The delegation of legislative power to the executive during an emergency could be controlled by a provision requiring parliamentary approval of regulations enacted by the executive within a fixed period.⁹⁰ Another example of a reasonable restriction on executive crisis power, is the provision of a right of appeal by detained persons to a specially appointed tribunal, if not to the courts. Then again, the powers of military courts may be circumscribed by limiting the offences they may try, the punishment to be imposed, and the conditions in which they may function.

(11.) THE SCOPE OF JUDICIAL REVIEW IN A TIME OF EMERGENCY:

In the context of a state of emergency, the question of judicial review arises in two types of cases: first, whether there exists a public emergency threatening the life of the nation and, second, whether the measures taken are permissible in law to restore normalcy. The question can arise before two different forums, namely, national courts as well as the appropriate organs of a regional or international treaty to which the respondent state may be a party. The mechanism of judicial review both at national and international levels will be considered.

(11.1) *Judicial review at a national level :*

The safeguard of judicial control at the national level over a declaration of public emergency is far from generally accepted. In 1961, the Lagos conference on the rule of law of the International Commission of Jurists (ICJ), did provide that a declaration of emergency, by the executive is susceptible, “only to a *posteriori* legislative ratification and judicial review”.⁹¹ In the same year, an important UN seminar on Human Rights held in Mexico expressed three different views on the topic:

- (a) the court should have the power to annul the declaration of emergency where it was considered “undesirable” in the sense that it was “not justified by the *de facto* situation”;
- (b) the power of the court should be limited to cases where requisite formality has not been complied with; and
- (c) the declaration of a state of emergency, being a political decision, should be entirely withdrawn, from the control of the court.⁹²

Six years later, the Kingston seminar of the United Nations recorded the general agreement that the “declaration of a state of emergency should not be subject to judicial control.”⁹³ Despite the possibility, of the conflicting views of international organs and national courts, confronted with political judgements, over the proclamations of emergency, Mrs Daes, is of the opinion that “the ordinary courts of a state, should not abdicate the responsibility, of testing the legality of a declaration of emergency, even if it may be considered necessary, or advisable to leave the political organs of the State with a certain – preferably implied – margin of appreciation.”⁹⁴

On the other hand, the ICJ, while accepting the position that it is “axiomatic that, for the protection of human rights, the greatest possible degree of judicial control should be striven for”, observed:

“However, it is widely thought that the executive and the legislature, the political branches of government, are entitled to discretion in determining the existence and gravity of a threat to the nation, that is the need for a state of emergency, and the necessity for recourse to specific measures. Whether judicial review of these two decisions is advisable is, therefore, another issue which must be decided in the light of the legal traditions of each country”.⁹⁵

(11.2) *Alexander’s seminal study :*

The seminal study of the role of national courts in different types of emergency situations by Professor George J. Alexander, is a significant contribution bearing in mind the dearth of legal literature on the topic. Having examined the history, of court involvement in the case law, of eight common law countries,

(the United States, Great Britain, South Africa, Ireland, New Zealand, Canada, Australia and India), its main thesis, is that the court is vulnerable in times of national crisis, and that "*in the most serious cases, courts have performed badly, will necessarily continue to perform badly, and should ideally not be involved*"⁹⁶ (emphasis added). In the United States and other common law countries the courts have upheld, with few exceptions, "far-reaching expansion of governmental power with corresponding contraction of individual rights during times of public emergency".⁹⁷ According to Alexander, the response of national courts varies in three different types of emergency, depending upon the public danger.

First, in wartime measures, the British and American courts in substance will not involve themselves with the military or executive decisions. According to him, the courts in Britain, the USA and the Commonwealth countries will not involve themselves in the legitimacy of military decisions in the absence of bad faith. Issues, which arise in this sort of emergency, put courts at the most extreme disadvantage except in rare instances where they are bold enough to act. "Regrettably, they often act shamefully at such times as did the American and Canadian courts in approving Japanese relocation which, it should be pointed out, they did after the end of World War II without even the excuse fervor."⁹⁸

Second, at the opposite extreme, a number of cases involve an emergency that is much more controversial than war or active insurrection, for example, when troops have been called to quell labour disturbances and peaceful civilian protest. In such circumstances, several courts have intervened and determined whether a state of emergency is of the sort that immediately threatens the continued existence of a nation; a situation of this sort is at some level "manageable by courts".⁹⁹

Third, there is a middle ground in which problems arise out of a variety of threats to national security (excluding armed conflicts). In this area, the issues such as freedom of expression or precursors of unlawful overthrow of the government are involved. In such cases, which are of the utmost importance in democratic countries, the national courts can play an important role in preserving fundamental liberties and in particular "should insist on the rule of law and resist the temptation to embellish legislative proscriptions."¹⁰⁰

Any review of the decision of national courts in emergency cases, particularly of a serious type, seems to reveal that the precedents of the court are so perplexingly ambivalent as to render recourse to the doctrine of *stare decisis*, an exercise in futility. Accordingly, in human rights cases, legal experts in an adversary position can each cite powerful but conflicting precedents in support of their respective contentions.

On the specific issue of whether a declaration of emergency is justiciable, the preponderant view is that the judgement of the political branches of the government (executive and legislature), is normally immune from judicial review, but there are some exceptions.¹⁰¹ In principle, recent juristic opinions support a more activist judicial role in reviewing emergency powers.¹⁰²

(11.3) *The court's power of review: a few examples :*

Another important question which arises is the court's power to direct (for example, by issuing a writ of mandamus), the political branches of the government to terminate an emergency when the circumstances that warranted its initial declaration or continuation, have ceased to exist. The point arose in several decisions.

(11.3.1) *Malaysia : The Judicial Committee :*

For instance, in the case of *Teh Cheng Poh v Public Prosecutor, Malaysia*,¹⁰³ the point, involved in the case, before the Privy Council, was whether the court had the power, to revoke the proclamation of emergency in Malaysia, made by the constitutional ruler, on the advice of the cabinet of Ministers. It was observed by Lord Diplock, *per curiam*, that a mandamus can be issued against the members of the cabinet requiring them to advise the ruler to revoke the proclamation in an appropriate case where, the failure to exercise his power of revocation would be an abuse of his discretion. On the facts of the case, the contention of the Defendant that the security area proclamation must be treated in law as having lapsed, was however not accepted by the Privy Council on the ground that:

“Their Lordships are far from suggesting that there was any material in existence before that date which would have satisfied an application for mandamus on the grounds that have been mentioned above. They do not regard themselves as qualified to express any views on the matter either way.”

As noted in the ILA's Montreal report (at 114), the effect of the decision, was pointed out, by a Malaysian jurist:

“But Teh Cheng Peh was short-lived. The executive marshalling its majority in Parliament validated the invalidated emergency laws, made proclamations of emergency no longer justiciable before the Courts, and as a sop to the conscience, provided for a review of security cases already tried, all with gymnastic dexterity reminiscent of the great Olympian masters. And now the Privy Council is no more; the ultimate court of appeal in these matters, of the cherished freedoms is the Federal Court.”

(11.3.2) *India's three proclamations of emergency : the perspective of the Supreme Court :*

It may be recalled that the first proclamation of emergency in India continued from 26 October 1962 till 1 July 1967. It was first proclaimed immediately after the Chinese attack on India, but was continued even after China declared a

cease-fire on 21 November 1962. The emergency acquired a new lease of life, as it were, with the outbreak of armed conflict between India and Pakistan across their borders in April 1965 followed by a war later in the same year. The cease-fire took place in terms of the resolution of the UN Security Council, and the two heads of governments signed a declaration on 10 January 1966, stipulating the procedure for the normalization of relations.

The emergency, however, continued in force even after the normalization; criticisms of abuse of power became very pronounced. Prominent jurists asked the Prime Minister to revoke the emergency. The International Commission of Jurists, in its bulletin in March 1967, pointed out that since the features of grave emergency did not appear to exist any longer, there was no justification for the suspension of the fundamental rights. It was against this background that on 18 March 1967, the Home Minister announced the decision of the government to revoke the state of emergency with effect from 1 July 1967.¹⁰⁴ The Supreme Court of India, was at that stage, "rudely disturbed" with prolongation of such measures, as detention without trial, by the continuation of an emergency, "without the existence of justifying necessity ...¹⁰⁵

The second proclamation of emergency was made on 3 December 1971, on the outbreak of war between Pakistan and India, but it continued till 25 June 1975 when the third emergency was proclaimed. Although the hostilities between India and Pakistan ceased on 16 December 1971, the emergency continued. In early 1975, in a habeas corpus petition before the Supreme Court, the validity of the continuation of the emergency was challenged on the ground that there was no longer any threat of external aggression. The arguments lasted from March 1975 till the beginning of May 1975 when the Supreme Court was closed for its summer vacation. Before the judgement could be delivered on the reopening of the Supreme Court in July 1975, a new emergency was declared.¹⁰⁶ An opportunity was thus lost for a definitive pronouncement of the Supreme Court on this issue.

In an important case, *Waman Rao and Others v Union of India*, the validity of the 40th and 42nd constitutional amendments was challenged.¹⁰⁷ The Supreme Court left open the question whether the issuance of the proclamations of emergency of 3 December 1971 and 25 June 1975 raised a justiciable issue, and on the basis of the materials placed before it, the Court came to the conclusion that they had been duly issued. Chandrachud CJ observed in the course of his judgement:

"Thus, in the first place, we are not disposed to decide the question as to whether the issuance of a proclamation of emergency raises a justiciable issue. Secondly, assuming it does, it is not possible in the present state of record to answer that issue one way or the other. And, lastly, whether there was justification for continuing the state of emergency after the cessation of hostilities with Pakistan, is a matter on which we find ourselves ill-equipped to pronounce."

The validity of the two proclamations, was upheld by the Court. The challenge

that the proclamation of 3 December 1971 should have been revoked much earlier and that the second proclamation of 25 June 1975 was wholly uncalled for and *mala fide*, was negated.¹⁰⁸ The decision was followed recently by a two-member bench of the Supreme Court in *P.B. Samant v Union of India* (judgement of 17 December 1987).

An additional contention, was that the resolutions passed by Parliament, which had the effect, of continuing the duration of emergency, should have been published in the official Gazette; this was not done, and for this reason, the proclamations should be deemed, to have become ineffective, on the expiry of the period of two months, from the issue thereof. This contention was rejected on the ground that the two resolutions were duly published in the official reports of the two Houses of Parliament which fully met the requirement of due publicity.¹⁰⁹ That apart, the recent trend in the Supreme Court of India shows that the individual judges are inclined to take a restrictive view of the power of the court to terminate an emergency by a mandamus.¹¹⁰

(11.3.3) The US Supreme Court :

The position is ambivalent in the United States. In a number of cases, the US Supreme Court has supported the proposition that war and emergency measures may be exercised until the emergency has ended, and that the determination of when the emergency had ceased is a political act, not subject to judicial review. For instance, in *Ludecke v Watkins*,¹¹¹ some three years after the hostilities had ceased, the Supreme Court upheld the applicability of the Alien Enemy Act of 1798, which gave the President broad power to restrain and remove alien enemies during declared war. In striking contrast to the aforesaid view, the Supreme Court held in *Chastleton v Sinclair*,¹¹² that the Court should inquire whether the exigency of circumstances, which justified a particular law, still existed.

(11.4) Judicial Review : ILA's National Standard :

Paragraph 7 of Section (A) of the Black Letter Rule provides, *inter alia*, that at the national level, power of judicial review, over declaration and duration of an emergency, shall be exercised "in terms of the constitution, and legal tradition of the state concerned, keeping in view, the undertaking of the state, to adopt legislative or other measures, to give effect to the rights recognized, by any treaty, to which it may be a party." Two important points are to be kept in view by the national judiciary in reviewing the validity of the declaration or continuation of a state of emergency.

First, whatever may be the status of the emergency regime, in the legal framework of a particular state, which is a party to an international treaty, like the Covenant, compliance with the crux of that state's obligations, under the treaty, as embodied in Article 2, must be considered a crucial and relevant

factor, by the national court in exercising its jurisdiction, of reviewing the initial or continuation of a declaration of emergency.

Second, which is indeed an illustration of the first proposition, the national court, should also take into account, the vital significance of the fact, that the obligation of a state party, to any of the three treaties, (Article 4 of the ICCPR; Article 15 of the ECHR and Article 27 of the ACHR), is to satisfy the objective standard, that the public emergency, must be one which threatens the life of the nation. The existence of such a threat is a condition precedent to the exercise of the power of proclamation. It is the incumbent duty of the national court to note that the international or regional treaties do not in terms provide for any subjective satisfaction of the executive. For instance, there is nothing in such treaties which can accommodate a theory of subjective standard, such as, in Article 352 of the Indian Constitution: "If the President is *satisfied* that a grave emergency exists ..."

These two vital aspects are of great relevance for the consideration of an activist judiciary in an egalitarian society where there is a need for the protection of individuals against abusive assumption or exercise of emergency power by an independent judiciary. This, however, does not mean the rejection of the doctrine of margin of appreciation; on the contrary, one has to appreciate the necessity of executive discretion and the constraints of judicial review without patently overstepping the permissible limits of the executive's margin of appreciation. Accordingly, the ILA has come to the conclusion:

"So far as the scope of judicial review, of a declaration of an emergency, under the municipal system, this Committee would like to emphasize, that the factual existence of circumstances, which threaten the life of the nation, is a condition precedent, for the assumption of power by the political organs, of the particular state. The Municipal Court, neither having the expertise nor access to certain sources of information, necessarily will have to allow a significant measure of discretion to the political organs on the complex problems relating to the declaration of emergency.

Nevertheless, there is no reason why, in appropriate cases, the judiciary should not be able to pronounce judgement invalidating the declaration of an emergency where, for instance, it is *mala fide* or a fraud on the exercise of constitutional powers. In all cases, the Municipal Court should ensure compliance with the constitutional or legal formalities relevant to such declaration. It is in the light of these observations that the Committee has formulated the principle laid down in paragraph 7 above." (Para 14 at 63 of ILA's Paris report).

(12.) THE IMPORTANCE OF AN INDEPENDENT JUDICIARY IN A TIME OF EMERGENCY:

The important role of the judiciary in a time of emergency has been

emphasized in each of the three sections of the ILA's Paris Standards. As noted earlier, the emasculation of the judiciary and the harassment of defense lawyers are not uncommon in a state of emergency. As Alexander's profound study revealed, in such an environment, the protection of the individual, by the judiciary, becomes largely illusory.¹¹³

During an emergency, the expansive horizon of executive power is necessarily commensurate, with substantial contraction, of the rights and freedoms of the individuals. The necessity for a rule of law in an emergency regime, to ensure reasonable protection to the individuals on the one hand, and to prevent abusive exercises of executive powers on the other, is an imperative necessity. This task can only be performed by an independent judiciary, "for a subservient judiciary cannot be relied upon, to accomplish the difficult task of protecting human rights and the rule of law, during an emergency."¹¹⁴ The role of the judiciary, in protecting individuals, against repression and abusive exercise of emergency powers, is one of the best guarantees, for a rule of law, in a state of emergency. The judiciary shall have the power and jurisdiction to decide four areas of vital controversy between the state and the individual.

First, whether or not an impugned emergency legislation is in conformity with the constitution of the state. For instance, if the constitution stipulates a separation of powers, for the three branches of government, and prohibits military courts from trying civilians, a decree law by the executive, or an enacted law by the legislature, empowering a trial of civilians, by military courts in contravention of the constitutional ban, (as was done in Argentina in 1976 by the military government¹¹⁵), should be declared in-operative and a nullity by the judiciary.

Second, the judiciary should decide whether or not any particular exercise of emergency power, is in conformity with the emergency legislation. For, example, if a law of preventive detention, in a time of emergency, sets out the specific grounds permitting detention without trial, an order of detention by the executive authority, on a ground outside those grounds, should be struck down by the court. A detainee will be entitled to show that the order of detention was not under, or in compliance, with the law or, was *mala fide*.

Third, there are several basic rights, which are non-derogable even in a time of emergency. If any legislative or executive emergency measure results in an encroachment of any non-derogable right, the court shall decide the issue and declare, if satisfied, such encroachment *ultra vires* and of no effect. Again, and perhaps more important, in a case where an emergency measure, (legislative or executive), is challenged by a victim, on the ground of non-compliance with the rule of proportionality, the court shall examine the complaint with meticulous care, and if satisfied that the grievance is a genuine one, it shall make an appropriate declaration to that effect.

Finally, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them, as being in effect and, if necessary, grant relief on such a basis. In any event a court of law shall

have full power to declare null and void any emergency measure, (legislative or executive), or any act of application of an emergency measure which does not satisfy any, or more, of the aforesaid, four tests.

SECTION B: EMERGENCY POWERS AND THE PROTECTION OF THE INDIVIDUAL:

GENERAL PRINCIPLES:

- (1.) During the period of the existence of a public emergency, the state concerned, may take measures, derogating from its obligations, to respect and ensure to all individuals, within its territory, and subject to its jurisdiction, the human rights and fundamental freedoms internationally recognized, but it may not derogate, from internationally prescribed rights, which are, by their own terms, “non-suspendable” and not subject to derogation.
- (2.) The power to take derogatory measures as aforesaid, is subject to five general conditions:
 - (a) Every state, which is a party to a regional or international human rights treaty, shall comply with the principle of notification, as may be prescribed by the particular treaty.
 - (b) Such measures must be strictly proportionate to the exigencies of the situation.
 - (c) Such measures must not be inconsistent with the other obligations of the state under international law.
 - (d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin.
 - (e) The basic rights and freedoms, guaranteed by international law, shall remain non-derogable, even during an emergency. As the minimum, the constitution shall provide that the rights recognized as non-derogable in international law, may not be affected by a state of emergency.
- (1.) While assuming or exercising emergency powers, every state shall respect the following principles:
 - (a) The fundamental functions of the legislature, shall remain intact, despite the relative expansion of the authority of the executive. Thus, the legislature, shall provide general guidelines to regulate executive discretion, in respect of permissible measures of delegated legislation.
 - (b) The prerogatives, immunities and privileges of the legislature, shall remain intact.

- (c) The guarantees of the independence of the judiciary and of the legal profession, shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary, shall be prohibited by the constitution.
- (1.) (a) All emergency measures in derogation of the rights of individuals, shall be supported by the authority of law, as enacted by the duly elected representatives of the people.
- (b) As far as practicable, norms to be applied during an emergency, shall be formulated when no emergency exists.
- (c) States shall review and, if necessary, revise the emergency measures, (legislative or executive), from time to time, to ensure reasonable guarantees against any abusive exercises of emergency powers.
- (2.) The judiciary, shall have the power and jurisdiction to decide firstly, whether or not an emergency legislation is in conformity with the constitution of the state.

Secondly, whether or not any particular exercise of emergency power, is in conformity with the emergency legislation.

Thirdly, to ensure that there is no encroachment upon the non-derogable rights, and that derogatory measures, derogating from other rights, are in compliance with the rule of proportionality; and

Fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers, to declare null and void, any emergency measure, (legislative or executive), or any act of application of any emergency measure which does not satisfy the aforesaid tests.¹¹⁶

(1.) THE POWER TO TAKE DEROGATORY MEASURES: FIVE CONDITIONS PRECEDENT:

The power to take derogatory measures, is subject to five conditions: notification; the rule of proportionality; no inconsistency with other obligations under international law; derogation measures must be non-discriminatory; and, finally, rights non-derogable, even during an emergency. Each one of the five conditions needs discussion.

(1.1) The notification of derogation :

The first condition, is that the principle of notification of derogation, as may be prescribed by the particular treaty, shall be duly complied with. Such a notification, serves three main purposes:

(1.1.1) Three main purposes:

First, it is an important restriction on the use of emergency powers, in as much as, in the words of Rene Cassin, “the real purpose of Article 4, was to require states to take a decision in public, when they were obliged to restrict such rights.”¹¹⁷ Years later, the importance of a public notice of derogation, was emphasized by the Human Rights Committee, when it stated in 1984, in reviewing the state report of El Salvador, that such a notice was “no mere formality, and that it could lead governments, to abandon their plans with respect to certain derogations, because, all things considered, they did not find them absolutely essential.”¹¹⁸

Second, a notification of derogation, is a matter of serious concern to the other states parties – as was emphasized in the *travaux preparatoires* : “It was, generally agreed, that the proclamation of a public emergency, and consequential derogation, from the provisions of the Covenant, was a matter of the gravest concern, and that the states parties, had the right to be notified of such action.”¹¹⁹

The community of interest, in matters of derogation measures, it has been rightly suggested, gives rise to a certain *ordre public* between states parties, giving each of them an interest in human rights situations in other states parties.¹²⁰

Third, states of public emergency, and their effects need to be thoroughly scrutinized by the organs charged with the implementation of the relevant human rights treaty.¹²¹

(1.1.2) The Provision of Notice in the three treaties: common and distinctive features:

All three treaties, namely, the European Convention on Human Rights, (hereinafter, referred to as the European Convention or the ECHR), the International Covenant on Civil and Political Rights, (hereinafter, referred to as the International Covenant or the ICCPR), and the American Convention on Human Rights, (hereinafter, referred to as the American Convention or the ACHR), provide for a notification of derogation, at the time of a public emergency, and also for a further notice, in the event of its termination. Apart from these two common features, there are four points of difference in the language of Article 4(3) of the ICCPR and Article 27(3) of the ACHR, on the

other. These differences, discussed below, seem more semantic than substantial.

(1.1.3) *To whom is the notification to be sent?*

Under the ICCPR and the ACHR, the notification, is to be sent to the other states parties, through the intermediary of the Secretary-General of the United Nations, and the Organization of American States (OAS) respectively; under Article 15(3) of the ECHR, it is to be sent to the Secretary-General of the Council of Europe. However, although the ECHR does not expressly provide, that the Secretary-General is to send notifications to the other states parties, in resolution (56) 16 of 26 September 1956, relating to the implementation of Article 15(3) of the ECHR, the Committee of Ministers of the Council of Europe filled this gap, and hence, in practice, there is no difference between the three instruments.¹²²

(1.1.4) *Within what time is the notification to be sent?*

While the ICCPR and the ACHR provide that the notifications should be sent “immediately”, the ECHR is silent on this point. Although, Buergenthal considers the insertion of the term, “immediately”, an improvement of the ECHR, on the ground that it calls for a “notice to be dispatched almost simultaneously, with the proclamation of the emergency, or the taking of derogating measures”,¹²³ it seems that the difference is more apparent than real. The word, “immediately”, really means that the notice should be sent, “within a reasonable time and in any case, without delay”, (as Daes puts it), or, “within a brief period”, (as Questiaux puts it). Although, it is true that the ECHR is silent on this point, the European Court in the *Lawless* case, has considered that the notification without delay, was an element, in the sufficiency of information, as required by Article 15(3).¹²⁴

(1.1.5) *What should be the contents of the notification?*

While both the ICCPR and the ACHR, provide that the “provisions” of the relevant treaty, from which the state had derogated, and the “reasons” by which it was actuated, are to be indicated in the notification, the ECHR provides that the “measures” of derogation taken, and the “reasons”, are to be specified. Two diametrically opposite views have been expressed, about the interpretation of the terms quoted. Buergenthal, for instance, feels that the ICCPR version, is an improvement upon the ECHR. This is because, under the ECHR, the requirement of “measures”, “would be met by a state, which merely declared that certain provisions of its national constitution, have been temporarily suspended” and even if accompanied, by reference to the relevant provisions of the constitution, “would not necessarily indicate, from which specific rights guaranteed in the Convention, the state party is derogating, and

some very serious infringements, might consequently go unnoticed. Article 4(3) of the Covenant, reduces this risk.”¹²⁵

Questiaux, on the other hand, has expressed the view, that the obligation under the European Convention, is “broader” because: “Apart from the provisions from which a state party has derogated, the reasons by which it was actuated, and the date on which it terminates such derogation, all cases provided for in the three instruments, the European Convention, extends the obligation, to include the nature of measures taken.”¹²⁶ This is perhaps, technically not correct because the ECHR in its terms, does not require a notification of the “provisions” of the treaty, from which a state party had derogated, nor does it mention “the nature” of measures taken. In practice, however, the better view, seems to be, that under all three instruments, the monitoring authority requires, that the notification should cover, not only the provisions of the treaty suspended, but also the derogation measures actually taken, and the reasons which influenced the state, to take recourse to such measures. The “reasons” must be indicated with sufficient clarity, although, “every detail of each particular measure taken”, need not be given.¹²⁷

The fact that there is not much difference with regard to the type of information required under the three treaties, despite differences in phraseology, will be clear from the practice, *inter alia*, of the Council of Europe and of the Human Rights Committee. Apart, from the four stages dealing with the mechanical aspects, of a notice of derogation under the ECHR, (namely, the *note verbale* in a summary form is sent to the Secretary-General, the latter acknowledges receipt, and then notifies the other states parties, and finally transmits a copy to the heads of the important organs of the ECHR), the practice of the Council of Europe, envisages that such a *note verbale*, should contain at least the following information: grounds invoked, (that is, a brief description of the manifestations of the political crisis); a list of provisions of the ECHR restricted or suspended; the emergency clauses of the municipal law, referred to in the note; and, if applicable, the expected period of derogation and its geographic extent.¹²⁸

In the same vein, albeit in different terms, general comment 5/13, (on emergency), of the Human Rights Committee, emphasizes the importance of the notification under Article 4(3). It stipulates, that the state party should furnish at least, the following information: “whether a state of emergency has been officially declared”; “the derogations it has made, including the reasons therefor ... the nature of each right derogated from, together with the relevant documentation”; “the applicable provisions of law governing derogations”; and whether any non-derogable right “had in fact, been derogated from”.¹²⁹

(1.1.6) The Role of the Depository :

The fourth point of difference, is that, while the Secretary-General of the Council of Europe as depository, is to be kept “fully informed”, under the terms of the ECHR, the other two treaties are silent on this issue. That apart, the

Secretary-General under the ECHR, can ask for additional information or explanations, “on his own responsibility and at his discretion”, as confirmed by the proceedings before the Consultative Parliamentary Assembly of the Council of Europe. This power is derived from the express provisions of Article 57 of the ECHR. The absence of a similar provision in the ICCPR, makes it difficult for the depository to exercise similar powers, in respect of a notice of derogation under Article 4(3) of the Covenant.¹³⁰

In sum, the notification of derogation by common consent, is an important requirement for the protection of individuals in a state of emergency. Any notification without adequate information, is useless and futile. The principle of effectiveness means, that prompt, adequate information is absolutely essential, if the control mechanism under the Covenant, however imperfect, is expected to achieve a minimum level of efficacy.

The result can be achieved, by interpreting the general obligation of a state party, under Articles 4(3) and 40 of the ICCPR, construed in the light of general comment 5/13, to require it to submit additional information, or a special report, whenever the Committee so requires, or on a voluntary basis, when an emergency has been so declared, outside the scheduled reporting period: for instance, as Nicaragua did, “in submitting additional information on the subject, (relating to derogation measures, during a notified emergency), without being requested to do so”, as noted by the Committee in 1983.¹³¹

The growing international consensus, for the improvement of the content and timing of the notice of derogation, and for submitting the requisite information to the Human Rights Committee, as reflected, for instance, in Siracusa Principles 45 and 46 and 71 – 76, are all aimed, at making the control mechanism more effective, to prevent abuses of human rights, in a time of emergency.

(1.1.7) *The notice of termination of derogation :*

All three treaties, provide for a notice of termination. A derogation shall be terminated in the shortest possible time necessary, to bring to an end, the public emergency. The requirement under Article 4(3) of the ICCPR, that a state should communicate “on the date” on which it terminates such derogation, was made advisedly. It stresses the importance of its effects at the earliest possible moment, namely, full restoration of all rights and freedoms protected by the Covenant, namely, those rights suspended or derogated from during a temporary period of public emergency.

(1.1.8) *The Consequences of non-compliance with the notice of derogation :*

The precise legal effect of non-compliance with a notice of derogation remains somewhat unclear. In the well-known *Landinelli Silva* case, the Human Rights

Committee points out, on the one hand, that although “the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to Article 4(3) of the Covenant”, the Committee is of the view:

“If the Respondent Government, does not furnish the required justification itself, as it is required to do, under Article 4(2) of the Optional Protocol and Article 4(3) of the Covenant, the Human Rights Committee cannot conclude, that valid reasons exist to legitimize a departure from the normal legal regime, prescribed by the Covenant.”¹³²

Further, in reviewing the report of Sri Lanka in 1984, the Committee emphasized that “as long as no notification or justification had been given, in respect of rights permitting derogation, they must be considered in force and hence, the government must account for them as in normal situations.”¹³³ In the case of Sri Lanka, no notice under Article 4(3) had been sent, despite the fact that the existence of an emergency was an admitted fact.

In any event, non-compliance with the notification requirements, amounts to a breach of obligation, which may deprive a state party, “of the defences otherwise available to it, in procedures under the Covenant”,¹³⁴ and further, such failure “will not validate measures taken, or continued after the events, which justified the public emergency and derogation has ceased to exist.”¹³⁵ The fact that the Covenant does not, as yet, provide any effective sanction for breach of such an important obligation, does not in any way diminish the imperative need for its compliance by a state of emergency.

It may be useful to refer to some precedents under the ECHR, as well as, the ICCPR and the Optional Protocol in the context of a notice of derogation. While the two cases under the European Convention do not seem to clarify sufficiently the important legal issues involved, the Human Rights Committee – despite the importance it attaches to a notice of derogation – has yet to develop a consistent jurisprudence in this area.

(2.) THE RULE OF PROPORTIONALITY:

(2.1) *The rationale of this important safeguard :*

The second condition, namely, that the rule of proportionality or necessity has to be strictly observed, is perhaps one of the most important and significant safeguards for the protection of individuals in a time of public emergency. Basically, this rule derives from the fundamental theory, that the authority of governments to curtail rights, even in a time of public crisis, is limited by the overriding provisions of Articles 29(2) and 30 of the Universal Declaration of Human Rights upon which, are based the provisions of Article 5(1) of the ICCPR. The emergency powers cannot be used to destroy the guaranteed rights altogether or to impose unwarranted limitations on their exercise. As Buergenthal succinctly puts it:

“Article 5(1) stipulated, in effect, that rights and powers conferred for one purpose may not be used for another, illegitimate purpose. Viewed in this light, Article 5(1) forms, an integral part of all the provisions of the Covenant, that authorize derogations, limitations, or restrictions. Thus, a government’s exercise of the right of derogation under Article 4 of the Covenant, for example, must be judged not only for its formal compliance with the requirements of the provision, but also by asking, in reliance on Article 5(1), what the government’s “aim” or purpose is.”¹³⁶

In other words, as Daes puts it, the principle of proportionality implies “that the extent of any limitation should be strictly proportionate to the need or the higher interest protected by the limitation.”¹³⁷ It will follow that the exercise of the individual’s rights and freedoms is the general rule and any limitation or derogation is an exception to the rule, and is permissible to the extent strictly required, for the protection of the general welfare in a democratic society.

Accordingly, every measure of derogation has to be justified by satisfying the test laid down in this rule. Thus, conclusion 5(iii) of Committee II of the Lagos conference on the rule states: “Finally, during any period of public emergency, the executive should take only such measures as are reasonably justifiable for the purpose of dealing with the situation, which exists during that period.”¹³⁸

Another theoretical basis for the rule is the principle of self-defense in international law “which requires the existence both of an imminent danger and of a relationship between that danger and the measures taken to ensure protection against it, which measures must be proportionate to the danger.”¹³⁹ This is an attempt to apply within national frontiers, in a time of public emergency, the limits of the right of self-defence as recognized, for instance, in the Caroline doctrine, (1837), which laid down two tests for a lawful resort to wartime armed intervention in self-defence:

- (a) there must, initially, be a necessity of self-defense that is instant and overwhelming, leaving no choice of means and no moment for deliberation; and
- (b) the acts done in self-defense must not be unreasonable or excessive, since the acts justified by a necessity of self-defense must be limited to that necessity and kept within it.

While the first test, laid down the minimum condition for the commencement of the exercise of the right, namely, the imminence of danger, the second test, laid down the condition regulating the actual exercise of that right, namely, the rule of proportionality – the defensive measures must be proportionate to the threat involved.¹⁴⁰ Apart from the questionable status of the Caroline doctrine, in the scheme of the UN Charter, the need for great caution in applying the doctrine of preventive self-defence, in a time of public emergency is obvious, in view of the fact that the pretext of the imminence of a threat, has often been used in recent years, in assuming or exercising exceptional powers.

(2.2) *The guidelines in the Siracusa Principles: severity, time and space :*

The Siracusa Principles have laid down certain objective and valuable guidelines relating to the scope and application of the principle of proportionality. The three crucial factors – namely, severity, duration and geographic scope – introduce the three constituents of reasonableness, time and space for testing the compliance of a particular derogation measure, with the requirement that it shall be strictly required by the exigencies of the situation. Thus, Principle 51 provides that the “severity, duration and geographic scope of any derogation measure shall be such, only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.”

To illustrate, the first constraint of severity envisages that where ordinary measures presumably, under the specific limitation clauses of the Covenant, would be adequate to deal with the public danger, the derogation measure cannot be considered strictly necessary. For example, administrative detention without trial, was to be justified both in the *Lawless* case and *Ireland v UK* cases because normal measures were not considered adequate. The second constraint – of time – requires that the derogation measures must cease to operate when the intensity of the public danger that brought it into existence, no longer subsists. The third constraint – of space – means that a nationwide derogation measure is not strictly required when the public crisis is confined to a limited area of the state.

The Siracusa Principles also laid down several other safeguards to ensure that the rule of proportionality is properly observed. The derogation measure, must be applied in an objective manner, to meet an actual or imminent, and not a latent or speculative, danger; the need for a proper assessment, and prompt and periodic review by the legislature, is another important safeguard; and effective remedies should be available, when a challenge is made, that a particular derogation measure, does not satisfy the rule of strict necessity.¹⁴¹ In this respect, the four functions of the national judiciary laid down in paragraph 5 of Section B of the Paris Standards, are particularly relevant. The judgement of the national authorities is not conclusive on this issue and is subject to such international supervision as a particular applicable treaty may provide.

(2.3) *The application of the rule in decisions under the European Convention: a critical evaluation :*

From the decisions under the European Convention, it appears that compliance with the rule of proportionality, can be tested on three grounds.

First, the application of the ordinary law and of the restrictive clauses that are permissible in normal times, must be insufficient to meet the public danger.

However, it has been held that the rule of proportionality was not *ipso facto* infringed, despite the fact that subsequently the measures of derogation were abated or brought to an end, without any corresponding abatement of the intensity of the danger having been noticed.

Second, emergency measures should, at the very least, apparently make it possible to abate or bring to an end the specific situation of danger, even though their justification is not dependent on ascertaining whether, in fact, the application of such measure achieved their objective.

Third, the rule must be deemed to have been observed if the undue severity of the measures taken, are offset by the introduction of adequate safeguards or extra-judicial guarantees, as a substitute.¹⁴²

On the question of the rule of proportionality, before the Human Rights Committee, the *travaux préparatoires* of Article 4, bring out two points: first, there was “general agreement” among the draftsmen about the importance of the concept, and there was hardly any controversy from the beginning.¹⁴³

The purpose was to ensure that the derogation must be strictly limited and was not an “escape clause”.¹⁴⁴

General comment 5/13, emphasizes that the measures under Article 4 of the Covenant, must be “exceptional, and temporary measures, may last as long as the life of the nation is threatened.” Both while reviewing state reports and examining individual communications, the Committee had made a meticulous endeavour to ensure compliance, with the rule of strict necessity; if the results are not spectacular, the reason is non-cooperation of the governments concerned, to respond to the request for adequate information.

(3.) CONSISTENCY WITH OTHER INTERNATIONAL LAW OBLIGATIONS:

The third condition, on the power to take derogatory measures, is that the measures of derogation must not be inconsistent with “other obligations under international law”. This is a legal criterion which, requires to be satisfied in the facts and circumstances of each case.

The measures of derogation must not be in conflict with the obligations of a state party, under a treaty, or any principle of customary international law. Such treaties include, *inter alia*, the Charter of the United Nations; the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; the Geneva Conventions of 1949 and the relevant Protocols thereto, (humanitarian law applicable to war and armed conflicts, particularly relevant to an emergency situation); the 1951 Convention on the Status of Refugees and the 1967 Protocol, as well as, other instruments concerning the prevention of statelessness and the right of asylum; International Convention on the Elimination of all Forms of Racial Discrimination, 1966; the International Convention on the Suppression and Punishment of the Crime of Apartheid;

the relevant International Conventions of the International Labour Organization, (ILO); the International Convention against Torture, (opened for signature on 4 February 1985), and various other international, regional and even bilateral human rights instruments.

So far as the obligations of states under customary international law are concerned, the ILA broke new ground when it laid down the test:

“The categories of human rights, now a part of customary international law, cannot be considered to be static, and new norms are emerging which already are recognized by the community of nations, either as binding principles or, as candidate rules for future legal recognition.”¹⁴⁵

In fact, the test has been developed and applied by the ILA, in the formulation of the expanded list of rights which are not derogable, even in a time of emergency, in Section C of its report.

There are two consequences of the particular principle, in the context of the validity of a derogatory measure taken by a state, in a time of public emergency. First, the obvious consequence, is that if the derogatory measure is in breach of any other obligation, under conventional or customary international law, it would necessarily amount to a breach of both Article 4 of the ICCPR, and the other international law obligations.¹⁴⁶

Second, even derogation measures strictly required under a particular emergency, may nevertheless be impermissible under Article 4(1), if they conflict with other obligations of the derogating state, under international law, for instance, when a state is a party to another treaty, which contains no derogation clause, or has a stricter derogation clause forbidding, derogation from some rights, for which derogation is permitted under Article 4, such as the wider list of non-derogable clauses, in the ACHR.¹⁴⁷

Other instances, which may be cited include, “basic human rights conventions” of the ILO, which refer to Convention numbers 11, 87, 98, 136, 141 and 151 concerning freedom of association; Convention numbers 29 and 105 concerning forced labour; and Convention numbers 100, 111 and 156 concerning equality of opportunity and treatment. Of these, only Convention number 29 concerning forced labour, creates an express exception to the applicable international standards during a national emergency. In this context, one may also refer to the rights guaranteed by common Article 3 of the 1949 Geneva Conventions, ratified by 152 states as well as, Article 6(2) and (3) of Protocol II, which provide for “indispensable judicial guarantees” for a fair trial.¹⁴⁸

There has as yet been no authoritative interpretation of the common expression of the three treaties concerned, namely, “other obligations under international law”. The question arose in the *Lawless* case, where the European Court observed, that although, neither the Commission nor, the Irish Government, had referred to this provision in the proceedings, yet, it was the function of the Court, which was to ensure, the observance by the parties, to

the Convention, (Article 19), required the Court to determine *proprio motu*, whether this obligation had been fulfilled, in a particular case. No facts came to the knowledge of the Court, to suggest that the measures taken, might have conflicted with other obligations of the Irish Government, under international law.¹⁴⁹

A moot question of some importance, may be mentioned in this context. If a state commits a “crime against humanity”, during a war or, an armed conflict, or even during a peacetime emergency, obviously the state concerned would be violating its obligations under Article 4 of the Covenant. In general comment 14(23), relating to the right to life, (Article 6), the Human Rights Committee has recently expressed its view that “the production, testing, possession, deployment and the use of nuclear weapons should be prohibited and recognized as crimes against humanity.”¹⁵⁰ The victims of radiation, of the testing of nuclear weapons, if any, it seems can lawfully claim a violation of Articles 4 and 6 of the Covenant, if the facts so warrant.

(4.) THE PRINCIPLE OF NON-DISCRIMINATION:

The fourth condition, is that the measures of derogation taken, must not involve any discrimination *solely*, on the ground of race, colour, sex, language, religion or social origin. This prohibition is based on the fundamental principle of equality and non-discrimination; a principle which is generally regarded as a basic prerequisite for the protection of human rights. Almost all national constitutions and important international human rights instruments, recognize the principle as a basic one.¹⁵¹

The principle of equality and non-discrimination, is generally enshrined in Articles 2(1), 3 and 26 of the ICCPR and 2(2) of the International Covenant on Economic, Social and Cultural Rights. This principle, is also enshrined in Article 14 of the ECHR. The grounds of discrimination prohibited, are substantially identical in the aforesaid international and regional instruments, save and except, that Article 14 of the ECHR, also forbids any discrimination, on the ground of “association with a national minority”.

Although the ILA Committee, is mainly concerned with the non-derogable aspect of the principle, as contained in Article 4(1) of the ICCPR, a brief reference as to the status of the principle of equality and non-discrimination in national and international jurisprudence, may be useful. Broadly speaking, the principle has two dimensions, in the matter of the enjoyment of human rights and fundamental freedoms.

First, there is a mandatory affirmative injunction upon every state to grant equality before the law and equal protection of the law. Second, there is a further prohibitory injunction to prevent discrimination on any of the ten grounds expressly stated. For instance, in Articles 2(1) and 26 of the ICCPR, these are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Both injunctions, are correlated but are independent human rights. They represent two sides of the

same coin, emanating from the fundamental principle that all human beings, “are born free and equal in dignity and rights”, (Article 1 of the Universal Declaration).

It is considered that the principle of “equality before the law”, embodies Dicey’s concept of the rule of law, of the British jurisprudence, while the concept of the “equal protection of the laws”, represents the American constitutional doctrine, with its wider egalitarian dimensions, including the prohibition of discrimination.¹⁵² It is well established, both in national and international jurisprudence, that the general principle of equality before the law and equal protection of the law, which embraces the principle of non-discrimination, do not prevent a legitimate selection, or classification based upon some differentia, which distinguishes persons or things left out of the group, provided that such differentia, have a reasonable nexus, to the public interest, sought to be achieved. The principle in substance, means that there should be no differential treatment among equals, but it permits affirmative action, to promote the equality of treatment.

The *travaux preparatoires* relating to the relevant provisions in both the Covenants of 1966, make it clear that the formulation of the principle, contemplates the adoption of positive measures by way of affirmative action in favour of weaker sections of the community or disadvantaged groups. The current position of the status of the principle in international law, is explained in the well-known decision of the European Commission and the European Court, in the *Belgium Linguistic* case. The rationale of the decision, has been summed up by the European Court as follows:

“On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment, is violated if the distinction has no objective and reasonable justification. The existence of such a justification, must be assessed in relation to the aim and effects of the measure, under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment, in the exercise of a right, laid down in the Convention, must not only, pursue a legitimate aim: Article 14 is likewise violated, when it is clearly established, that there is no reasonable relationship of proportionality, between the means employed, and the aim sought to be realized.”¹⁵³

We now revert to the non-derogable aspect of the right to equality and non-discrimination, in a time of emergency, as stipulated in Article 4(1), of the ICCPR. The first point to be noticed is that the measures of derogation involving discrimination, are forbidden only on six grounds, (race, colour, sex, language or social origin), and not on ten grounds as mentioned in Articles 2(1) and 26 of the ICCPR. The drafting history, makes it clear, that originally in 1950, the delegate from Lebanon, included a comprehensive non-derogable, non-discrimination clause, (covering the grounds in Article 26 of the ICCPR), but this proposal was not accepted, because some delegates felt the need for discriminatory treatment of enemy aliens, in wartime. However, in 1952, the

differences were reconciled by restricting the scope of the clause, (for example, by excluding “national origin” and also by using the word “solely”).¹⁵⁴

The acceptance of the principle of non-discrimination, as a peremptory standard, beyond the permissible limit of derogation, of the guaranteed rights and freedoms, even in a time of serious crisis, threatening the life of a nation, seems to be a recognition, that this important principle, has acquired the status of *jus cogens*. The view has been expressed, with which the writer agrees, “that the principles of equality and non-discrimination are now established parts of international customary law, and it would be difficult to deny them the character of *jus cogens*, at least, as regards consistent patterns of comprehensive violations.”¹⁵⁵

In the context of an emergency situation, it is important to notice that the word, “solely”, appears only in Article 4, of the ICCPR, but otherwise the non-derogable right to freedom from discrimination, is identical to Article 27 of the ACHR. The use of the expression, “solely”, seems to be important and appears to imply, that the only derogations prohibited under Article 4(1), are those where the grounds listed, are the sole and exclusive reasons for the discrimination.

Measures of derogation, which are directly aimed at suppressing the mischief, but indirectly or incidentally affect, say, a racial or religious or linguistic minority group, would not be prohibited.¹⁵⁶

It has also been suggested that, within the scope of a derogation clause, the measures strictly required by the situation, might involve action directed against, or specially affecting, a particular racial or religious group, for example, for the purpose of quelling a riot. Such a measure, it has been said, would not discriminate “solely” on the ground of race or religion, since it might be strictly required by the situation. Such, is the prevailing interpretation of the doctrine.¹⁵⁷

Article 14, of the ECHR, which provides for non-discrimination, though wide in scope, is not a non-derogable safeguard, covered by Article 15, of the ECHR. It has been suggested by Questiaux, that the doubt about the non-derogable character, of the principle of non-discrimination, would hopefully be resolved by case law, in a favourable sense, under the European Convention.¹⁵⁸ The author regrets, that although such an occasion did arise, in the case of *Ireland v UK*, the response of the organs under the European Convention, was far from favourable.

(5.) NON-DEROGABLE RIGHTS AND FREEDOMS:

(5.1) *The Principle of emergency-proof non-derogable rights:*

The fifth condition, circumscribing the power to take derogatory measures, requires that the legal system of every state, shall provide that the rights

recognized as non-derogable, in international law, must not come within the scope of permissible measures of derogation. In other words, the fact that such rights cannot be suspended, even in a time of public emergency, for the asserted objective of saving the life of the nation, is a measure of the primordial significance of the non-derogable rights.

(5.1.1) The status of non-derogable rights in the European Convention on Human Rights and Fundamental Freedoms; the International Covenant on Civil and Political Rights and the American Convention on Human Rights: progressive development :

Twelve such rights, are recognized in one, or the other, of the three regional or international treaties:

- (a) Right to life: ICCPR, Article 6; ECHR, Article 2; ACHR, Article 4.
- (b) Prohibition of torture: ICCPR, Article 7; ECHR, Article 3; ACHR, Article 5.
- (c) Prohibition of slavery and servitude: ICCPR, Article 8; ECHR, Article 4; ACHR, Article 6.
- (d) Prohibition of retroactive criminal laws: ICCPR, Article 15; ECHR, Article 7; ACHR, Article 9.
- (e) Right to recognition of legal personality: ICCPR, Article 16; ACHR, Article 3.
- (f) Freedom of thought, conscience and religion: ICCPR, Article 18; ACHR, Article 12.
- (g) Prohibition of imprisonment for breach of contractual obligations: ICCPR, Article 11.
- (h) Rights of the family: ACHR, Article 17.
- (i) Right to a name: ACHR, Article 18.
- (j) Rights of the child: ACHR, Article 19.
- (k) Right to a nationality: ACHR, Article 20.
- (l) Right to participate in government: ACHR, Article 23.

It will have been observed, that the list of non-derogable rights – or what Mrs Daes has described as “emergency-proof” rights – has progressively

developed from one treaty to another. Thus, the catalogue of those rights under the Covenant, is somewhat longer than the European Convention; the American Convention provides for an even longer list.¹⁵⁹

The view has been expressed, that while the reasons for prohibiting derogation from the Articles, specified in paragraph 4(2), of the ICCPR, were not expressed, presumably, some were deemed too important, to permit derogation even in an emergency, for example, the right to life. With regard to some other rights, it appeared inconceivable, that any derogation would be strictly required, even in an emergency, for example, the prohibition of imprisonment for failure to meet a contractual obligation.¹⁶⁰ Of these two, the first one, (the right to life), is too fundamental, to permit derogation and seems to be more consistent, with the intent of the draftsmen of the Convention.¹⁶¹

(5.1.2) Theoretical underpinnings of the concept of non-derogable rights :

The concept of non-derogable rights, even in a time of emergency, has its foundation in various legal theories. First, there is a consensus among jurists, that the first four fundamental rights, common to all three treaties, (right to life, prohibition from torture, prohibition of slavery or servitude and prohibition of retroactive criminal laws), are recognized, as the basic minimum rights, and hence, their non-derogable character, should now be regarded, as reflecting general principles of law, recognized by the international community. Put in a different way, these rights are recognized as having the character of peremptory norms of international law, within the meaning of Article 53, of the Vienna Convention, on the law of Treaties.¹⁶² Such rights are binding, irrespective of any conventional obligation.

Second, it was also noted, that in a time of war, and even in the case of armed conflict not of international character, Article 3, which is common to the Geneva Conventions, 1949, on the humanitarian law of war, prohibits, "at any time and in any place whatsoever", the infringement of a basic set of principles, that are deemed inalienable, such as the prohibition of torture. It has been suggested, that the rights considered as inalienable under the Geneva Conventions, should apply *a fortiori* in the event of purely internal disorders; otherwise it would be paradoxical, if the guarantees in peacetime, were weaker than the guarantees in wartime.¹⁶³

A third theory, suggested by Questiaux, is that the list of *rights of absolute inalienability*, should be extended by reference to the American Convention, which instrument, confers the most liberal guarantees.¹⁶⁴

This writer, respectfully agrees with this view and it is her understanding, that the same view, is reflected in the ILA's Paris Minimum Standards.¹⁶⁵

In view of the experience gathered, and lessons learned, from states of emergency, which occurred between 1966 and 1982, with distressing frequency, the ILA Committee is of the view, that it is not only possible, but absolutely imperative, to devise, in addition, to the rights already recognized

as non-derogable in international law, some additional minimum safeguards, for the protection of the individual, against abusive exercise of emergency power, in certain defined areas.

One can contend, that the built-in principle in Article 4, of the ICCPR, which requires identification of “other obligations under international law”, to be respected by the ratifying states, even in a state of emergency, is not confined to merely conventional obligations, arising out of existing customary international law. The expression should also cover those emerging norms, for the protection of international human rights, which form a core of essential values recognized as such, by the community of nations.¹⁶⁶

(6.) THE PARIS MINIMUM STANDARDS: THE ILA’S DYNAMIC MOSAIC OF SIXTEEN NON-DEROGABLE RIGHTS:

The ILA Committee, has been guided by the rationale of the International Court of Justice, in the *Barcelona Traction* case,¹⁶⁷ read in the light of its *Advisory Opinion on the Reservations to the Genocide Convention*.¹⁶⁸

The principles which emerge from this rationale, are that, from the various internationally recognized human rights, there are some very important basic rights. Those rights, can be identified by the fact, that breaches of such rights, are universally condemned, while the need for their protection is universally recognized. The need for such protection, is based on the most important elementary principle of morality, and has a purely humanitarian and civilizing purpose.

In view of the importance of those human rights, the principles and rules concerning their protection, may be considered as principles recognized by the community of nations, as binding upon, them even without any conventional obligation. Since all states have a common interest in their protection, they are obligations *erga omnes*, that is, binding on all states, and also having the status of peremptory norms, (*jus cogens*), in contemporary international law. Such obligations, are not a closed chapter, and confined to the protection from the crime of genocide, slavery and racial discrimination. The obligations, in this area, are of a dynamic and developing character. These considerations, are some of the ones, which have been followed by the ILA Committee, in its formulation of non-derogable rights in Section C of its Paris report.¹⁶⁹

SECTION C: THE SOUTH AFRICAN SCENARIO: THE APARTHEID ERA:

It is both common and respectable, for modern states, even democratic ones, to adopt permanent statutes, which empower the government of the day to take swift and effective action in times of crisis or emergency. While the situations with which such legislation deals, often include natural disasters, (such as earthquakes), and serious economic depression, my present concern is with those emergencies, that threaten the safety of the state or the maintenance of peace and order. The extreme danger that insurrectionary groups may pose to the stability and welfare of societies, is tragically illustrated by the destruction of the Weimar Republic by the Nazi movement. Such historical precedents, remind us of the importance of giving governments the means of protecting the institutions of state, and the people against insurrection, riot, disorder and revolution.

There is also the danger, much more common in our times, that societies may be ruined not by “grave occasions”, which threaten peace or stability, but by their manner of responding to them. This is particularly the case when the government makes the emergency permanent, no doubt a contradiction in terms, but one, which is regularly encountered in practice. Though democracies, may well be undermined by riot or revolution, they are just as susceptible to destruction by being converted into permanent dictatorships, on the pretext of the need to cope with a continuing crisis or emergency. David Bonner, in his recent work on emergency powers, draws attention to the danger of crisis government, leading to the installation of an authoritarian regime and shows that, while this is typical of the Latin American experience, there are instances of it occurring in Europe as well.¹⁷⁰

For this very reason, an expert on emergency government has said that “it is temporary and self-destructive” and that “when the crisis goes, it goes”.¹⁷¹ When the citizens of a country are “made to live as if in a perpetual state of emergency”¹⁷², we can be sure that the government is caught up in a legitimacy crisis, on account of such factors as the denial of political rights, discrimination and repressive policies. A legitimacy crisis is not a true emergency but rather a fundamental malaise requiring political responses from those in power.

Emergency rule by definition, qualifies or removes the basic freedoms of an open society; and when a government seeks to avoid thorough-going reform by instituting crisis government, the destruction of democracy is assured. In countries like South Africa, where the roots of democracy were shallow, and its realisation, only partial, the regular use of crisis powers turned political development decisively in the direction of authoritarianism and thereby, undermined the prospects of a democratic resolution conflict.

The Black people of South Africa, for the most part, encountered the security system as a brutal and repressive institution designed to frustrate the attainment of their legitimate social and political aspirations. The ruling Whites perceived same system to be their country's salvation from evil forces bent upon the destruction and take-over of the society. These immediate perceptions, were being overshadowed, slowly, but steadily, by the realisation that the "law and order" machine had generated, and was setting at large, forces that could engulf and destroy the personal security and aspirations of the members of all groups, within the society, whether Black or White, ruling or dominated, majority or minority. The security system, in brief, had been transformed into an institution destined to serve the interests of *none* of the social segments of our society, and probably to undermine them all.

As a first task, this Section, therefore, seeks to explain the institution of "government under law", that had been so disastrously destroyed in South Africa. The story that unfolds, is of the displacement of constitutionalism by ministerial fiat, as the principal mode of government in South Africa.

(1.) THE PUBLIC SAFETY ACT OF 1953:¹⁷³

This law, which applied throughout the Republic and South West Africa,¹⁷⁴ empowered the State President, to declare, by proclamation, in the *Gazette*, that a state of emergency existed within the Republic or South West Africa, (Namibia), or within any area thereof.¹⁷⁵ He may have issued such a proclamation, if in his opinion, there was, on account of action or threatened action, within the Republic of South Africa, (or Namibia), a serious threat to the safety of the public or the maintenance of public order, which could not be brought under control, by the ordinary law of the land.¹⁷⁶

The power to declare a state of emergency, and to withdraw a proclamation establishing it, was entirely within the discretion of the State President, and was not subject to legal challenge in the absence of proof of bad faith.¹⁷⁷ It is a mind-boggling thought, that the courts were therefore precluded from questioning the State President's belief that "ordinary law", (including extreme measures for banning, indefinite detention and the like), were "inadequate" to contain the unrest that led to the 1985 and 1986 declarations of an emergency. An emergency could be made retroactive for up to four days prior to the proclamation¹⁷⁸ but this did not nullify the "*nullum crimen sine lege*" maxim and an activity, which was not a crime on account of the retroactive operation of the emergency.¹⁷⁹ The proclamation of a state of emergency, could not remain in force for longer than twelve months, but it may be followed by another or other proclamations of emergency.¹⁸⁰

The State President was authorised to proclaim regulations for any area in which a state of emergency had been declared, and for as long as the existence of the emergency remained in force.¹⁸¹ The enabling provision declared, that he may make such regulations as appear to him to be necessary or expedient for maintaining public safety or public order, and

terminating the emergency or dealing with circumstances pertaining to the emergency.¹⁸²

Except for certain express limitations on this power, prescribed in the Act,¹⁸³ the State President's power to promulgate emergency regulations, was expressed in the broadest terms, though it arguably goes too far to say, as the court did in *R v Maphumulo*¹⁸⁴, that his authority was equal, to the legislative power of Parliament.

This statement, has since been repudiated, by the Transvaal Court, in *Momoniat & Naidoo v Minister of Law and Order*¹⁸⁵, Goldstone J, pointed out, that it was clear that, although legislation passed by Parliament, otherwise than bona fide, was not susceptible to a declaration of invalidity, this did not apply to subordinate legislation, even if made by the State President, under the ample powers conferred by the Act. In two judgements¹⁸⁶ of the Natal Court, certain provisions of the emergency regulations, relating to the making of subversive statements, and the seizure of newspapers, were struck down as invalid, thereby laying to rest, the notion that the State President was on par with Parliament, when he legislated under the powers conferred upon him, by the Public Safety Act.

On what grounds may the validity of regulations made by the State President, be impugned before the courts? In *Momoniat & Naidoo*, bad faith was postulated, as a basis for a declaration of invalidity, but since the notion of legislating in bad faith, (as opposed to giving a decision in bad faith), was an awkward one, the Court adopted, as an alternative to mala fides, the proposition that subordinate legislation was invalid, if the legislature could, "never have contemplated, that such a measure, be countenanced".¹⁸⁷

The test for determining what the legislature could not have contemplated was unrelated, the Court said, to the subjective state of mind of the authority in question, but was an objective one, to be determined according to the facts. This approach was in reality, the test of unreasonableness, but, in view of the wide powers to legislate, conferred upon the State President, it had to be unreasonableness in so gross a form that it was beyond the intended powers of the subordinate legislator.

In the first two Natal cases, referred to above, *Metal & Allied Workers Union v State President of the Republic of South Africa*, Didcott J, acted on the basis that, subordinate legislation which was vague and uncertain, (aspects of the definition of subversive statements), or which goes beyond the objectives, for which the State President may legislate, (the ban on seeing a legal adviser without permission), was void and unenforceable. In either case, the ground of invalidity was the ultra vires doctrine in terms of which, subordinate legislation is invalid, if it was too unclear to be understood or if it strayed beyond the objectives specified in the enabling legislation. If a regulation was ultra vires, it was not saved even by the ouster clause,¹⁸⁸ introduced in 1986, and designed to prevent legal challenges to regulations issued by the State President or the Minister of Law and Order.

Subordinate legislation, could be made subject to a further limitation, in the form of a presumption that Parliament was deemed, in the absence of a contrary indication, to have preserved established constitutional principles and the fundamental values of the common law. The effect of this limitation, would be create a kind of implied bill of rights,¹⁸⁹ enforceable against subordinate law-making authority; but the Court in *Momoniat & Naidoo*, was not prepared to go that far, since it held, that the State President could deprive detainees of a *prior* right to a hearing, (*audi alteram partem*), even though, the legislation did not expressly authorise the withdrawal of this basic right.

The Court did express the view, that had the State President abolished the right to a hearing after a confirmation of a detention order, the regulation so providing, would be *ultra vires*, as a grossly unreasonable exercise of power that Parliament could not have contemplated.¹⁹⁰ It is arguable, however, that the right to a hearing *prior* to being detained, is fundamental to our legal and constitutional tradition, that it should have given way only, in the face of a clear and irresistible statutory intention to abolish it. The following passage from H W R Wade's book on administrative law, is pertinent in this context:

“One of the law's notable achievements, has been the development of the principles of natural justice, one of which is the right to be given a fair hearing *before being penalised in any way*. These principles are similarly based upon implied statutory conditions: it is assumed that Parliament, when conferring power, intends that power, to be used fairly and with due consideration of rights and interests adversely affected. In effect, Parliament legislates against a background of judge-made rules of interpretation, which place the necessary restrictions on governmental powers, so as to ensure that they are exercised not arbitrarily, but fairly and properly.”¹⁹¹ (Emphasis added).

This passage shows that the courts could go further than the judges in *Momoniat & Naidoo*, subject only to the condition that to afford a hearing, would not frustrate the exercise of the admitted power to detain persons without trial. It seems clear that recognition of the right of a detainee to make written representations, (as distinct from an oral hearing), while involving the authorities in more work and inconvenience, would not have caused a breakdown in the administration of the institution of preventive detention. In *Omar v The Minister of Law and Order*¹⁹², Friedman J, brusquely, (and correctly, it is submitted), dismissed the inconvenience argument, by saying that if fourteen days was too short to consider representations from detainees, the State President should provide for a longer period.

Didcott J, in the *Metal & Allied Workers Union* case, came close to basing the Court's decision on the invalidity of the regulation excluding the right to see a lawyer without permission, on the fundamental nature of that right in our legal system. Unfortunately, the finding was not explicit, on the acceptance of the notion of an implied bill, and the regulation dealing with access to lawyers foundered on the rock of overbreadth.

The possible grounds of a declaration of invalidity reviewed, above all,

appeared to be expressions of the ultra vires principle. A subordinate law-giver, such as the State President, may have been said to act ultra vires, when he made regulations which were vague or meaningless, grossly unreasonably, contrary to the fundamental principles of the legal system or executed in bad faith. There was persuasive authority for the view, that all the traditional grounds of review, were to be subsumed under ultra vires;¹⁹³ and an important practical consequence of so doing, was that the ouster clause, contained in the Public Safety Act¹⁹⁴, would not protect anything, that was to found to be beyond the powers, conferred upon the State President.

If a declaration of emergency, is made retroactive, emergency regulations may likewise, be made retroactive, to the date from which the emergency has been declared to exist;¹⁹⁵ and although regulations are normally applicable only in declared emergency areas, the State President could specifically declare, that they were to be applicable outside such areas, if he deemed this necessary, for dealing with the state of emergency.¹⁹⁶ Without prejudice to the generality of the power, to make regulations, conferred on the State President, the Act specifically declared, that he may delegate authority to make orders, rules and by-laws,¹⁹⁷ provide for the imposition of penalties for breach of regulations, or directions issued thereunder,¹⁹⁸ and make different regulations for different areas, or classes of persons.¹⁹⁹

In regard to delegation, the courts, had held that the power to delegate, may not be sub-delegated except, to specified persons and the regulation authorising the Commissioner of Police, to delegate the authority to make orders to any person authorised by him, was declared invalid.²⁰⁰ The State President, immediately thereafter, overcame these judgements of the courts, by the retroactive promulgation of an amended regulation, which provided for delegation to commissioned officers of the security forces.²⁰¹ It was possible that the specification of delegates in the amending regulation, was still not specific enough.

Regulations, may further, make provision for the summary arrest and detention of persons,²⁰² and for such persons to be held anywhere in the Republic, whether within or without an emergency area.²⁰³ The extreme power of the State President, to qualify or nullify the basic rights of citizens, under the emergency rule, shines through the regulations promulgated in all three emergencies declared, since the enactment of the Public Safety Act in 1953. The 1960 emergency regulations, have been extensively surveyed in the literature,²⁰⁴ and will not be discussed here.

The regulations promulgated under the emergency, declared on 21 July 1985,²⁰⁵ provided for detention without trial and access, conferred legal immunity on officials, (including the police and defence forces), for bona fide actions taken during the emergency, authorised extended powers of search and seizure, made provision for censorship over emergency reports, created a broad crime of threatening to inflict harm, hurt or loss upon any person and authorised the use of force as an officer, "deemed necessary", to remove or otherwise act against persons, who had failed to respond to an order to proceed, to any place, or to desist from specified conduct.

Rules made in terms of delegated authority, granted by the regulations, provided *inter alia*, for the treatment of detainees, curfews in prescribed areas, control of movement into areas and the prevention of educational boycotts. When the third emergency was declared on 12 June 1986, the regulations²⁰⁶ promulgated by the State President, sought to vest the state and its agents with totally lawless power. The 1985 emergency regulations, were substantially re-enacted, but they were beefed up, by a mind-blowing criminal prohibition on the making of “subversive statements”, by a prohibition on the making, without permission of visual or sound reproductions of unrest activities, or security force actions to contain them, and by conferring, on the Minister of Law and Order, the arbitrary power to seize publications, and to abolish the right to publish.

The main purpose of the Public Safety Amendment Act of 1986, was to introduce a “no hassle” emergency power. As the memorandum accompanying the preceding bill frankly admitted, the declaration of a state of emergency by the State President “has far-reaching consequences for the Republic”. The amending Act, aimed to eliminate, or to mitigate, the impact of those consequences, which had hitherto constituted the most effective restraint on the use of emergency powers, by authorising the Minister of Law and Order, (who replaced the Minister of Justice, as the responsible Minister under the Act), to declare areas to be unrest areas, and to apply, in those areas, such regulations as he deemed necessary, to control the situation.²⁰⁷ The declaration was effective for three months, (unless withdrawn at any prior time by the Minister), but may be renewed with the consent of the State President.

The Minister was granted a power to make regulations for unrest areas, which was broadly equivalent to the State President’s legislative authority under the Act. Both the declaration, of an area as an unrest area, and the framing of regulations for such an area, were stated to be within the subjective discretion of the Minister, the exercise of his powers, being made dependent, in the first instance, on his opinion, and in the second, on what appeared to him, to be necessary or expedient. In an attempt to limit further the jurisdiction of the courts, over emergencies, a provision of the Act declared that the courts were to have no jurisdiction over declarations of emergencies or states of unrest, or over regulations made pursuant to them.

It appears to have been the objective of the 1986 amendments, to make the State President an absolute despot, in respect of national emergencies and the Minister of Law and Order, lower-ranking, but an equally absolute despot, over micro-emergencies. Although the courts, as shown earlier, had never demonstrated any eagerness, to question the proclamation of the emergency itself, and were equally unlikely to pronounce on the decision to proclaim an unrest area, the ouster clause, did not appear to take the matter any further, and the courts continued under the macro-emergencies, to test regulations for compliance, with the ultra vires doctrine, either in its pure form, or in the form of its prohibition on vague or grossly unreasonable, subordinate legislation.

As the Eastern Cape Court said in *United Democratic Front v The State President*,²⁰⁸ its jurisdiction to decide whether a regulation had been lawfully made in terms of the Act, was not extinguished by the ouster clause. Of course, the extent of the court involvement, depended on judicial attitudes, and the outcome of the conflict, between an emphasis on power, as represented by the Natal full bench, in *Kerchoff v Minister of Law and Order*,²⁰⁹ and an emphasis on the limitation of power, as expressed by the full bench in *Tsenoli v State President of the Republic of South Africa*,²¹⁰ was crucial to the future role of the courts, in emergency government, whether of the macro or micro type.

(2.)THE BANNING OF MEETINGS:

The most extensive controls in South Africa over meetings, processions and assemblies, were in the Internal Security Act of 1982, which authorised both the Minister and a magistrate to impose bans. In the case of ministerial bans, the Act drove the proverbial coach and horses, through the rule of law. The grounds on which the Minister could act, were nebulously stated-he must deem it necessary or expedient to act in the interests of state security, the maintenance of public peace or order, or the prevention of inter-group hostility. The wording of the Act seemed designed to ensure, that the courts had no power, to review the grounds upon which a ban was imposed,²¹¹ and the procedure by which the order was made, was simply one of ministerial fiat.

Not a single principle or procedure, of the rule of law, was left intact by this provision for ministerial banning. This was all the more alarming, because there was no limit on the scope of the Minister's power, and he was virtually authorised to abolish the right of assembly on public and private premises in South Africa. Since the Minister's power, was specifically declared to rest upon *his opinion*, his decision to act, was for practical purposes, unchallengeable. A person who was served with a notice prohibiting him from attending public gatherings, was thereupon effectively silenced, since no person could, except with the consent of the Minister, or for purposes of proceedings in a court of law, reproduce or make known, anything he had said or written.²¹²

The provisions of the regulations concerning meetings and gatherings empowered a magistrate or commissioned officer,²¹³ to prohibit either generally, or specifically, gatherings or processions, of more than a number of persons specified, by the magistrate or officer, in any area.²¹⁴

A "public gathering" was defined in the Act as, "any gathering, concourse or procession in, through or along any public place, of twelve or more persons having a common purpose, whether such purpose be lawful or unlawful".²¹⁵ Public place was defined as, "any street, road, passage, square, park or recreation ground, or any open space", to which all members of the public habitually or by right, have access."²¹⁶

From the wording of the provision, it is plain that Parliament conferred upon the Minister, an absolute administrative discretion, to impose a prohibition on meetings. If the Riotous Assemblies Act and the Suppression of Communist Act are read together, it becomes plain that the Minister was unrestricted in his power to control meetings of all kinds. He had exercised this power on several occasions, for example, to ban, for several years, gatherings on the Grand Parade in Cape Town and on the City Hall steps in Johannesburg.²¹⁷ The power, could have been exercised, at any time without a prior declaration of an emergency.

Certain categories of gatherings or processions, were excluded from that power, for example, those connected with religion, instruction imparted under any law, funerals, statutory bodies, entertainment and weddings.²¹⁸ It was offence to be present, or take part in a prohibited gathering, unless the accused was not voluntarily present, or did not know, (or could not reasonably have known), that the gathering was prohibited.²¹⁹

The magistrate or commissioned officer, if of the opinion, that the presence or conduct of any person or persons was dangerous, may order such person, (or persons), to proceed to some other place, or to desist from that conduct.²²⁰ If the order was not obeyed forthwith, force may be used to implement the order, even if death resulted therefrom.²²¹ It was clearly possible, for the officers concerned, to disperse meetings or processions under that power. The condition upon which the exercise of the power depended, was the officer's *opinion* that the danger existed, not the objective state of affairs.

It is clear that, at the magisterial level, the banning power was more circumscribed. The magistrate could only act, if he had reason to apprehend, that the public, would be endangered by the meeting or assembly, in question. In this instance, the basis for the prohibition was specified with reasonable clarity. However, while some courts had been prepared to review the magistrate's reasons for acting, others had decided that a bona fide decision by the magistrate, made without ulterior purpose, was not subject to challenge in the courts.

If this second approach was adopted by the Appellate Division, rule-of-law controls would in practice fall away, even in respect of magisterial bans. While magistrates could ban, only in their own districts, this absence of external control was disturbing, in view of the frequency of such bans, in all the metropolitan areas of the Republic. Unfortunately, magistrates did not enjoy an independent status and were civil servants, subject to instructions from the Government.

(3.) THE DETENTION OF PERSONS AND THE BANNING OF INDIVIDUALS:

Under all three emergencies, the security forces had been given the power to detain without trial. During each emergency, the authorities employed this

power to detain on a mass scale. Over eleven thousand persons were detained during the emergency in 1960,²²² eight thousand during the 1985 emergency²²³ and a number believed to be in the region of eight thousand for the first two months of the 1986 emergency.²²⁴

Massive detentions, were facilitated by the arbitrary nature of the detention power. Regulation 3,²²⁵ provided for an initial detention of fourteen days, at the instance of any member of the police or defence forces and thereafter, by written notice, signed by the Minister of Law and Order, for a further detention, for as long as he determined. Following a decision by the courts, that the corresponding Regulation, of the 1985 emergency, required the Minister to afford the detainee, a hearing before extending the detention,²²⁶ this “obstacle”, was swiftly removed by retrospective amendment, and the 1986 Regulation, also put the matter beyond doubt, by declaring that the Minister, may extend the detention, without giving notice to the detainee, and without affording a hearing.

According to *Momoniat & Naidoo v Minister of Law and Order*²²⁷, the detainee was entitled to be heard, *after* the extension of his detention, and any regulation purporting to deny, or frustrate the exercise of that right, was invalid. The Court, in *Cameron Bill v Minister of Law and Order*, an unreported judgement, followed that ruling, and amplified it, by declaring that the detainee, for the purposes of making written representations to the Minister, was entitled to consult a lawyer, to demand an outline, of the reasons for his detention and to adequate time, to prepare his submissions.

To the extent that the Regulation empowered the authorities, to refuse access to a lawyer, for the purposes of preparing written representations, was ultra vires the authority of the State President, and therefore invalid.²²⁸ The recognition, of the right to make submissions, after the Minister had decided to extend a detention, was no doubt, better than having no right at all; but as suggested earlier, there were persuasive arguments for the proposition, that the State President did not have the power, to abolish the prior right to a hearing, and this proposition, should have prevailed before the Appellate Division.

The language of the Regulation, conferring the power to arrest and detain, and authorising the Minister to extend a detention, was subjectively phrased and that meant, according to the dogma at the time, that the courts did not generally investigate, the merits of the decision to arrest and detain or, to extend detention. Discretion that may have been exercised subjectively, could not be challenged on the basis that it was unsupported by relevant facts; it could only be challenged on the ground, that it was influenced by bad faith, improper motives or legally irrelevant considerations.

In *Krish Naidoo v Minister of Law and Order*, an unreported judgement, Jennett J, upheld a detention order, which he conceded, was based on facts that were open to doubt, because, “it has been established that Petzer, (the police officer), held the requisite opinion, whether rightly or wrongly”. A detainee, who sought to have a detention order, set aside by the courts, on

the ground that there was no justification for it, therefore, had the formidable task, and perhaps hopeless mission, especially where the detaining authority, provided plausible reasons for linking the detainee with unrest or disorder, and had not disclosed an improper motive, or purpose in effecting the arrest or detention.

Where detainees had managed to secure their release by court order, the arresting official, had generally acted, so as to proclaim a reliance on improper or irrelevant considerations. This was true, of the arrest and detention of a nun, after she had objected to a police assault, upon a young man in a Black township, and of the detention of a journalist, whose professional occupation, appeared to be the sole reason, for the decision to take him into custody.²²⁹ The regime, provided for detainees, by Regulation 3, read with the rules for the treatment of detainees, promulgated by the Minister of Justice,²³⁰ was one of exceptional severity. The detention was incommunicado, and visits could only take place with official permission.²³¹ There was a specific right to interrogate detainees,²³² and this probably explains why there had been so many allegations of ill-treatment and torture, since the promulgation of the 1985 and 1986 emergencies.

Where assault, torture or other forms of maltreatment were alleged, the court could grant a restraining order, on the authorities, and did grant a provisional order, against the security forces in the Eastern Cape, in October 1985, following the startling revelations, made by a young district surgeon, Dr Wendy Orr, who placed her observations, on the condition of detainees examined by her, before the court, on affidavit. Dr Orr, was shortly thereafter, prevented from seeing detainees and similar applications to court, could founder, because there were few Wendy Orrs, in strategic positions in the Government service.

Several such applications succeeded, however, before the Natal Court. The rules governing detention, also provided, for strict control over communications, with outside persons by letter,²³³ and made detainees guilty of an offence if *inter alia*, they sang, whistled, or made unnecessary noise, caused discontent or agitation among fellow detainees, or were insolent or disrespectful towards prison employees, official visitors or the police.²³⁴ These prohibitions, made it surprising, that the fact of the detainee's existence, had not been declared criminal and punishable.

Finally, it was an offence to disclose the names or identities of detained persons, without the consent of the Minister or a person authorised by him.²³⁵ If the authorities so decided, detentions could be kept secret, until the names of detainees were tabled in Parliament, in terms of the Act.²³⁶ The prohibition on disclosing the identities of detainees, introduced into South Africa, the phenomenon of "los desaparecidos", surely one of the marks of a police state. The way was then paved, for the permanent destruction of personal freedom.

The process for banning individuals, violated the legality principle, in the same way, as the detention regulations, and ministerial proscriptions of organisations. In brief, the criteria for banning an individual, were broad and

unspecific, (activities which endangered the security of the state, or the maintenance of law and order), the possibility of court intervention, was negligible, (because of the judicial attitude, to subjective discretion clauses), and the procedure for reviewing banning orders, was ineffective, because the Chief Justice, to whom the matter was referred, when a review board disagreed with the Minister's decision, had strictly circumscribed power to interfere.

The case of *Nkondo & Gumede v Minister of Law and Order*²³⁷, had introduced an important due process element into the banning procedure since, in terms of that decision, meaningful reasons had to be given for banning an individual. Past banning orders, which were not accompanied by a proper statement of reasons, appeared to be invalid. Nevertheless, the due process violations remained disturbing, despite the improvement just mentioned, and the possibility of a court reviewing the grounds for a banning order, was remote.

(4.)EMERGENCY CRIMES:

The emergency regulations created many offences, of which only a few, will be analysed in this section. It was offence to print, distribute or convey, to any other person, any subversive statement, whether such statement was verbal or written.²³⁸ A subversive statement, was defined as one, which was calculated, or was likely to have the effect, of subverting the authority of the Government, of inciting any person, (or persons), to resist or oppose the Government, a Minister, or any official, in connection, with measures concerned with the emergency, public safety, or the application of the law, of creating hostility between different sections of the Republic, or of creating panic, alarm or fear among the public, or a section of the public.²³⁹

Though it was a defence, to show that the statement was, "a true and complete narrative", the prohibition on subversive statements, clearly made punishable, almost any critical comment, on the Government, during the emergency. It was enough, that the statement was likely to have the effect of causing any other person, to *oppose* an official of the Government.

A person who verbally, or in writing, and directly or indirectly, threatened to inflict harm, hurt or loss, upon any other person or his property, was guilty of an offence.²⁴⁰ The regulation, did not prescribe the requirement, that the threat had to be wrongful, or that it had to relate to the emergency, or to public safety or, order. As it stood, almost any threat to any other person, even if lawfully made, was a criminal offence.²⁴¹

The Court could have imported the requirement of wrongfulness, but even then, the range of prohibitions was incredibly wide. However, if the element of wrongfulness was intended, it would have been expressly prescribed. It seems likely therefore, that the prohibition, was as broad, as it appeared on its face.

A person who did any act, (including the uttering of words or sounds), which was calculated, or likely to have the effect of preventing, interfering with, or disturbing any lawful gathering or procession, was guilty of an offence.²⁴² Any person, who, by words or conduct, indicated approval of such an act, was also guilty of an offence. These prohibitions, were wide enough to cover, hecklers at a meeting, to cite only one possible example. A person who contravened these provisions, and who could not prove, that he was not acting in prosecution, of a common purpose at the time, was found guilty of any offence with which he was charged, arising out of any act, done at a lawful gathering or procession, whereby physical injury was inflicted on any person.²⁴³

The purpose of this provision, was apparently to make a person who, in concert with others, disturbed or interfered with a meeting, criminally responsible for any injury caused at the meeting, even if no such charge could be sustained at common law. Thus, if two persons decided to heckle a speaker, and in an ensuing scuffle, someone was seriously injured, they may be charged with attempted murder, (or assault with intent), and if so charged, was found guilty even if, they were not responsible for the injury.²⁴⁴ The provision carried the *versari* principle to incredible lengths. The section of the Regulations dealing with offences,²⁴⁵ created a battery of crimes which will not be analysed here. It is sufficient to state, that one or more of these offences, were excessively broad, for example the provision which made it criminal, to threaten, that a person who took up, or failed to take up a certain attitude, would suffer disadvantage or inconvenience.²⁴⁶

(5.) THE SUPPRESSION OF PUBLICATIONS AND ORGANIZATIONS:

A great number of the security-law provisions, that have featured in the discussion so far, affected freedom of expression and information. Some of those provisions, such as banning and detention, tended to restrict the right of expression directly. Even to the extent that it remained possible, for a person in detention or under a banning order, to continue to write or speak freely, the exercise of that right was inhibited or "chilled" by the imposition of a detention or banning order.

If, as frequently happens, the victim of a detention or banning order was a journalist, the consequences for free speech were much more serious. There were other provisions of the security laws, which had a direct effect on speech and information. Examples were, the banning of publications and the silencing clause that came into operation when an individual's name was entered on the consolidated list. In addition, many of the security crimes, directly curtailed the freedom of speech. The multifarious restrictions on speech and information, both direct and indirect, that flowed from the security provisions, did not come near to exhausting the restraints on these rights, imposed by the security system.

The notion of a free press in South Africa, had strong mythical elements about

it. The power to ban newspapers existed and had been widely exercised. Newspapers, like everyone else, had to avoid contravention of the excessively wide security crimes, or the publication of speeches and writings by listed persons, to cite but two examples, of restraints on the press. In addition to all the other restrictions, there was a security-law restraint on the registration of newspapers, which was not widely known and understood within the country, let alone by persons abroad.

This restraint, embodied in a provision of the Internal Security Act of 1982,²⁴⁷ enabled the Minister of Law and Order, to make the registration of a newspaper conditional upon the deposit, with the Minister of Home Affairs, of an amount of up to R40 000, as a kind of guarantee, of good behaviour. If the newspaper, was thereafter banned, under the Act,²⁴⁸ the deposited amount would be forfeited, unless the Minister of Law and Order directed otherwise. It was illegal to print or publish a newspaper in South Africa, unless that newspaper had been registered.²⁴⁹ The requirement of registration applied to all newspapers, published at intervals of not exceeding one month, which consisted substantially of political or other news, or of articles related thereto, or to other topics, prevalent at the time.²⁵⁰

Until the security-law intrusion, into the registration process, freedom to establish newspapers, was guaranteed by an obligation imposed on the Minister, to register a newspaper, if the applicant complied with the prescribed formalities, and did not choose, for the newspaper being registered under a name that was the same as an existing one, or so similar, as to be calculated to deceive.²⁵¹ Registration was, therefore mandatory, and the freedom to publish was guaranteed by the Act.

Security legislation had limited this freedom drastically.²⁵² The Internal Security Act, of 1982, declared that no newspaper, shall be registered, unless twenty-one days had elapsed, since the submission of the application for registration, and unless the proprietor of the newspaper, deposited with the Minister of Home Affairs, a deposit of not exceeding R40 000, which the Minister of Law and Order, could require from the proprietor, within the prescribed period of twenty-one days.²⁵³ The latter Minister, could insist on such a deposit, "whenever he is not satisfied" that a ban on the newspaper, "will not at any time become necessary" under the banning provision²⁵⁴ of the Act.²⁵⁵ In less circuitous language, the Minister could demand a deposit, if he believed that it might be necessary to ban the newspaper at some future date. If the Minister did not ban the newspaper, the deposited amount, (together with any interest not paid to the proprietor),²⁵⁶ was forfeited to the State, unless the Minister decided that a portion of the money should be refunded.²⁵⁷

Newspapers already in existence, when the deposit requirement was introduced, could not be subjected to that Damoclean form of press control, unless their registration lapsed. The Internal Security Act, of 1982,²⁵⁸ declared that, unless the Minister of Home Affairs, with the concurrence of the Minister of Law and Order, decided otherwise, the registration of a newspaper lapsed, if printing or publishing, was not commenced within one month of registration, or was suspended, at any time for a period exceeding a month,²⁵⁹ or if the

newspaper changed hands. If any of those events occurred, the right of the newspaper to continue publishing, could be made subject to a deposit of up to R40 000.

If the range of persons affected by the crime is stunning, the scope of the definition of a subversive statement can only be described as stupefying. The State President, was authorized by the Public Safety Act, to prohibit, by notice in the *Gazette*, and in a newspaper circulating in the area concerned, the publication of any "documentary information", which in his opinion, was calculated to engender feelings of hostility, between the European inhabitants of the Republic, and any other section of the public.²⁶⁰ "Documentary information" meant any "book, foreign magazine, pamphlet, manifesto, foreign newspaper, hand-bill or poster, or any article or advertisement, cartoon, picture or drawing in any periodical or newspaper".²⁶¹

Severe penalties, in the form of a fine not exceeding R20 000, or imprisonment not exceeding ten years, (without the option of a fine, if so decided by the court), were provided for persons convicted of committing the offence just described.²⁶² It is no exaggeration to say, that press freedom, in relation to the security situation, had been brought to an abrupt end by these measures, in that, they had made it impossible, for the media to present independent information and comment about unrest and disorder in the country, and about the activities of the security forces.

Local newspapers and magazines, were exempt from a total ban, but the State President was empowered to ban articles, "advertisements and cartoons", and pictures or drawings appearing in them. Unlike the "racial hostility" clause of the Bantu Administration Act, there was no requirement that the writer must have intended to engender racial hostility. It was sufficient to show, that the likely effect of the publication was to create feelings of hostility between the groups mentioned. The Court held in *Du Plessis v Minister of Justice*²⁶³, that the purpose of the provision was to prevent the creation of race hatred between the European section of the population, and any of the sections of the non-European population.

When the State President had prohibited a publication, the Minister was required to send to the editor, or to any other person responsible for the issue of the publication, a copy of the notice of prohibition.²⁶⁴ Any person affected by the prohibition could, within fourteen days after the first publication of the notice, apply to the Supreme Court for an order setting the prohibition aside.²⁶⁵

The applicant for such an order, was required to show that the "documentary information" was not of such a nature, that feelings of hostility would be engendered by its publication. In *Du Plessis v Minister of Justice*,²⁶⁶ the Court set aside a prohibition, because it was satisfied that the publication in question, was an attack upon the Government and its policies, not upon any particular section of the inhabitants. This judgement illustrated the value of the judicial control which had been retained for prohibitions on publications under the Act, but dropped in respect of bans on publications, under the Suppression of Communism Act.²⁶⁷

The power to ban under the latter Act, was wider because it could be exercised in respect of any publication and because there was no judicial control. The fact that there was unrestricted power to ban under the Suppression of Communism Act, considerably diminished the significance of judicial control over prohibitions under the Riotous Assemblies Act.

Moreover, the Minister was granted the further power, without giving notice or affording a hearing, to ban publications, including future editions of periodical publications, such as newspapers, if of the opinion that the publication in question contained any matter of a subversive nature.²⁶⁸ After an order of this kind had been issued, it was an offence to make, write, import, print, publish, distribute or possess the publication, or to be in any way involved in such activities. In addition, the Minister, (or a commissioned officer), could order the seizure, forfeiture and disposal of publications affected by the banning order. In a nutshell, the Minister was granted the power, (to be exercised according to his subjective discretion), to shut down newspapers and, indeed, the entire press in the Republic.

The Section of the Act, dealing with publications, also authorized the Minister of Justice, to prohibit a person, by notice sent to him, from being within an area specified in the notice, and for a period specified therein, if the Minister was satisfied, that the person concerned, was promoting feelings of hostility, between the European inhabitants of the Republic, and any other section of the inhabitants.²⁶⁹ The wording of the provision, showed that judicial control was excluded, since the Minister was authorized to act, if he had formed the requisite opinion.

It was, in fact, the corresponding provision of the old Act,²⁷⁰ which led to the Appellate Division to declare in *Sachs v Minister of Justice*,²⁷¹ that, "Parliament may make any encroachment it chooses upon the life, liberty or property of an individual subject to its sway". Since the Act declared,²⁷² that a person affected by a prohibition, could ask for reasons *after* the notice had been served on him, the *audi alteram partem* rule was excluded by implication.²⁷³ The Minister, could also exercise the power to exclude persons, from specified areas under the Suppression of Communism Act,²⁷⁴ in terms of which, he was also not accountable to any other person or body.

A person debarred from specified areas under the Act, committed an offence if he failed to comply with the Minister's notice, and could be removed from the prohibited area by the police.²⁷⁵ The Minister could authorize the payment of expenses, and a subsistence allowance to a person whom he debarred from any area.²⁷⁶ This discretionary power, to the Minister, to provide financial assistance to persons debarred from entering areas, was an indication of the possible drastic consequences of an order. It is clear that these prohibitions, were the stuff of the siege society and the police state.

Apart from having the power to suppress publications, the Minister of Justice was also empowered, to investigate any organization which he suspected "is in any way connected with any matter relating to the state of the emergency" by requiring the examination of any person by a magistrate.²⁷⁷ He may further,

by notice in the *Gazette*, direct any association, corporate or unincorporated, to discontinue its activities.²⁷⁸ Failure to comply was an offence.²⁷⁹ Any person who thereafter, promoted or took part in the affairs of the association, was guilty of an offence.

The Minister also had wide powers, under the Regulations, to ban publications or to prohibit any person or association of persons, from publishing material deemed by him, to be subversive.²⁸⁰ The Regulations were so worded, that the exercise of the Minister's powers against an organization or publication, was not subject to judicial control. For practical purposes, his discretion was absolute.

(6.) THE POWERS CONFERRED UPON THE POLICE:

The police were given extensive powers of search and seizure, by the Regulations.²⁸¹ The Regulations provided for a power to enter premises, to search such premises or any person, and to seize property therein.²⁸² This power, could be exercised without a warrant, at any time and the officer effecting entry, was given the very broad power to take such steps as he deemed necessary for the maintenance of order, the safety of the public or the termination of the emergency. The subjective power to determine the steps to be taken, was of questionable validity.

The right to use force, including lethal force, was freed from virtually all controls, or restraints, by a provision of the emergency Regulations,²⁸³ which authorized a commissioned, warrant or non-commissioned officer, who had formed the opinion, that the presence or conduct of any person or persons, at any place, may endanger the safety of the public, or the maintenance of public order, to order the person, (or persons), in question, in a loud voice, in both official languages, to move elsewhere, or to desist from the conduct in question and, if the order was not obeyed forthwith, to use such force, as he, under the circumstances, may deem necessary, to prevent the suspected danger.

The most disturbing feature of this clause, was the subjective nature of the discretion conferred, on what could have been a low-ranking member of the police or defence force. The right to order other persons to leave or to desist from specified conduct, was conditional upon the *opinion* that they may constitute a danger, not upon their actual conduct and its context. Once that order had been given and disobeyed, the extent of the force that could be used depended upon the subjective judgement of the officer in question, not upon the nature and extent of the threat.

This may be contrasted, with the right to use force in non-emergency situations, where the law requires a degree of correspondence, between the extent of the force that is used, and the objective to be achieved. The use of force under the emergency law, was legally divorced from the surrounding circumstances and conditioned entirely on belief, however little, that belief

corresponded to reality.

A further disturbing feature of the law, was that in a multilingual country, the announcement preceding the use of force, was required to be in the official languages, and not in the language or languages of the majority of persons in the area concerned.

There appears little doubt, that the force, which could have been used, under the emergency Regulations, included the killing of persons. For this reason, the courts should have been willing, and even ready, to judge the bona fides of an officer's use of lethal force, by external facts. Where killing appeared to have been clearly unnecessary, to ward off the suspected danger, a finding that force was used in good faith, should not have been made. Though good faith was presumed,²⁸⁴ unless the contrary was shown, the proof of facts that threw serious doubt on the good faith of the officer in question, should generally have been sufficient to discharge the onus. Assuming that the indemnity clause of the Regulations was valid, it would only have validated a use of force which complied with all the conditions of the Regulations, and which the court found to have been used in good faith.

In addition, the Commissioner of Police, could issue orders, *inter alia*, for the control of traffic, the closing of industries, the removal of the public from or to any area, the control of essential services, the occupation of streets and public places and for all other matters deemed by him, to be desirable, for ending the emergency.

It is also disturbing to note, that informing and spying, were extremely prevalent as to have become a disease in South Africa, at the time. Police spies and informers had been uncovered on university campuses, in political organizations, in Black communities and in churches. The extent of the penetration, was well illustrated by the discovery, that several police informers were simultaneously members of the student representative council, at the University of the Witwatersrand, thereby making the police component of the council, a substantial voting block, if not a majority.²⁸⁵

It is not just the prevalence of undercover operatives that disturbs, but also the nature of their mandate, which required them to report on political dissent, irrespective of whether it related to a crime of either a subversive or non-subversive kind. They had been used, for example, to monitor the activities, of the eminently respectable Lawyers for Human Rights organisation. A large part of their general business, was to monitor anti-Government opposition. Sometimes, the information so gathered, was used for crude intimidation, as when parents of dissenting students, were anonymously given information, about the "dangerous" political activities, in which those students were indulging on the campuses. Information of a similar kind, passed on to employers, resulted in the firing of workers.

There was a total absence, of both legal, and political control over the use of spies and informers in South Africa. The common law was unlikely to be of much assistance to a victim of undercover operations. While the persistent

shadowing of a person could have been actionable, as an invasion of personal rights,²⁸⁶ undercover operatives did not usually follow or observe the victim in an obvious way. If confidential papers and documents were removed or copied, there could have been an action;²⁸⁷ but a removal of papers was not an inevitable feature of informing or spying. Was the act of spying itself, an actionable invasion of personal rights? Where the informing involved reports on what was said in a university classroom or open meeting, there seemed to be no invasion of personal rights, such as privacy.

It was possible however, that persons who participated in confidential meetings, may have had an action if their private discussions were carried elsewhere.²⁸⁸ But even if there was, a common-law remedy, its scope was unclear and, in any event, it would not have provided a really effective method of controlling unjustified spying.

Even such limited freedom, as the law permitted, in South Africa, was being snapped away by the pernicious use of undercover operatives. It is difficult to imagine a more all-embracing grant of power.

(7.) PROCEDURAL AND EVIDENTIAL MATTERS:

There were numerous provisions in the Regulations, which altered the established procedures, by reversing the onus of proof of certain matters, or by creating presumptions. One of the provisions,²⁸⁹ declared, *inter alia*, that any account or document found upon any premises, land or place, occupied by the accused, was admissible in evidence against him, as an admission of the facts set forth therein. The possibility of an accused being "framed" under such a provision, was real and frightening.

(8.) INDEMNITY AND THE EXCLUSION OF THE JURISDICTION OF THE COURTS:

The 1986 emergency Regulations, incorporated a provision which sought to indemnify the security forces and certain named officers of the State, from civil or criminal liability, for actions taken in good faith, in the course of their emergency duties and functions.²⁹⁰ The combined effect of this Regulation, (if valid), and the censorship Regulations considered above, was to free the security forces *in advance of action taken by them*, from both legal and public accountability.

Such immunity, was disturbing, in the light of the ominous development in the Eighties, of an increasingly lawless police power, in the State. There appeared to be enough evidence, to convince an objective observer, of the unrest in South Africa, that the police "eliminated" troublemakers, by shooting, and that they supported, or turned a blind eye to vigilante attacks on activists,²⁹¹ and that torture was widely practiced on detainees.

The growth of official lawlessness, made the scope and validity of the

indemnity Regulation, an issue of the highest importance. The validity of a similar indemnity, enacted as a part of the 1960 emergency Regulations, was questioned before the Court in *Mawo v Pepler NO*,²⁹² but it was unnecessary for the resolution of the case, to pronounce on this question. Although the presiding Judge declared obiter, that he was “far from holding” that the indemnity clause was invalid, it was arguable, that it was a grossly unreasonable exercise of rule-making authority. Whether this was so, depended on the scope of the indemnity provision as determined by judicial interpretation; and the first point to be made, is that it was not as wide as it was generally assumed to be.

The indemnity, covered only acts “in good faith advised, commanded, ordered, directed or performed” in the carrying out of duties, the exercise of powers or the performance of functions “*in terms of these regulations*”. It follows that, it did not exempt members of the police or defence forces, or the other persons specifically mentioned, from legal liability for actions performed, under the authority of any law, other than the emergency Regulations.

If, for example, the police had acted in terms of the general powers derived from the Police Act of 1958, the indemnity was not applicable. Moreover, only bona fide acts were covered, and the indemnity was applicable, if the official in question, was proved, to have acted in bad faith. It is by no means clear, however, what bona fide meant in that context. Did an official who knew that his actions were illegal, but honestly believed that they were necessary to deal with the unrest situation, act in good faith? Could an official be said to have acted in good faith, if what he had done, was strictly not necessary for the suppression of the unrest?

There is English authority, for the proposition, that there is a general presumption, against the indemnification of acts, not necessary for the suppression of rebellion, but also for the proposition, that an indemnity may be wide enough, to protect acts, which an official knew to be illegal, but which he genuinely believed, were necessary, to cope with the emergency situation.²⁹³ Though the indemnity Regulation, enacted for the 1986 emergency, was framed in wide terms, the courts should have insisted on the requirement, that the officials in question, should have entertained the honest belief, that their actions were lawful. If this was not made a requirement, for the operation of the indemnity clause, the torture of a detainee, to discover the location of a cache of weapons, would have been protected, if the interrogator genuinely believed, that his actions were necessary, to ensure the safety of the public, or to bring the unrest situation, under control.

There were several other factors, which appeared to limit the invocation of the indemnity provision. It had been suggested, for example, that it affected only criminal prosecutions on the authorities, and delictual actions against them, and that actions in contract, or to determine the ownership of property, were left untouched by its provisions.²⁹⁴ The indemnity could not be invoked, moreover, in criminal prosecutions of individuals, under the emergency Regulations.²⁹⁵ Moreover, only actions falling within the scope of official duties, were protected. Finally, the indemnity could not operate, so as to bar an

inquiry, into the validity of the regulations themselves.²⁹⁶

Notwithstanding these apparent limitations, on the potential scope of the indemnity clause, it might have had the effect of legalising, (and it is submitted, that it did), extreme invasions of citizen rights. The Commissioner of Police, was granted the power, under the emergency Regulations, to issue orders *inter alia*, "relating to any other matter, the regulating, control or prohibition of which, in his opinion, was necessary or expedient, with a view to the safety of any member, or members of the public, or the maintenance of public order, or in order to terminate the state of emergency ...".²⁹⁷

Prior to the shootings at Langa, investigated by the Kannemeyer Commission, all Divisional Commissioners of Police, received a telex which contained the following instruction:

"When acid and/or petrol bombs are thrown at police vehicles, private vehicles and houses, efforts must be made, in all circumstances, to eliminate those who are guilty."²⁹⁸

If this instruction had been issued, as an order, by the Commissioner of Police, prior to the declaration by the Court, in *Natal Newspapers (Pty) Ltd v The State President*,²⁹⁹ that the conferral, upon him, the blanket power, to make regulations, was invalid, it seems that it would have been protected by the indemnity, (together with any action taken under it), since the Commissioner, at that stage, could have genuinely believed, that such an order, was necessary, for the protection of the public, or the maintenance of law and order, and that it fell within the wide powers, accorded to him, by the Regulations. Moreover, if the Regulations were amended, so as to grant the Commissioner, a narrower power to make orders, for the protection of the force or the public against terrorist acts, he could have, again formed the bona fide belief, that an order, for the elimination of throwers of petrol bombs, was both necessary and lawful.

There are strong grounds, for believing, that an indemnity, that purported to immunise such conduct, was *ultra vires*, either on the ground that it was a serious interference with Court jurisdiction,³⁰⁰ or on the ground that its enactment, was unreasonable conduct, which could not have been anticipated, by the legislature, as a valid exercise of subordinate law-making authority. The effect of indemnity clauses, (as distinct from ouster clauses which are inoperative, where an official has acted illegally), is to validate conduct, that would otherwise, be illegal and, being only indirectly related, to the task of restoring law and order, their creation should generally be a matter for Parliament, and not for inferior law-making authorities, to whom Parliament has clearly, not delegated this specific power.

The nature of indemnity clauses, cautions against a judicial policy, of inferring parliamentary delegation, of the power to enact them. Dicey wrote as follows, on the subject of Indemnity Acts:

"...of all laws which a Legislature can pass, an Act of Indemnity is the most likely to produce injustice. It is on the face of it, the legislation of

illegality; the hope of it encourages acts of vigour, but it also encourages violations of law and humanity. The tale of Flogging Fitzgerald, in Ireland, or the history of Governor Eyre in Jamaica, is sufficient to remind us, of the deeds of lawlessness and cruelty, which in a period of civil conflict, may be inspired by recklessness or passion, and may be pardoned, by the retrospective sympathy or partisanship, of a terror-stricken, or vindictive Legislature."³⁰¹

Considering that Dicey, was discussing a retrospective indemnity law, and not one which sought to free the authorities, *in advance* from liability for illegal actions, our courts should have insisted that indemnities, were a matter for the highest legislative authority, (as in the case of Section 103*ter*(2) of the Defence Act 44 of 1957).³⁰² The Public Safety Act, did not clearly and unequivocally delegate the power to create indemnities to the State President, and his attempt to do so, should have been declared, to be ineffective.

(9.) GENERAL COMMENTS ON THE PUBLIC SAFETY ACT:

The starting point, of any critical discussion of an emergency powers law, is the recognition, that every state should have the power, to act swiftly and effectively when its safety is threatened. "Those republics which in time of danger cannot resort to a dictatorship, will generally be ruined when grave occasions occur."³⁰³

It is better, that a government resort to drastic powers, for strictly limited periods, than that, it legislate a permanent emergency, into existence.³⁰⁴ But even if full allowance is made, for the necessity of retaining a reserve power to put down threats against the basic order, it is arguable, that the provisions of the Public Safety Act went too far.

The foregoing resume of the Act, and the Regulations promulgated under it, during the 1960 emergency, has shown that there was too little parliamentary control, virtually no judicial control, and an unnecessarily wide delegation of authority to the executive. So far as parliamentary control is concerned, the provisions of the British Emergency Powers Act 1920,³⁰⁵ make a useful comparison. If the British Parliament is not in session when the emergency is declared, it must be called into session within five days of the emergency proclamation.³⁰⁶ There was no corresponding duty, to summon Parliament in the Public Safety Act. The British Act requires emergency regulations to be laid before Parliament, as soon as they are made, and stipulates that they lapse after seven days, unless both Houses pass a resolution for their continuance.³⁰⁷ The corresponding South African provision, made emergency regulations effective until the end of the current or next ensuing ordinary session of Parliament, or until either House passed a resolution, disapproving of them.³⁰⁸

Judicial control over the declaration and continuance of an emergency, was excluded by both the British and South African Acts, whereas it is retained by the American Emergency Detention Act.³⁰⁹ While it may, perhaps be

recognized, that the executive and Parliament should have had control, of the declaration and duration of an emergency, the relegation of the judiciary under the Public Safety Act, to a position of total impotence, in respect of the conduct of the emergency, seemed neither necessary, nor desirable.

When a court judgement had demonstrated, that some shred of judicial control remained, the Regulations were immediately altered, to exclude the jurisdiction of the courts. Considerably more judicial supervision, over the conduct of the emergency, was retained under the British Act, by reason of the narrower power, of the executive to make regulations,³¹⁰ and the express provision, that no regulation "shall alter any existing procedure in criminal cases, or confer, any right to punish by fine, or imprisonment without trial".³¹¹ The Act, does not suspend the writ of *habeas corpus*,³¹² as was the case in South Africa. Even when allowance was made for the different social and political conditions, in the two countries, it is difficult to justify the total surrender of authority, to the executive, in the Public Safety Act.

The reader, who is inclined to defend laws like the Public Safety Act, by reference to similar legislation elsewhere, might well be consoled by the stringent provisions of the Civil Authorities, (Special Powers), Act, (NI), 1922 of Northern Ireland. That measure, delegated to "the civil authority", (the Minister of Home Affairs), almost unlimited power for preserving peace and maintaining order.³¹³ This power had been used to detain persons without trial and to create sweeping offences.

However, considerable caution, must be exercised in using the legislation in Northern Ireland, as the basis of a blanket justification of the South African legislation. In the first place, justifying a law by the worst example that can be found elsewhere, is a dubious exercise. Secondly, the Special Powers Act in Northern Ireland, must be seen against the background of the strife in the year that it was introduced, (230 people were killed and property worth 3,000,000 pounds were destroyed),³¹⁴ and the serious unrest in that country ever since. Finally, lawyers in Northern Ireland have been critical of the Act,³¹⁵ and their opposition had led to considerable moderation in the application of the law. All these factors, must be kept in mind, in any comparison of the Northern Ireland and South African legislation.

It may therefore, be declared, by way of summary, that though a measure like the Public Safety Act, should certainly find a place on the Statute Book, an analysis of the actual terms of that measure, demonstrates that it was fundamentally defective in a number of respects. Provision for more parliamentary and judicial control should have been made, without destroying the effectiveness of the Act for dealing with threats to public order and safety.

(10.) THE DEFENCE ACT OF 1957 AND THE POLICE ACT OF 1958:

There are certain provisions of these two Acts, which became relevant upon

the declaration of an emergency. In terms of the Defence Act, both the Permanent Force and the Citizen Force, could have been employed in the prevention or suppression of internal disorder, or for the preservation of life, health or property.³¹⁶ The State President was authorized to mobilize the Defence Force, or any part thereof, by proclamation in the *Gazette*, for the purposes of dealing with an emergency or with internal disorder.³¹⁷ Provision was made, for the rapid mobilization by the Minister, where in his opinion, there was insufficient time for the more protracted procedure of mobilization, by proclamation, to be followed.³¹⁸ Mobilization by the Minister, was for a limited period only, and had to be followed by a proclamation, if the Force was required for a lengthy period.³¹⁹

The Act, provided for expedient methods of notification to persons called up for service in an emergency.³²⁰ The State President, could authorize the commandeering of property, or the take-over of transport systems, during operations to prevent or suppress internal disorder.³²¹ The Act, also declared that the Minister, could order the evacuation of persons, or the assembly of persons in a particular place or building, during operations for preventing or suppressing disorder.³²² An order for the assembly of persons in a particular place, could not remain in operation for more than four days.

The Police Act, authorized the use of the Police Force,³²³ by direction of the State President, in the event of an emergency.³²⁴ While so employed, the Police Force, fell under the laws governing the discipline, command and control of the permanent defence forces.³²⁵

(11.) THE CIVIL DEFENCE ACT OF 1966:

This Act, was linked with the Public Safety Act, in that, it was enacted to “provide for the protection of the Republic and its inhabitants, in a state of emergency”.³²⁶ However, though a “state of emergency”, as defined in the Act, included an emergency, declared under the Public Safety Act, and a “time of war”, as defined in the Defence Act,³²⁷ it also included “internal riots” or “any disaster” which the Minister,³²⁸ had declared to be a state of emergency, by notice in the *Gazette*.³²⁹ “Disaster” was defined, as including “an act of God, the influx of refugees into the Republic and any form of sabotage, as defined in Section 21 of the General Law Amendment Act, 1962, (Act No. 76 of 1962)”.³³⁰ In view of these wide definitions, the Minister’s power to declare an emergency, was practically unlimited.

The Act, conferred certain powers upon the Minister, to enable him to take measures, other than those prescribed in the Public Safety, Defence and Police Acts, for providing the population with the “greatest possible measure of protection and assistance” and for combating civilian disruption during a state of emergency.³³¹ With these objects in mind, the Minister was authorized, to take such steps, as he deemed necessary, with regard to fire-fighting, rescue and evacuation work, shelters, medical treatment and health services, emergency housing, food and clothing, readjustment of communities and individuals, the maintenance of essential services and the protection of

essential industries and places, transport and communications, the continuation of national and local government, and any other matter, which the State President could designate in the *Gazette*.³³²

Without prejudice, to the generality of these powers, he could direct persons, to furnish him with all kinds of information,³³³ direct persons to surrender property, (including land and buildings), and, if he considered it necessary, in the public interest, direct the management of any industry or service, which he considered essential, to take such steps as he may prescribe, with reference to the detailed objectives specified above,³³⁴ or to the continuation of the industry or service.³³⁵ Since it was especially provided, that the power to demand the surrender of property, shall be exercised only during a state of emergency, it followed that all the other powers, could be exercised at any time, without reference to a declared emergency.

The powers to demand information, and to direct the management of essential industries or services, to take such steps as he could prescribe, were especially wide. Though the surrender of property during an emergency, was subject to compensation, there was a broad indemnity against claims for loss and damage, arising out of the administration of the Act.³³⁶ All the above-specified powers, could be delegated by the Minister, to any person in the service of the State.³³⁷ It was also provided, that if any person failed or refused to carry out any act, after a written direction from the Minister, he, (the Minister), could have such act, performed and thereafter, recover the cost from the person concerned.³³⁸

The Act, provided for both, the voluntary and compulsory training of persons, for any of the purposes of the Act. All persons between the ages of 17 and 65, except those falling within certain exempted categories,³³⁹ were liable to be conscripted for training.³⁴⁰ This conscription, was not independent on the declaration of an emergency, and could therefore, take place at any time, in accordance with regulations, prescribed by the Minister. Employers were not obliged to pay wages to a person called up for training, but committed a criminal offence, if they, in any other way penalized a trainee or attempted to frustrate his training.³⁴¹ The State President was authorized to establish institutions for training, which took place in accordance with regulations prescribed by the Minister.³⁴² Persons, other than those falling within certain exempted categories, could volunteer for training.³⁴³

During an emergency, persons acting in execution of duties, under the Act, could break into premises, if they believed on reasonable grounds, that this was necessary for certain purposes, including the preservation of life or the prevention of injury to persons or animals.³⁴⁴ Any person, employed at any place, in respect of which the Minister has directed protective action, could arrest and search any person entering or attempting to enter such place, without the authority prescribed by the Minister, and could seize anything, in the possession of such person.³⁴⁵ This extensive power, was not confined to a time of emergency. Criminal penalties, were provided for persons who, *inter alia*, hindered the administration of the Act, or who, without reasonable cause, failed to comply with certain directions under the Act.³⁴⁶

The Minister, had the power to make regulations, with regard to any matter prescribed in the Act, and such regulations could prescribe punishments not exceeding those prescribed in the Act.³⁴⁷ The regulations had to be tabled before Parliament, and lapsed if not approved by Parliament by the end of the session, in which, properly tabled, or if expressly disapproved, by the resolution of either House.³⁴⁸ The State President, could, by proclamation, declare any or all of the provisions of the Act, applicable to South West Africa.³⁴⁹

In terms of the Civil Defence Act of 1977,³⁵⁰ Provincial Councils, could make ordinances relating to civil defence, for the purpose, *inter alia*, of combating civil disruption during a state of emergency, declared under the Public Safety Act.³⁵¹ All four provinces had enacted ordinances in terms of this power.³⁵² The Minister of Defense, also had the power, under the Civil Defence Act to declare a state of disaster, for the purpose of adopting extraordinary measures, to protect the public and to combat civil disruption.

A disaster, was defined in the Act, as including the consequences arising out of terrorism.³⁵³ The declaration of a state of disaster, did not appear to confer any further emergency powers on the authorities, but rather to have the effect of activating the provisions of civil defence ordinances, and of putting civil defence organisations on the alert. It did, however, enable the Minister of Defence, to take over the powers or duties, imposed or conferred by the Act and the ordinances.³⁵⁴ Finally, the State President had extensive powers of legislation over Black areas, and those were often used to impose emergency rule, within such areas.³⁵⁵

(12.) COMMENTS ON THE CIVIL DEFENCE ACT:

Civil Defence legislation, is obviously a necessity in the modern age. For this reason, no objection to the enactment of Civil Defence legislation, can be made in principle. Nevertheless, the terms of the South African legislation may be criticized. Far-reaching powers, could be exercised under the Act, in peacetime and without declaration of a civil defence emergency. In this respect, the blanket conscription provision, and the powers, which the Minister could exercise over industries, stand out. Unlike its American³⁵⁶ and British³⁵⁷ counterparts, which are oriented towards hostile attack, the South African legislation was related to all kinds of emergencies and disasters, from the most serious, (such as war), to the most minor, (such as local disturbances). The invocation of such extensive powers, should not have been authorized for any internal or local disturbance. The words "Civil Defence" are something of a misnomer, in relation to an Act, which was, in large measure, concerned with internal security.

(13.) THE RIOTOUS ASSEMBLIES ACT OF 1956³⁵⁸:

The provisions of this law, were concerned more with local disturbances and

disorders and may be regarded as supplementary to the common law powers of martial law. They fall into two categories, namely, the control of gatherings and the control of publications, which have been dealt with already.

(14.) COMMENTS ON THE RIOTOUS ASSEMBLIES ACT:

The provisions³⁵⁹ of the Act discussed in this section, are much in excess of those required, to deal with local disturbances or riots. This remark applies with particular force to the Minister's power to impose a blanket ban on gatherings, to silence persons who were prohibited from attending gatherings, and to debar persons from entering specified areas.³⁶⁰ These powers, were all the more draconian, when it is considered that they could be exercised in peacetime, without declaration of an emergency, and that there was no independent check on the abuse of the Minister's authority to act.

The Minister could act without prior notice, and could withhold the reasons for the action taken by him. A person affected by one of the drastic orders, authorized by the Act, could not have them set aside, no matter how strong a case he had.

The authority to prohibit particular gatherings, was also within the entire discretion of the magistrate, or the Minister. While the need to prevent meetings, which are likely to be violent, ought to be recognized, there should have been more effective, independent control, to ensure that gatherings were not prohibited, because the groups planning to hold them, were disfavoured by the authorities, or because there were not willing, to protect persons planning to gather peacefully, from attacks, by others who disliked their purposes. The power to prohibit meetings, should have been vested in a judge of the Supreme Court, who should have been required to hear evidence satisfying him, at least *prima facie*, that violence which the police could not prevent, was likely to break out.

(15.) THE GENERAL LAW FURTHER AMENDMENT ACT OF 1970³⁶¹:

Towards the end of 1970, mainly as a response to student processions, in Johannesburg and Cape Town,³⁶² Parliament included a Section³⁶³ in this Act, which declared that, whenever a local authority,³⁶⁴ was given permission to organize or hold a procession, that had been granted, in terms of any law requiring such permission, the permission was deemed not to have been granted, unless the magistrate of the district, in which the procession was to be held, also gave his permission. The magistrate, could withhold permission only if, "he has reason to believe", that the holding of the procession, could endanger the maintenance of law and order.

The provision, effectively withdrew control over processions, from local authorities by subjecting their approval, to magisterial veto. From the language of the Section, particularly the words, "if he has reason to believe", it appeared

that the veto could not be exercised arbitrarily, but only if there were facts which justified the apprehension of a threat, to law and order. Theoretically, therefore, the magistrate was subject to the control of the courts. It is submitted, that the magistrate would not have been correct, in withholding permission, if the danger to the maintenance of law and order came, not from persons taking part in the procession, but from groups hostile to the procession, *unless* he was satisfied, for good reason, that the authorities could not control such groups. The magistrate should have been prepared to enforce this principle, consistently and fearlessly.

(16.) AN OVERVIEW OF THE EMERGENCY LEGISLATION IN SOUTH AFRICA:

There is something decidedly artificial, about discussing emergency legislation and the rule of law in South Africa. "Ordinary" and permanent legislation, had brought about a ninety-percent destruction of the rule of law, and put the country into a permanent state of emergency.

When, on top of this, an emergency was declared under the Public Safety Act of 1953,³⁶⁵ the tattered remnants of the rule of law, were stripped away for the duration of the crisis. Under the 1985 emergency, the security authorities, assumed a number of additional powers, in particular, the power to detain with greater freedom, on a mass scale, to impose curfews and drastic limitations on movement, and generally, to act as they wished, without being answerable to the courts, for anything that could not be proved, to have been done *mala fide*. This last power, brought into effect by the indemnity provision of the Regulations, enabled the police and military authorities, in the language of the notorious instruction sent to the Port Elizabeth police prior to Uitenhage, to "eliminate" the law-and-order troublemakers. When the law enabled the security forces to mete out their own version of street justice, it seems bizarre to talk about the requirements of the rule of law.

Under the nation-wide emergency, declared on 12 June 1986, the State President promulgated regulations, which purported to strip away the last vestiges of security force legal and public accountability, that remained under the previous emergency. In a Regulation, subsequently held to be partly invalid, the publication of subversive statements, was prohibited, such statements, including those that were expressed to another person, and had the effect, of causing hostility towards "any section of the public or person or category of persons" or of "weakening or undermining the confidence of the public, or any section of the public, in the termination, of the state of emergency".³⁶⁶

Other Regulations,³⁶⁷ imposed a system of total censorship over the emergency, including the conduct of the security forces. Most newspapers published little more than the "ministry of truth" announcements, that came from official sources. The methods used by the security forces thereafter, ceased to be a part of public knowledge, but occasional private reports and court judgements, (such as the one ordering the release of a nun, from a

detention that took place, when she attempted to prevent a member of the security forces, from assaulting a young man), suggest that advantage was being taken, of the charter for lawlessness and secrecy, that was ironically known, as emergency law.

Moreover, the Minister of Law and Order, had the power to declare emergencies on a local basis, and to make regulations similar to those that were put into effect in the 1985 and 1986 emergencies.³⁶⁸ The exercise of his power, signaled the final internment of the principle of government under law, in South Africa.

The combination in South Africa, of permanent and temporary emergency measures, was therefore, fatal to the rule of law in any meaningful sense. It was also politically foolish. One of the reasons for retaining some rule-of-law restraints, under the emergency government, was to limit the social damage of security operations. The indiscriminate use of police power, during the 1985 and 1986 emergencies, had achieved the opposite by fuelling conflicts, increasing grievances and resentments, and broadening the already dangerous gulf between the security forces and the Black people of South Africa. Even if order was restored in the short term, the chances of future peace and accommodation had been gravely harmed, by making the security authorities in South Africa, unaccountable to the law.

(17.) THE SECURITY SYSTEM – A POLITICAL ASSESSMENT:

(17.1) *Democracy and the Rule of Law :*

The rule of law, appears to be related to democracy in several ways. It is related positively, as an institution designed to protect certain basic democratic rights, of the citizen, such as freedom of the person, of expression, of movement and assembly, and of association. The other side of this relationship, the negative aspect, is that the rule of law, has always been understood as an institution, which limits state power. The rule of law, as a “weapon against the growth of state authoritarianism” and “an inhibition on state power”,³⁶⁹ indirectly furthers the democratic style, of the management of society.

Another way, in which the rule of law furthers democracy, is “to bridge the gap between the legal doctrine of parliamentary sovereignty and the political doctrine, of the sovereignty of the people”.³⁷⁰ It achieves this accommodation, by requiring statutes to be interpreted, wherever possible, in accordance with “general notions of fairness and justice ... , which are taken for granted in the community”.³⁷¹ It follows, that every violation of the rule of law in South Africa, weakened the democratic elements, in conflict resolution, and had taken the society, a step nearer, to a system of state absolutism.

Democracy, had never achieved anything more, than a partial recognition in South Africa. The adoption of the Westminster system of government, in the

Cape Colony and Natal, and the subsequent acceptance of the Westminster style of government, at the time of union, provided some justification for the title democracy. However, Black participation in the Westminster system, was at best, nominal and was reduced and finally eliminated, after union.

The Republic of South Africa Constitution Act of 1983, while providing for the involvement of Indian and Coloured persons, in central decision-making, set the seal on the constitutional exclusion of Blacks, with terrible consequences, that are still visible almost daily, in the townships of South Africa. Reform talk, about Black involvement, at all levels of political decision-making, was not matched by any action, and in any event, even *talk* envisaged, little more, than Black membership of the President's Council, and the creation of a politically impotent National Council, a body with disturbing similarities, to the "toy telephone" Native Representative Council, that failed in the early Fifties. The denial to the Black majority, of the right to vote for members of, and hold office in, the central institutions of government, was incompatible with all forms of democracy.

When the new Constitution replaced the Westminster system, with a presidential one, the greater part of government, in the Westminster tradition, had already been eroded. Because the Westminster system, in South Africa, was steadily drained of its contextual lifeblood, it became, even within the limits of White politics, one of "unrestrained majoritarianism", without the compensation, of the alternation of parties, that was a feature of its operation elsewhere.³⁷² Repeated assaults on the rule of law, and the associated liberties of person, speech, movement, assembly and association, reduced the extra-parliamentary side of democratic freedom, to a state of extreme debilitation, even for White voters.

Extra-parliamentary organisation, association and dissent were seriously limited, by detentions and bans of all kinds, (bans of individuals, organisations, assemblies and publications), imposed by arbitrary executive decrees. The power of the executive, grew ominously, while that of Parliament and the people waned. As important aspects, of democratic freedom for Whites, went by the board, the result of the destruction of the rule of law, became catastrophic for Blacks who, already deprived of formal participation in the political system, now lost the remaining freedoms, that we associate with democracy. The outcome, has been called a racial oligarchy³⁷³ or alternatively a limited democracy, for Whites with political tutelage, for Blacks.³⁷⁴

The process by which civil rights had been weakened, to the point of extinction, had most commonly consisted, in the transfer to the executive officers, of the power, virtually unrestrained by law, to withdraw or suspend their operation, either generally, or in relation to specific individuals or groups. Every one of the basic civil rights, had been affected in this way. Freedom of the person, ceased to exist, when the Minister was given unqualified power to detain. The banning of individuals, nullified their freedom of movement, expression and association. The right of assembly, had long been a civil liberty casualty, by reason of the nationwide ban on almost all, outdoor meetings, and on many indoor ones as well. Freedom of association, had suffered grievously, by the banning of over thirty organisations, including the principal Black

political organisations.

The executive withdrawal, or suspension of basic rights, was regulated neither by clear statutory guidelines, nor by effective judicial supervision. This meant that an executive officer, usually the Minister of Law and Order, was free to determine who may participate in the political process, and thereby to alter the rules of the game, to the advantage of his own party. The Minister, or the other officers, acting under the direction of the executive, were not independent and dispassionate observers, of the political process; they were active participants, with a stake in the outcome, of the contest. The danger to democratic freedom, that is inherent, in authorising a participant to draw the line between subversion and legitimate dissent, was well captured in Commissioner Gilbert's dissenting opinion, on the emergency power recommendations, of the McDonald Commission, in which he said:

“Because insurrection and dissent are both expressed through confrontation with existing authority, such actions, leave themselves open to abuse by that authority. In either case, the existing authority, tends to react against the aggressor, by adopting a posture of self-justification. To sum up, it is not unfair to say, that the existing authority is both party and judge in its confrontation, with the dissenter, whether he be legitimate or insurrectional. It must be recognised, that such a situation easily lends itself, to vengeance and to the abuse of power.”³⁷⁵

The removal of rule-of-law controls, from security legislation, meant that the circumstances, in which civil rights could be withdrawn, or suspended were determined by an interested party and, as a direct result of that uncontrolled power, security-law measures had been used to control opposition, as much as subversion. Expressed differently, security laws, placed the ruling party in a position to make its own determination, of what was legitimate political opposition and what was subversion, and thereby, to control opposition to itself, and its policies. This flows directly from the fact that, subversion is defined not by law, but by the party in power. Of course, the government, denied that security law had been misused in this way, but the evidence was overwhelming, against the acceptability or even honesty of such denials.

Part of the evidence, was to be found in the actual wording of security legislation. The crime of subversion, punished those who sought to achieve any kind of change in South Africa, by various means including, for example, means which impeded or endangered the free movement of traffic. It is obvious, that a programme of political protest marches in a city, would impede traffic and therefore led to a prosecution for subversion. When a law, was expressly directed at extra-parliamentary dissent, the government that enacted it, could hardly be heard to say, that the law was not being used to control opposition. Where security laws, did not, in so many words, penalise campaigns against the government and its policies, they were vague enough, to permit their use for that purpose. Many security crimes in South Africa, were so vague and elastic, as to make the following remarks, apposite to these laws:

“In a legal system, in which the rules of criminal law, are so loosely defined, that it is difficult to say, in given cases, what specific acts, if any, constitute a breach of them, innocence and guilt lose precise meaning, as does proof.”³⁷⁶

Where innocence and guilt have lost precise meaning, the use of the law for partisan purposes, is a predictable consequence. This is doubly true, of vaguely defined powers of detention, banning and the like. Because the grounds upon which the Minister, or other executive officers, could detain or ban, were not clearly stated, and because they were subject to no effective external control, in the exercise of those powers, these officers could use them, for any purpose they chose; and prominent among those purposes, had been the control of opposition, to the party in power, and the policies for which it stood.

Under such powers, insurrection and dissent, had lost all meaning, thereby making possible, the removal of democratic rights, from the opponents of government. Anyone, who has followed the pattern of individual banning, in South Africa, will know that many of the victims, were nothing more, than active opponents of apartheid. The same is true, of the many banned organisations, of which the South African Defence and Aid Fund and the Christian Institute, are obvious examples. The most telling evidence, however, is to be found in the simple fact, that almost every individual or group, that was active in opposition to apartheid, sooner or later, came into conflict with the provisions of security legislation. Black South Africans in particular, had learnt that actively opposing apartheid, even by means that were non-violent, inevitably lead to personal experience with the whip, the bullet, a banning order, the criminal court or the detention cell. Opposition and subversion, were no longer distinguishable in South Africa.

It follows, that a major interest which “security” laws were intended to further, and did actually further, was the suppression of opposition – particularly Black nationalist opposition – to the ruling party and its policies. Even when the laws were invoked against those engaged in violence or insurrection, their legitimacy, was weakened, by the fact that the subversive conduct, was due in part, to the denial of other means, of opposing the system. The existence of these laws, and the manner of their use, is in fact one of the main grounds, for labelling the mode of conflict regulation in South Africa, to be coercive. Conflict regulations, in divided societies, may take one of two basic forms – democratic or unilateral.³⁷⁷ The unilateral, (domination or coercion) model, fitted the South African institutions, particularly the legal institutions, like the proverbial glove. If it were otherwise, the security system, would manifestly have had different objectives.

It is significant, that the Rabie Commission in South Africa, presented no framework of values, within which, security legislation, should be required to operate, in South Africa. Apart from an occasional, and usually passing reference, to the need for overall reform,³⁷⁸ the need to limit restrictions on individual rights,³⁷⁹ to those that are absolutely necessary, and a fairly derisory reference to the rule of law,³⁸⁰ the Commission’s approach was essentially non-normative. It declared, in fact, that its enquiry was to be, essentially a

legal or judicial one and rejected the suggestion, that it should enter upon “the political terrain”.³⁸¹ It is ludicrous to imagine, that a desirable security policy, can be formulated without a political and, indeed sociological, analysis. One cannot provide satisfactory answers, to a meta-legal question through formalistic legal analysis. However, the Commission’s reluctance, was humanly understandable.

Deeper analysis, would have shown, the South African security system, to be precisely one, that permitted its governors, to violate democracy, in the course of protecting its requisites, from alleged opponents. The fundamental purpose of the violation, moreover, was not to secure democracy, but minority control. Normative analysis by the Rabie Commission, would also have revealed, that security legislation, would have had to be totally transformed, not just tinkered with, as the Commission’s report recommended, to make it a vehicle for democratic conflict resolution.

The progressive eradication of democratic rights, under the guise of law and order, was accompanied by a phenomenon, that was perhaps, even more ominous – the weakening of civil authority, over the security forces, of the Republic. As I noted earlier, the decline of parliamentary authority, and the enhancement of executive power, was given further impetus, by the creation of a presidential executive, under the 1983 Constitution. This process of the accumulation of executive authority, was accompanied, for some time, by a parallel movement – growing security-military influence, over fundamental political decisions, in South Africa. The security establishment, as Kenneth W Grundy observed, “has positioned itself at the center of power”.³⁸² This second movement, was a direct consequence, of the militarization of the society and the semi-war footing, on which it had been placed, to meet the so-called “total onslaught”.

Within a short time, the two movements began to converge, as it became evident, that the State Security Council, a body in which the security/military establishment, was heavily represented,³⁸³ was impressing itself, powerfully on the decision-making of the constitutional executive.³⁸⁴ Signs of the *formal* ascendancy of the security establishment, over the civil authorities, had been accompanied, by instances of independent, and sometimes rebellious actions, by that establishment.

Though the full story, behind some of these actions was not known, and could not be revealed, by the actors, on account of the secrecy laws, there was enough to indicate, that the security establishment, was a semi-independent authority, in the State, and only partly subject to civil control. Defence department support, for the Renamo resistance movement in Mozambique, after the Nkomati Accord, between the two countries, is one example. The aid given to Renamo, euphemistically described as humanitarian,³⁸⁵ included the building of a landing strip and massive amounts of medical supplies.³⁸⁶ Subsequent government explanations, that the aid was exclusively designed to bring about peace, between Renamo and the Frelimo government in Mozambique, will impress only the extremely gullible observer, of Southern African politics.

Another example, is provided by the abortive attempt, in November 1981, of a group of mercenaries, under the command of Colonel Mike Hoare, to overthrow the government of the Seychelles. Though in camera hearings, deprived the general public, of knowledge of defence force involvement, in the attempted coup, it appears from the judgement, given by the trial judge, that there was definite support, for the mission, by high-up members of the military.³⁸⁷ Involvement of members of the National Intelligence Service, although not capable of definite proof, also seems clear. It is hardly credible, that this foolhardy enterprise, so damaging to the country's foreign relations, could have had cabinet approval, and it must seem as a frolic, which received clandestine backing, from the military establishment.

A third example, of the weakening of civil authority, over the security establishment, is that of police behaviour, towards the opponents of the government. Despite ministerial declarations, condemning torture and the enactment of codes, of conduct, designed to protect certain detainees, it is clear that the torture and physical abuse, of political detainees, by the police, was rife. Direct evidence, of physical assaults, on detainees, was provided by Dr Wendy Orr, a district surgeon in Port Elizabeth, in a court application, to interdict the authorities, from illegal treatment, of certain detainees, in that region.³⁸⁸ Court orders, to restrain the police, from assaulting or torturing detainees, were becoming almost commonplace.³⁸⁹ Police behaviour in controlling unrest in the townships, both within and outside emergency areas, had been blatantly lawless. Reports of unprovoked and unnecessary shootings, were widespread and many of these reports, appeared to be credible.

There can be no dispute, about the instant street justice, administered by the police, when they shot and killed, alleged³⁹⁰ stone-throwers, in the notorious "Trojan horse" episode, in the Cape Township of Athlone, in October 1985.³⁹¹ These, and many other similar incidents, present a picture of a police force, acting in a lawless and uncontrolled manner; and the heavy censorship, imposed in emergency areas, was the response of a government, unable to discipline its police force, and therefore compelled to limit, the immeasurable damage, to the country and its economy, of such brutal repression, by throwing a blanket of secrecy, over the application of emergency powers. When one takes into account, the immense harm that the security forces have inflicted on their own country, under emergency rule, it is hard to believe that a government, that could have controlled them, would not have done so.

I may conclude, that the destruction of the rule of law, by security legislation, has had, disastrous consequences, for democracy in South Africa. Security legislation, had drastically limited the democratic rights, of White South Africans, and abolished the remnants of democracy, that were available to Blacks. It had turned conflict resolution, decisively, towards the domination or coercion model. Finally, by freeing the military/security establishment, from the restraints of the rule of law, security legislation, had gravely weakened control, by the authorities, in the State.

(17.2) Democracy and Civilised Values :

Democracy, implies a commitment to standards of civilised behaviour, that extend beyond the recognition, of formal political rights. It requires, governments to observe, at least a minimum standard of decency and humanity, in the treatment of their subjects. The commitment to civilised values, distinguished democracies in the Western tradition, from the so-called totalitarian democracies, in the East, in which the subjects, to use Arthur Koestler's telling image, may be treated as no more, than sacrificial rabbits.

There were certain provisions of the South African security system, which violated the commitment to decent values, and standards of official behaviour. These measures, made it impossible, to accept the claim of the authors of security legislation, that its purpose, was to uphold the very standards, that are under discussion. One does not uphold standards, by denying them. Two features of security law in particular, stand out, as blatant violations of the State's obligation, to maintain acceptable standards of humanity: the provision for indefinite detention, of suspects in solitary confinement, and the exemption from legal controls, granted to the security forces, under emergency law.

No doubt, a case can be made out, that other provisions of security law, also denied legitimate expectations, to civilised treatment. However, these other examples, are more contentious, and the ensuing discussion, will focus on branches of the subject's right, to decent treatment, that is clear and indisputable.

Even if we grant the State's right to hold suspects for questioning, there is no case, in a civilised community, for the institution of indefinite detention, in isolation and without adequate court control. The medical evidence reviewed earlier, has shown that lengthy incommunicado incarceration, is in itself, a form of cruel and inhuman treatment, that frequently results in permanent psychological damage, mental derangement or suicide. It was also a foreseeable and predictable consequence, of freeing the interrogators, from legal controls, that the detainee, would have been subjected, to illegal treatment in the form of assault, torture, and the like.

The shock waves that reverberated around the world, following the horrendous treatment, and the death of Steve Biko, had not put an end, to the torture or abuse of detainees. In one of the more recent cases, a detainee was made to kneel on the floor, with a pistol against his head, and was then shot and killed in circumstances, that may never fully be known.³⁹²

The continuation, of the practice of torture, even after the enormous damage, to South Africa's standing, in the world community, caused by the Biko affair, and the Government's subsequent claim, that it did not sanction such behaviour, illustrated, that maltreatment of detainees, was a built-in feature, of incommunicado incarceration, and that a government which continued to make use of this diabolical institution, could not be too serious, about eliminating the abuse, of detainees. The treatment of Dr Wendy Orr, who was

removed from all contact with prisoners, after bringing the court's attention to the systematic ill-treatment of emergency detainees, spoke volumes, about the Government's attitude, to these practices.

As pointed out earlier, under the emergency regulations, promulgated at the time of the declaration of emergencies, in July 1985 and June 1986, members of the security forces, were exempted from civil and criminal accountability, for any action taken in good faith, (which is presumed until the contrary has been proved), in the course of exercising emergency powers, in dealing with the unrest situation.³⁹³ It is one thing, to free members of the military and the police from legal accountability, by the Indemnity Act, passed at the end of an emergency, but quite another, to dispense with legal controls, at the outset. The latter, was a statutory licence to the security forces, to act as they believed fit, and it was one, to judge by the reports of police misbehaviour, that were pouring in, that had not been neglected. The indemnity clause, was a recipe for uncivilised behaviour, and one that had no place in a country, that was constitutionally committed to "Christian values and civilised norms".

(18.) THE EFFICACY OF THE SECURITY SYSTEM:

A normative analysis, of the South African security system, illustrated that it was irreconcilable with democratic values and civilised behaviour. The State, to adapt the words of Paul Wilkinson, had pushed itself "into authoritarianism, and hence, into denying its constitutionalism, into dropping all humane restraints and checks on power, and ultimately, into becoming a paramilitary or police state, a mirror image, of the terrorism it was supposed to be defeating.³⁹⁴ The only remaining claim, that could conceivably be made for the security system, is that it was an effective instrument for securing peace and stability in the country. If, in addition to its violation of democracy and civilised standards, it failed to pass the test of effectiveness, there was literally nothing to support the retention of the security system.

The foundation stone of the security system, was laid in 1950, when the Suppression of Communism Act was passed. In that year, according to a report of the South African Institute of Race Relations, the only signs of political "trouble" were a one-day strike and a mass protest meeting, against the policy of apartheid.³⁹⁵ In the ensuing three decades, the ruling National Party, secured the passage through Parliament, through the battery of Draconian laws, that constituted the security system, in consolidated form.³⁹⁶

The description of the unrest situation, by the Institute of Race Relations in 1984, after over thirty years of drastic "law and order" medicine, made an illuminating comparison with the troubles of 1950. In 1984, the Institute reported, 175 people were killed in unrest-related incidents and 58 incidents of guerrilla insurgency took place.³⁹⁷ The death toll for 1985 stood at almost 900³⁹⁸ and the killings had not abated in the first half of 1986.³⁹⁹ These grim statistics, are only a part of the general picture of 1984, 1985 and 1986 which was one of riots and burnings, boycotts and strikes, and bombs and bullets. The tragic growth of political violence and disorder, after three decades of

Draconian law enforcement, makes it impossible to present the security policy, as one of South Africa's success stories. In fact, disorder had increased, in direct proportion to the application of harsh security measures.

Quite obviously, the security system had failed, in the sense that it had neither eliminated unrest, nor even contained it; but, more seriously, it was susceptible to the additional criticism, that it had contributed to political disorder. The Government, even from within its own ranks, was reminded, that drastic measures could be ineffective and counter-productive, in the longer term,⁴⁰⁰ but continued to act, as though the iron-fisted application of security legislation, had not added to the problem.

Police action during the 1976 disturbances, provided us with a clear instance, from which the authorities appeared to have learnt nothing, of a direct connection between security operations and increased, (rather diminished), violence and terror. When in that year, the full force of the security arm of the Government was turned on the Soweto school demonstrators, an unknown, but large number, (probably in the region of three thousand), became enforced refugees from their own country. It was inevitable that these refugees would become conscripts into the guerrilla movement and many had returned to South Africa, as trained fighters.

The steady growth of incidents of insurgency since 1976,⁴⁰¹ was no coincidence and a similar growth, was predicted in the years that followed the heavy-handed and lawless police crack-down in the unrest. Because the security system put no effective restraints, on police action, in unrest situations, the important principle of *minimal force* had been replaced by excessive and indiscriminate repression; and this replacement created the future guerilla movements.

The claim by security authorities, that they adhered to the principle of minimal force, was simply not borne out by the facts. A distinguished foreign correspondent, writing in *The Observer* of 4 May 1986, noted that there had been 1500 unrest deaths in the preceding 20 months and that *two-thirds* of the deaths were the result of security force actions.⁴⁰² Of the 879 dead in 1985, over half, (441), were apparently the result of security force operations.⁴⁰³ The percentage of persons killed by the security forces had been over fifty, in the past few years and this must represent a *reduction*, since only, in those previous two years, had the phenomenon of self-directed Black violence, become a reality.

By contrast, of the 2455 deaths that occurred in Northern Ireland, unrest in the period 1969-85, the security forces were responsible for 265 – a percentage of 10,8.⁴⁰⁴ This meant that security forces in South Africa, had been responsible for at least five times more killings, than their counterparts in Northern Ireland. In 1985, the security forces in South Africa, killed over 400 persons, as opposed to, the 265 killed by Northern Ireland forces in 17 years of civil strife. These comparisons, are not meant to play down, the horror of opposition violence in South Africa, whether it be in the form of necklacing, gunning down officials or bombing soft targets. There can be no objection to strong action

against the perpetrators of such terrible deeds. What was unacceptable in South Africa, was the indiscriminate and excessive nature of anti-unrest operations.

Security forces were contributing to unrest, by broadening and intensifying bitterness in Black townships. The bitterness was being broadened by police action against peaceful protestors, and demonstrators. Security law, in fact compelled the police to act against peaceful dissenters, because every outdoor meeting was illegal, unless prior magisterial permission had been obtained; as soon as people gathered in the open, their dispersal was required to prevent a violation of a valid, but incredibly stupid law. Black anger was also being aroused, and intensified by the indiscriminate use of police power in the townships. There were almost, daily reports, many apparently true, of unnecessary beating and shooting of children, of the reckless use of tear-gas canisters and of assaults upon innocent detainees. Even if jackboot tactics in the townships succeeded, in putting down the unrest, Black hatred and anger had been so fuelled, that more horrific township strife was probable.

All these considerations, amply justify, the comment in a recent analysis, of the relationship between law, order and state security in South Africa, that "coercion from above ... tends to give rise to chaos from below" and that "inopportune behaviour, by the authorities, that are in the state themselves, can also present a threat to state security".⁴⁰⁵ While the basic causes of unrest, are undoubtedly social and political, legalised coercion in the form of harsh security laws had become a potent contributory cause. Moreover, the harm caused by the security system, was not limited to the direct aggravation of unrest. Because that system, empowered the authorities to neutralise or eliminate Black leaders in various ways, there was a lowered incentive to engage in a process of negotiation and accommodation. Why talk if you can "legally" ban, detain, shoot or drive into exile, the troublesome opponents of apartheid?

The availability of an arsenal of repressive security measures, had tempted the authorities, into postponing the search for political accommodation, thereby making its achievement, infinitely more difficult. As Colin Legum had observed, "there is a new generation of Blacks emerging who believe that violence is the only language, the ruling Whites understand".⁴⁰⁶

This belief was a direct result, of the repression of Black political aspirations through the security system, and grew in response to lawless emergency rule; and as it grew, so too did the *political* damage caused by the security legislation. That legislation, had become a coercive and destabilising substitute for the politics of negotiation and consensus. Far from creating the preconditions for political dialogue, it was actually destroying the chances of political reform. In fact, security law had substituted violence for politics as the mode of resolving Black/White conflict in South Africa and the drastic amendment of that law was essential for establishing the predominance of talk and compromise over the bullet and the bomb.

I may conclude, that the South African security system, indefensible by

acceptable standards of moral and political judgement, was as great a failure, when assessed by its own implicit standard of justification – effectiveness in securing a peaceful and stable society. There was no chance, moreover, of increasing its efficacy, by a more rigorous application of security powers. The creation of a peaceful, prosperous and stable society required just the opposite of that – radical reform of security law in the context of overall political reform.

(19.) THE SECURITY SYSTEM AND THE RULE OF LAW - GENERAL CONCLUSIONS:

The South African security system had brought about the root-and-branch elimination of the rule of law; but this rather obvious conclusion is, not only one yielded by the preceding analysis of security legislation, according to the yardstick of legality.

The process of the legislative erosion, of the rule of law, had entailed the fearful corollary of the enthronement of the security authorities, as a lawless power in the country. Lawlessness in all its forms, is no doubt to be deplored; but there is nothing quite so corrupting as official lawlessness. When those who stood officially as the enforcers of the law, may dispense with all its traditional constraints, it was not long before others followed their example, even to the extent of losing respect for, and understanding of, the principle of government under law. In this sense, the security system had become a potent generator of the disorder it was ostensibly designed to eliminate.

The consequences of undermining legality and converting law into a naked instrument of power, was tragic for all groups in South Africa, including the group responsible for that transformation. The danger of the perversion of legality had been dramatically illustrated in a country, to the north of South Africa. The Ian Smith security machine developed in Rhodesia, in a futile attempt to secure White rule, by freeing the security forces from legal accountability, had been gratefully accepted, by the Mugabe Government in “liberated” Zimbabwe. Among the first victims of the management of the Smith security machine, were some White military officers, who were detained without trial and tortured under laws which they had helped to enforce. Such ironic twists of fate, are commonplace in history, but the lesson which they teach - that freedom is dependent upon the maintenance of the rule of law - has still to be learned.

Perhaps the finest dramatisation of that lesson, is Robert Bolt’s play, *A Man For All Seasons*, and particularly the following exchange in the play, between Roper and More:

Roper: “I’d cut down every law in England to do that.”

More: “Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws being flat?”

There was no place to hide in modern Zimbabwe, for those who incurred the displeasure of the Mugabe security forces, had enforced the Smith “laws” without pity against Nkomo supporters. Similar treatment, to that being inflicted on the opponents of the Botha Government, lay in store for both Black and White, in any future South Africa, with flattened laws. It follows, that one of the highest priorities for reformers concerned with freedom and justice, is the reconstruction of the rule-of-law state in this country.

SECTION D: THE SOUTH AFRICAN SCENARIO: THE POST APARTHEID ERA:

The process by which a society gives itself a Bill of Rights, can be viewed as the ultimate exercise of democratic power.⁴⁰⁷ The introduction of a justiciable Bill of Rights for South Africa in 1994, ushered in an entirely new legal and constitutional dispensation. The South African Bill of Rights, like other Bills of Rights, constitutes a cogent manifestation, of universally acknowledged moral and ethical norms, clearly enumerated, to constrain the legal behaviour of political and administrative office bearers, in all branches of Government, and administration, and even the conduct of individual citizens, in relation to one another, in certain circumstances.

The South African Bill of Rights, with its emphasis on liberty and equality, is the very antithesis of the policy of apartheid, that perniciously infused, all aspects of our previous constitutional dispensation.⁴⁰⁸ Moreover, when South Africa sought to place itself on the side of the “free” West, it undertook the burden of ensuring that the State, in its dealings with citizens, will recognise their humanity and right to civilised treatment.

However, even after apartheid, South Africa will remain a complex society. It will have to reckon with the heritage of apartheid, in personal prejudice and institutional inequity. It will have to press forward on urgent tasks of economic development. It will need to meld together people of various racial and ethnic groups, worshipping in different religions and holding an array of political convictions.

Given these realities, South Africa cannot escape the possibility of serious domestic conflict, despite the achievement of majority rule. The Government will need the ability to prevent the disagreements such differences will inevitably spawn, from descending into sectional warfare and even revolution.

At the same time, South Africa will face the risk of Governmental tyranny. Modern history, is filled with examples of revolutionary social transformations, that have degenerated into regimes, as oppressive as those they displaced. Sometimes, these ghastly results are the product of the intensifying ideological and personal designs of the revolutionaries; sometimes, they are the bitter fruit of the traditions of the old regime, traditions that the new rulers inherit more fully than they themselves may recognize. Whatever the cause, there is no reason to believe that South Africa is uniquely immune to this infection. It is important, therefore, to guard the new South Africa as well as possible, against this danger.

Emergency powers are a particularly threatening source of tyrannical authority - and also a potentially essential weapon against it. The very power, the state may need to preserve a benign social order from destruction, is the power that

it may abuse, to produce a new oppression.

In this Section, I will *inter alia*, outline certain factors that may determine how often a post-apartheid government will need emergency powers and other features that may affect the magnitude of the risk, that these powers will be misused as well as used. These factors are not matters on which easy predictions are possible, but I will suggest that it is safe to assume, both that South Africa will need emergency powers and that it might abuse them.

In the light of this prospect, South Africans will need to shape a constitutional response to the problem of emergency rule, a response that should both allow and restrain emergency authority. In the second part of this Section, I will examine two broad strategies for accomplishing this end. The first, paradoxically, is to say nothing about emergency rule in the Constitution; the second is to make explicit provision for it.

Each of these options, I will argue, is capable of being an effective response to the dilemmas of emergency rule, and each is subject to serious pitfalls. The purpose of this Section, is of course, to assist those who will choose among these strategies rather than to prescribe a choice. I will add, however, that the carefully drafted, explicit constitutional provision, namely Section 37, of the Constitution of the Republic of South Africa, 1996, which deals with states of emergency, was the most promising option for South Africa, and I will outline, the sorts of textual provisions, that could be employed, to circumscribe this ominous power, as effectively as possible.

(1.) CONSIDERATIONS BEARING ON THE TREATMENT OF EMERGENCY POWERS:

The design of a constitution is much more than a technical process. The powers of a government, ought to be the powers that it is expected to need. The limits that constrain a government, ought to be those, required to deal with the dangers, that the government's powers are expected to pose. We must therefore consider, first, how much a new South Africa may need emergency powers, and second, how much it may have to fear them. The answers to these questions, depend broadly on the sort of country the new South Africa is. Those who drafted the constitution for this new country, needed to weigh soberly the realities of their nation; they were also, however, in a position to shape those realities through the political struggles that led to the new South Africa.

(1.1) WILL A STATE OF EMERGENCY BE THE NORM?:

Every government needs to wield some emergency powers, on some occasions. The proper constitutional treatment of such powers, however, depends on whether the occasions for their exercise are expected to be common or rare. If a country is expected to face such persistent and profound

problems, that emergency will be the normal state of affairs, then perhaps the constitution should not raise serious obstacles to the exercise of special governmental power. But the more South Africa faces endemic emergencies, and the more its constitution is written to accommodate the regular exercise of emergency power, the less this constitution will be able to secure the rights of individual South Africans against the State. If, on the other hand, South Africa will not frequently need to resort to emergency powers, then the standards for the use of such authority, can be made more stringent.

South Africa will face difficult social problems even after apartheid is gone. Whether those social problems will require emergency solutions, however, is another matter. At least three overlapping factors, will bear on the likelihood, that South Africa needs to rule by emergency power: the extent to which the country is united or divided under the new Constitution; the nature of the social policies of the new Government; and the adequacy of the normal constitutional powers, for dealing with the exigencies to which the country will be exposed.⁴⁰⁹

First, it is useful to remember that “a house divided against itself cannot stand.”⁴¹⁰ The nature of the transition to the new South Africa undoubtedly affected the chances for harmony in the society. The more fully the Government can command the support of the entire South African population, and the more readily the various parts of that population subscribe to the venture of building a new nation, the less often the State will need emergency powers.⁴¹¹

Conversely, the more divided the new South African society is, the greater the possible need for emergency powers will be. An example from another country may illustrate this point, as well as the risk of abuse of this rationale for emergency powers engenders. After the overthrow of Somoza, Nicaragua established special courts, to handle the cases against its supporters. The Inter-American Commission on Human Rights considered these courts, a violation of “the right to a competent, independent and impartial tribunal,”⁴¹² a right secured by Article 8 of the American Convention on Human Rights.⁴¹³

Nicaragua, however, contended that its establishment of these courts, “somewhat dampened the rage of the masses and reduced the danger of a confrontation, between the thousands of family members, of the heroes and martyrs that died in the struggle, who wanted to take the law into their own hands, and the recently constituted authorities.”⁴¹⁴ Nicaragua’s defence of its policies may or may not have been persuasive, but the general proposition is inescapable: a country experiencing, or approaching, violent civil strife is likely to need emergency powers to deal with this threat.

Second, the nature of the social policies the new Government envisions will affect the ease of their implementation. The more profound and abrupt the social transformation that the Government plans, the more likely it will be, that normal governmental processes, will not suffice to bring it about. John Hatchard, quotes the argument of a former Zimbabwean Minister of Home Affairs, who said in 1983 that,

“Social change does not move in a police minuet; revolution is not a tea party with silver teapots and waiters. To meet the emergent economic threats, we need emergency powers to deal with economic sabotage that always threatens societies in the midst of change.”⁴¹⁵

Third, the more effective the ordinary constitutional powers of the government are in dealing with potential threats, the less need there will be for emergency rule. If advocacy of racial prejudice is a threat to the stability of a new South Africa, that *may* be a reason to deprive such speech of constitutional protection, even in ordinary circumstances. If localized resistance to majority authority is a danger, that *may* be a reason for firmly establishing the pre-eminence of national authority over local governmental points.

The more such dangers as these, can be handled through the normal provisions for the government's powers, the less need there will be for emergency rule. Obviously, however, it is no solution to the risk of governmental overreaching to give the Government powers, that make such overreaching the norm rather than the exception. One challenge South Africa will face, is the task of giving its rulers enough authority so that they do not need to resort frequently to emergency power, yet not so much that they themselves become a constant - rather than only intermittent - danger to the citizens' liberty.

(1.2) WILL THE RISK OF ABUSE OF EMERGENCY POWERS BE SUBSTANTIAL?:

No one who had sought to challenge the South African state of emergency, will doubt that emergency powers can be abused. South Africa's grim record, however, is not unique. As I have demonstrated, the danger of emergency authority is endemic throughout the world. This fact in itself, makes it clear that the new South Africa takes account of the prospect. I will suggest, moreover, that it is important for those who shape the new South Africa, to consider certain features of the new nation, in order to gauge the particular gravity of the threat posed by emergency powers.

That emergency powers are prone to abuse is, unfortunately, all too clear from the world's experience with them. As Clinton Rossiter observes,

“The most obvious danger of constitutional dictatorship ... is the unpleasant possibility that such dictatorship will abandon its qualifying adjective and become permanent and unconstitutional. Too often in a struggling constitutional state, the institutions of emergency power are served as efficient weapons for a coup d'etat.”⁴¹⁶

In a similar vein, the International Commission of Jurists, comments that there is a “disturbing tendency” for states of emergency “to become perpetual.”⁴¹⁷ Syria, to take just one example, “has been under a continuous series of emergencies since the end of the Ottoman rule in 1920.”⁴¹⁸

Emergency powers, tempt reformers as well as reactionaries, populists as well as autocrats. In 1978, at least a fifth of all the world's countries, were in states of emergencies.⁴¹⁹ The attraction of emergency powers, moreover, is hardly confined to new nations. "The crisis history of the modern democracies demonstrates," Rossiter writes, "that executives usually ask for more power than they really need"⁴²⁰

In the United States, President Truman declared a national emergency in 1950, as the Korean War approached. As Jules Lobel comments, "[t]hat national emergency remained in effect for almost twenty-five years."⁴²¹ Midway through that period, and long after the end of the Korean War, President Kennedy used Truman's emergency proclamation, "to provide the legal predicate for the embargo against Cuba."⁴²² Much more recently, according to a newspaper report,

"Lieutenant Colonel Oliver North and the Federal Emergency Management Agency ... drafted a contingency plan, providing for the suspension of the Constitution, the imposition of martial law, and the appointment of military commanders, to head state and local governments, and to detain dissidents and Central American refugees, in the event of a national crisis".⁴²³

Given the widespread use of emergency provisions, it should not surprise us that South Africa's four-year state of emergency was by no means unique, among the nations of Southern Africa. The Governor, of what was then Southern Rhodesia, declared a state of emergency before Ian Smith's unilateral declaration of independence in 1965; Robert Mugabe's government continued the state of emergency when it came to power in Zimbabwe in 1980.⁴²⁴ That country's declaration of emergency "has been renewed over 40 times since 1965."⁴²⁵ The Emergency Powers Act, that Zimbabwe now applies, was first passed in 1960, to combat African nationalism,⁴²⁶ and grants the President powers, quite similar to those conferred on South Africa's State President, by Section 3(1)(a) of the Public Safety Act 3 of 1953, which has been dealt with, in some detail, in Section C of my dissertation.

No country can afford to ignore the risk of abuse, of emergency powers. The greater the need for such powers, the greater the risk, but there are two other broad factors that are likely to affect the extent of that risk, in a post-apartheid South Africa: the political beliefs of the new nation and the structure of its government. The importance of the political beliefs of those who lead the new South Africa, and of the people whom they lead, is plain. The more strongly South Africans embrace the idea that the powers of their Government should be limited by principles of human rights, the less likely an abuse of emergency powers will be. Those in the Government will be more averse to such abuse, while those in opposition parties will be more vigilant in decrying any governmental surrender to temptation. Indeed, the people themselves will be more determined to reject usurpation of authority by their leaders.

In addition, the structure of the government, can help constrain the danger of

abuse. Attention to the structure of government, was a central focus of those who shaped the United States Constitution. As James Madison, one of the framers, wrote in 1787, “[i]t is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them, all subservient to the public good. Enlightened statesmen will not always be at the helm.”⁴²⁷ The United States Constitution reflects this insight, in an array of structural features meant to make it difficult, even for unenlightened rulers to oppress their people.

The structure of the government, will affect the use of emergency powers both directly and indirectly. The direct effects, will be those resulting from whatever procedures may govern the establishment and continuation of states of emergency. The greater the role of the legislature and the judiciary in decision-making about emergencies, the better the chances of preventing abuse by the executive power.⁴²⁸

There will also be a more indirect impact of governmental structure. Whatever the particular rules governing the use of emergency powers may be, the ability of the ruling party to abuse those powers, will depend partly on the extent of that party’s unity and pre-eminence over other voices in the system. The more vigorous the parliamentary opposition parties are, and the less rigidly the majority party controls the votes of its members, the harder it may be for the government to muster the votes necessary, to support an abuse of emergency powers.

The more assiduously and emphatically courts identify and decry human rights violations, the more likely it is that public and parliamentary opposition to government excesses, will also be sharp. However, more effective checks on the governing party’s ability to act improperly - or indeed at all. Again, the design of a system that secures enough, but not too much, power for the government to govern, was a delicate task for those who wrote the new South African Constitution.

This Section will not attempt to make detailed predictions, but I will assume, I hope not too optimistically, that a post-apartheid South Africa, will not need to resort to emergency powers as a matter of course. I will also assume, I think realistically, that South Africa - like most, if not all, nations-will face a serious risk that any emergency powers it grants, will be abused. With these perspectives, we can now consider what emergency provisions, if any, the South African constitution should include.

(2.) CONSTITUTIONAL STRATEGIES FOR REGULATING EMERGENCY POWERS:

I have called this section “constitutional strategies” rather than “constitutional provisions”, because one of the two principle strategies, is to make no explicit provision for emergency powers at all. The other strategy, of course, is to address the issue of emergency provisions explicitly, in greater or lesser

detail. Each of these methods, can contribute to the effective supervision of emergency powers, but neither is guaranteed to be successful. The choice between them, must turn on an analysis, not only of their intrinsic properties, but also of the political environment in which either of these strategies is to be deployed.

The strategy of textual silence, can help to foster a constitutional climate in which emergency powers are effectively, though tacitly, disfavoured. Unfortunately, it is difficult to be confident, that textual silence would have this effect in South Africa. Explicit constitutional treatment of emergency powers, can also help to cabin emergency powers, if the constitutional text is written to circumscribe rather than to encourage, the use of such authority.

This Section, will present in some detail, the sorts of explicit textual safeguards that could provide the needed limits. The central danger of the strategy of textual explicitness, however, is that those who adopt the new constitution may choose not to adopt such safeguards. In that light, I will argue that textual explicitness, is the most effective response to emergency powers in South Africa - but that its value, will be jeopardized, unless there is a firm political commitment to the enactment of a rigorous text.

(2.1) Textual Silence :

Silence may not seem like much of a solution to the dilemma posed by the necessity and danger of emergency powers. In the past, South Africa's constitution's general lack of entrenched human rights limits on governmental power, is demonstrably no solution at all, to the need for restraining governmental abuse.

The United States Constitution, embodies the strategy of textual silence, and a look at this experience, will help my inquiry. In that country, textual silence has proven - perhaps unsurprisingly - to be quite a workable predicate, for the use of governmental powers in emergencies. At the same time, textual silence may have been of value as a source of restraint on those powers as well. 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 helped engender a tradition of control of governmental authority. Once we understand the role that textual silence can play, however, we must ask whether the American experience would travel well to South Africa. I will argue that, unfortunately, we cannot be confident that textual silence would play the same benign role in South Africa, as it has in the United States.

Let me begin this examination of the United States Constitution, by acknowledging that this document, is not entirely silent on the issue of emergency powers. Nevertheless, the list of provisions that explicitly authorize emergency deviation, from normally guaranteed rights, is very short. One section authorizes the suspension of the writ of *habeas corpus*, "when in cases of Rebellion or Invasion, the public safety may require it."⁴²⁹ The Third Amendment, prohibits the quartering of soldiers, in any house, without the

owner's consent, during peacetime, but allows it, in a time of war.⁴³⁰ Finally, the Fifth Amendment, waives the requirement of a presentment or indictment, for "cases arising in the land or naval forces, or in the Militia, when in actual service, in a time of war or public danger."⁴³¹

To be sure, those who wrote the United States Constitution, realized that there might be emergencies to face. Congress can declare war,⁴³² and the President is the commander-in-chief of the armed forces.⁴³³ The militia may be called out to enforce the laws, subdue rebellion, or repel an invasion.⁴³⁴ On application from a state, the United States is bound to protect that state from domestic violence.⁴³⁵ In addition, the President wields the "executive power"⁴³⁶ and "shall take care that the laws, be faithfully executed."⁴³⁷ Much might be, and has been inferred from these and related grants of power. However, no provisions other than those cited in the previous paragraph, specifically permit emergency abrogation of the Americans' normally available rights, and no provisions expressly authorize the imposition of martial law, or the declaration of a state of emergency. In contrast, the language of the United States Bill of Rights, securing individual liberties is, in general, notably unqualified.

Despite the relative silence of the United States Constitution, government officials can and do exercise emergency powers. Just before this conference began, for example, state and local officials responded to the effects of hurricane Hugo with such steps, as a six p.m. to seven a.m. curfew and an order blocking citizens from returning to their homes, until rescue work was over.⁴³⁸

Emergency powers have also been used in more controversial ways. Local governments coping with urban riots in the 1960s "not infrequently" imposed curfews or other emergency measures in response.⁴³⁹ The Mayor of Milwaukee, Wisconsin, confined all city residents except "doctors, nurses and others performing essential services" to their homes for twenty-six hours, with two brief pauses to permit food shopping.⁴⁴⁰ Riot curfews were "generally upheld" by the courts.⁴⁴¹ The Mayor of Philadelphia, proclaimed a state of emergency pursuant to a local ordinance, after the assassination of Martin Luther King, Jr., and banned almost all types of outdoor gatherings of twelve or more persons.

The United States Supreme Court, found that an appeal challenging arrests, under this state of emergency, did not present a substantial federal question.⁴⁴² In 1955, a labour dispute in Indiana, became so violent that martial law was imposed.⁴⁴³ Perhaps most notoriously, during World War II, military authorities excluded from the Pacific Coast area, all people of Japanese descent, including American citizens, and confined many, in internment camps. The constitutionality of this extraordinary action, was upheld by the United States Supreme Court.⁴⁴⁴

In short, textual silence does not make emergency powers unavailable. If silence is not abolition, however, perhaps it is – or will be taken to be – assent. In that case, textual silence would have little to recommend it as a strategy, for it would amount to a blank check to the executive authorities.

Notwithstanding the litany of uses and abuses of emergency power just mentioned, ordinary life in the United States is substantially free of the pressure of emergency authority. No doubt, the source of this good fortune, lies largely in broad political and social characteristics of this country, features that are unrelated to the particular omissions and inclusions in the U.S. Constitution. In particular, the United States' relative internal peace since the Civil War, and its freedom from external invasion, have surely reduced its need for emergency powers. I suspect, however, that the silence of the U.S. Constitution on emergency powers, also plays a role in limiting their use.

This constitutional silence, makes the existence of emergency powers and the occasions for their exercise, matters of inference and debate.⁴⁴⁵

In three distinct ways, moreover, the text's silence may contribute to the outcome of this debate being favourable to citizens' rights. First, the presence of explicit guarantees of rights, and the absence of explicit grants of emergency power affect what might be called the "balance of argument." No one engaged in this debate is likely to be indifferent to the need for the nation to survive the emergencies it faces. The tenor of the constitutional text, however, serves as a constant reminder, of the importance of searching for solutions that do not trammel guaranteed liberties. Responsible officials, may give such concerns greater weight, than they, otherwise would. If they do not do so, of their own accord, their opponents may object more powerfully than they otherwise could.

Second, the absence of express authorization for emergency rule, assures that such power remains special, even if it is accepted as legitimate. We tolerate what is ordinary and familiar, more readily than what is extraordinary and strange. The U.S. Constitution's silence, makes emergency power always extraordinary, and so again, bolsters the force of the arguments against its use.

Third, the uncertain reach of emergency powers and the absence of express vesting of prerogatives, in the executive branch open the way for the involvement of the other branches. If the existence of checks and balances, within the government is in general, an institutional safeguard of liberty, the same system may be of value when emergency action is considered. To be sure, an explicit provision, calling for judicial review or legislative consideration of the use of emergency power, would provide, at least as great an encouragement for such involvement, by the other branches, as does textual silence. But textual silence is much better in this regard, than an explicit text, which places such matters unmistakably, in the discretion of the executive alone.

In fact, both Congress and the courts in the United States, have on occasion, sought to limit the boundaries of executive emergency powers – although the record of both legislative and judicial intervention in this sphere is a mixed one. Congress enacted several pieces of legislation in the 1970s, including the War Powers Resolution of 1973,⁴⁴⁶ in an attempt to cut back on the previous decades' expansion of executive emergency powers.⁴⁴⁷ These efforts have

been attacked as a dismal failure,⁴⁴⁸ but Congress may be able to block particular executive ventures, even if it does not divest the executive of general discretion. Individual members of Congress, also can help catalyze public concern, even when they cannot prevail in the legislative process.

The courts, have also contributed to the limitation of emergency power. To say this, is not to deny that the courts have sometimes shied away from controversies that threatened to bring the judiciary into collision with the political branches of the government.⁴⁴⁹ Indeed, emergencies, by their nature, are likely to generate forces so intense that courts, (and even legislators), may find it politic to avoid the issues. It is therefore, no surprise that some judgements have endorsed extremely broad deference to executive emergency decisions.⁴⁵⁰

Despite such constraints, the United States Supreme Court, has recently declared that, "We can readily grant that a declaration of emergency by the chief executive of a State, is entitled to great weight but it is not conclusive."⁴⁵¹ It has also been held, that even when military powers must be used, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."⁴⁵² Although the same decision properly recognizes "a permitted range of honest judgement as to the measures to be taken,"⁴⁵³ this discretion is not unlimited. The U.S. Supreme Court has repeatedly curtailed emergency bypassing of the courts.⁴⁵⁴ During the Korean War, the Court went so far, as to invalidate President Truman's contention that the seizure was necessary, to forestall a strike that would directly jeopardize the war effort.⁴⁵⁵

More broadly, the courts may contribute to a climate of restraint, not so much through their relatively infrequent decisions on grand issues of executive emergency power, as through their day-to-day work on the articulation of the balance of individual rights, against the needs of the state.⁴⁵⁶ This task has long been one of the staples of the courts' work. The United States Constitution, guarantees a right of free speech, for example, and no word in the text permits this right to be taken away.⁴⁵⁷

It has fallen primarily to the courts, to decide when speech poses such a danger to the nation, that it can constitutionally be suppressed. The courts' record in answering this question, has not always been an admirable one. Over the years, however, the courts have wrestled with the question, first evolving the "clear and present danger" test and, more recently, the stringent "incitement" test to help specify those circumstances, under which governmental necessity can justify controlling political speech.⁴⁵⁸ In making these decisions, and a host of others, the courts have given force, to the claim that constitutional rights and national security are compatible. The more this claim becomes a part of the bedrock of political belief, the less room there is, for abuse of executive power-and the silence of the text provides the space for this principle to gather force.

In short, the result of textual silence, is that the extent of emergency powers, becomes the product of an ongoing debate among the people and among the

branches of government of the United States. The case for adopting the strategy of textual silence, is that it has not unduly cramped the government's powers, and yet it has contributed to a climate, in which those powers have been used with relative restraint.

Unfortunately, it is far from clear, that such a climate could be fostered in the same way, in a post-apartheid South Africa. The evolution of American constitutional understanding, is undoubtedly the result of a host of factors, more or less peculiar to American history and society; South Africa's constitutional meanings, will be equally the product of the particular facets of South African life. In this sense, for South Africa, the strategy of textual silence is almost a shot in the dark.

While it is impossible, to predict the course of South African history, it is possible to identify grounds to fear, that textual silence in South Africa, would not be heard as it has been, in the United States. One basis for this proposition, is that in South Africa, "the genie is out of the bottle": emergency powers were in use, and their potential necessity in the future, was hardly ignored by the drafters of a post-apartheid constitution. The risk exists, that emergency powers will be needed, even in a post-apartheid South Africa, and if that unhappy possibility is realized, then a constitution silent on the issue of emergency powers, may be read as reflecting the drafters' implicit decision, not to regulate this field at all.

This reading, seems all the more plausible for two reasons. First, much South African constitutional tradition, emphatically conveys the message that parliamentary supremacy, is virtually absolute. Even with the adoption of a post-apartheid constitution, that does create enforceable limits on state power, this tradition may leave behind a reluctance to infer unstated constitutional limits on the power of the state. At best, the notion that there are unstated constitutional limits on emergency powers, while limits on other aspects of state power are spelled out, may seem anomalous and confusing for those in the government or in the courts, who are called upon to abide by it.

Second, a number of important international agreements that protect human rights, incorporate explicit provisions for states of emergency. To omit a textual treatment of emergency powers, when such prominent models exist, and when so many other matters will no doubt be receiving explicit textual discussion, would be odd and even perilous. In South Africa, textual silence might not become a part of a slow accretion of constitutional tradition, limiting emergency powers, but instead could come to be seen as a tacit acceptance of a largely unlimited extraordinary authority.

To be sure, the framers of the United States Constitution, also wrote with the memory of the revolution fresh in their minds. Those in power, in the early years, saw threats that tempted them to limit citizens' liberties.⁴⁵⁹ These early events, could have become the seeds of a radically different understanding of the balance of governmental power and individual rights, in the words of the American Constitution. I do not suggest, therefore, that the fact that emergency powers cannot be ignored in the deliberations over a new South

African Constitution, compels their explicit treatment in that document. I do suggest, however, that the strategy of textual silence in South Africa, may well be a gamble against the odds.

(2.2) Textual Explicitness :

While textual silence is not a dependable curb on emergency powers in South Africa, it remains to be seen whether textual explicitness is a better alternative. Textual explicitness is a popular strategy in modern human rights documents, but the task of crafting constitutional provisions to ensure a narrow delineation of emergency powers, is not a simple one. Moreover, the stakes are high, for a loosely worded provision, will not impose restraints on emergency powers and may instead, encourage their use.

Two sorts of responses are necessary to meet this risk. The first, is to determine what protections must be embodied in the constitution, in order to limit effectively the dangers of emergency power. The second, and ultimately more important response, is to generate the political will required to ensure the adoption of the textual provisions that are called for. I will argue that a “logic of emergency” tends to undermine the commitment to liberty that is needed. Furthermore, the full range of potentially helpful provisions may be so extensive that, even with the best of intentions, the drafters may conclude that some have to be omitted from a constitution. The upshot is that only dedicated political leadership will ensure that textual explicitness does not become an even weaker safeguard of South Africans’ rights, than textual silence might be.

(2.2.1) THE ELEMENTS OF AN EFFECTIVE TEXTUAL LIMITATION ON EMERGENCY POWERS:

In identifying the constitutional language that might regulate emergency authority, we can draw on a range of models, for if textual explicitness is a risky strategy, it is nonetheless a strategy in wide use. A number of international human rights instruments,⁴⁶⁰ as well as many nations’ constitutions,⁴⁶¹ make explicit provision for emergency powers.⁴⁶² Some commentators also support this strategy.⁴⁶³ One early endorsement came from Machiavelli:

“Now in a well-ordered republic, it should never be necessary, to resort to extra-constitutional measures; for although, they may for the time, be beneficial, yet the precedent is pernicious, for if the practice is once established, of disregarding the laws for good objects, they will in a little while, be disregarded under that pretext for civil purposes. Thus no republic will ever be perfect, if she has not by law provided for everything, having a remedy for every emergency, and fixed rules for applying it”.⁴⁶⁴

The South African Law Commission took such a course. It recommended the

following in Article 30 of its Bill of Rights:

“The rights granted in this Bill, may by legislation, be limited to the extent, that is reasonably necessary, in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others, or for the prevention of disorder and crime, but only in such measures, and in such a manner, as is acceptable, in a democratic society”.⁴⁶⁵

The Law Commission’s proposal, may very well be meant to provide genuine restrictions on the State’s power to abridge the rights guaranteed elsewhere in the Bill of Rights. It is far from clear, however, that it would have had this effect in practice. Article 30 permitted the restriction of rights for a very wide range of reasons. Indeed, it would seem that any legitimate purpose of legislation, might also be a legitimate basis for interfering with constitutional rights, for all such purposes would surely be embraced in “the public interest” to which this Article referred.

Moreover, although courts *could* actively enforce the requirement that the limiting of rights not exceed the measure and manner “acceptable in a democratic society,” this standard is neither clear nor necessarily strict. It seems quite possible, that the actual result of this provision, would be to do precisely what textual silence can avoid doing – to make the invasion of rights for a number of reasons, seem normal.

If this undercutting of constitutional guarantees is to be avoided, the exception provision must be drafted much more restrictively. I believe, that those who draft the constitution’s emergency clauses, will need to look, at three sorts of restrictions, on the power to derogate from rights: rules specifying, the procedures to be followed, by the executive and legislative branches, in wielding emergency authority; substantive limits, on the extent of the emergency powers available, to the government; and provisions for judicial review, to enforce some, or all of the foregoing requirements. I suggest a consideration of the following elements, but there are surely others that will also be worth including.⁴⁶⁶

(a.) Procedures for Executive and Legislative Emergency

Action :

- (i) A “sunset” provision, 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 :** The effect of this sunset rule, would have been, that the leaders of the new South Africa, would have had to apply their own minds, freshly to the question, of what emergency powers, they would have needed.

(ii) A prohibition on invasion of rights except pursuant to statutory authorization : If the Law Commission's provision for a limitation of rights "by legislation" impliedly excluded limitation without legislation, it created precisely this prohibition. The virtue of such a prohibition, is that it denies legitimacy to pretensions of power that have not won legislative approval. For this very reason, however, those responsible for preparing such legislation, might be prone to phrase it broadly and thus explicitly authorize emergency action, which might otherwise come to be considered beyond constitutional bounds. Explicit statutory treatment of emergency powers, like explicit constitutional treatment, may restrict less than it permits. Whatever the decision on the requirement of statutory authorization, it should be made clear that no emergency powers, statutory or otherwise, can be exercised except in accordance with the restrictions on emergency powers, set out in the constitution itself.

(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, a similar requirement, for legislative approval, of any emergency regulations, adopted by the executive : Conditioning the use of emergency powers, on legislative approval, will press the legislature, to give direct consideration to their use. In contrast, a provision, which allowed the executive to proceed, so long as the legislature did not actively *disapprove*, would shift the burden of inertia, so as to favour executive power.⁴⁶⁷

The importance of legislative involvement, in the decision to use emergency powers, also counsels, in favour of a requirement, that the legislature, be called into session, without delay, if an emergency is declared while it is in recess, and perhaps, for a requirement, that the legislature remain continuously in session, for the duration of any emergency.⁴⁶⁸ Dissolving the legislature during an emergency, should be prohibited unless a new legislature is to be democratically elected without delay.⁴⁶⁹ Similarly, altering the structure of the judicial branch through emergency power, should not be permitted.⁴⁷⁰

(vi) A requirement that legislative approval of the use of emergency powers, be by a super-majority vote : Invasion of rights is a serious matter. If the government cannot muster a super-majority, (such as a two-thirds vote), perhaps that indicates that the necessity for such interference with constitutional rights, is not clear enough to the population at large, to justify going forward.⁴⁷¹

(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 a renewal by the executive and re-approval by the legislature.⁴⁷²

(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 : Both (v) and (vi) are meant, like certain of the other procedural requirements, to try to generate periodic executive and legislative reassessment, of the case for emergency action.

The effect of these suggestions, would be to make rule by emergency power somewhat more difficult to initiate and maintain. Nonetheless, an executive that commanded a large parliamentary majority, would be able to meet all of these requirements. Because future South African politics, like that of so much of the last forty years, could be dominated by one political party, two other sorts of protections should be considered as well. The first, is the imposition of substantive restrictions on emergency powers. The second, is the guarantee of judicial review to enforce the various procedural and substantive restrictions, set forth in the constitution.

(b.) SUBSTANTIVE LIMITS ON THE EXTENT OF EMERGENCY POWERS:

(I) Permitting invasion of rights, only “in time of war or other public emergency, threatening the life of the nation” :⁴⁷³ The effect of this limitation, should be both, to restrict the occasions, for the invasion of constitutional rights, and to emphasize to rulers and citizens alike, that such invasions, are the exception, and not the rule. Admittedly, even this limitation may be subjected to loose interpretation, and some deference to those authorities charged with identifying and responding to such dangers, is entirely appropriate.

Such a provision, does seem to capture, however, the important distinction between situations that threaten the nation’s existence and other occasions, such as natural disasters, that constitute emergencies of a lesser order. The effect of making this distinction, should not be to preclude all abridgement of citizens’ rights in these lesser emergencies. Rather, the effect of this restriction would be to empower the courts, to assess the legitimacy of these other abridgements, within the general body of the doctrine that governs the rights themselves. “Normal” restrictions would be assessed in the light of the normal doctrine; only emergencies affecting the life of the nation would justify more substantial invasions of rights.⁴⁷⁴

(ii) Permitting invasion of rights only “to the extent strictly required by the exigencies of the situation” : This limitation, is a

part of both the European Convention on Human Rights⁴⁷⁵ and the International Covenant on Civil and Political Rights.⁴⁷⁶ The standard is meant to be a genuine limitation, but would appropriately be applied with substantial deference to the judgement of the executive branch, as confirmed by the legislature, that particular steps were needed.⁴⁷⁷

A related principle, would call on governments not only to show “the need for the measures in question, but also ... to demonstrate the efforts made to ensure that the measures employed will not be abused.”⁴⁷⁸ A review of emergency measures after the end of the state of emergency, might also be required to insure that injustices are found and corrected as far as possible.⁴⁷⁹

(iii) *Forbidding derogation from certain rights* : It is painful to identify rights from which derogation should never be permitted, because the very act of ensuring some rights, announces the vulnerability of others. Nonetheless, protecting some rights from derogation, seems better than protecting none. Conceivably, the detailing of non-derogable rights will also have the salutary effect of reinforcing the general value, placed on the protection of rights.

International human rights treaties, that do permit some derogations are useful sources of suggestions, for the list of rights that must never be violated. The International Covenant on Civil and Political Rights, makes the following rights non-derogable: the right to life; the right to be free of torture or cruel, inhuman, or degrading treatment; the right not to be enslaved; the right not to be imprisoned for failure to fulfill a contractual obligation; the right not to be punished under retroactive criminal laws; the right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion.⁴⁸⁰ The International Covenant, also forbids any derogation from rights that “involve[s] discrimination solely on the ground of race, colour, sex, language, religion or social origin.”⁴⁸¹

The American Convention on Human Rights, is broadly similar to the International Covenant, but it also protects the following rights, not made inviolable by the Covenant: certain rights of the family; the right to a name; the right of children to protection; the right to a nationality; and the right to participate in government.⁴⁸² The American Convention, also secures “the judicial guarantees essential for the protection of such rights.”⁴⁸³

The International Commission of Jurists, offers extensive recommendations for making various due process rights non-derogable.⁴⁸⁴ Due process protection, is not made inviolable in the International Covenant or the American Convention.⁴⁸⁵ The South African experience, however, underlines the importance of securing this complex of rights.

In particular, even if detention without trial is to be permitted, it is essential to guarantee certain protections for detainees. The International Commission of Jurists, identifies a number of important protections of detainees, such as the right to see counsel and family members.⁴⁸⁶ It urges, in addition, that

“The ordinary civilian judiciary, should retain jurisdiction, to review individual cases of detention, in order to ensure, that the stated grounds, are within the purposes of the emergency legislation, authorising detention orders, that proper procedures have been followed, and to ensure that the conditions of detention, comply with the law”.⁴⁸⁷

It maintains as well that “the ordinary courts should retain jurisdiction over charges of abuse of power, by security forces.”⁴⁸⁸

Finally, to the extent that the new South African Constitution confers enforceable social and economic rights, it will be necessary to consider whether, and to what extent, derogation from these rights, should be permitted during an emergency. The International Covenant on Economic, Cultural and Social Rights “does not contain a provision, permitting derogation in times of emergency,”⁴⁸⁹ but I doubt that in an emergency, in which many human freedoms, are subject to abridgement, there would not be valid cause for interference, with at least some economic or social rights.

This detailing of non-derogable rights, may seem to deprive the emergency exception of its value to the government. Even if all of the rights identified here were made non-derogable, however, emergency powers could still be potent sources of government authority. The government could wield increased power to search, arrest, and perhaps to detain without trial, to restrict citizens’ movements within the country and across its borders, and to restrict such fundamental elements of liberty as freedom of speech and freedom of assembly. Moreover, the limits on these actions, that would be imposed by such substantive and procedural provisions as I have outlined, will be prey to violation, unless they can be enforced. For that reason, judicial review is a critical component of a constitutional limitation on emergency powers.

(C) GUARANTEEING JUDICIAL REVIEW OF THE JUSTIFICATION FOR INVADING CONSTITUTIONAL RIGHTS:

I would suggest, that the courts be empowered and required to review whether an emergency exists, and whether it justifies the particular steps the government has taken to deal with it.⁴⁹⁰ It is undoubtedly difficult for courts to weigh the gravity of a threat to the nation, or to determine whether particular steps, need to be taken in a situation so serious, that the government has labelled it an emergency. Precisely for this reason, deference to the judgements of the other branches on these questions, will be appropriate.

This deference, however, should not be complete. There are cases where elements of such review, have been accomplished, not only in the United States, but also, notably, in South Africa. Quite recently, in *End Conscriptio Campaign and Another v Minister of Defence and Another*,⁴⁹¹ Justice Selikowitz determined that war, did not “actually prevail” in the Western Cape and therefore martial law could not lawfully be imposed. Perhaps courts will

overturn executive and legislative assessments, of the existence of an emergency, only when the government's predicate for acting is strikingly unjustified, but even the possibility of their intervention, can be a valuable safeguard.⁴⁹²

Where the issue is not the existence of an emergency, but the steps taken to address it, the courts' role can and should be more vigorous. Lower courts have sometimes performed this role, with striking vigor and even under South African law, in reviewing and disapproving aspects of the emergency regulations issued by the Government.⁴⁹³

In assessing the steps the government takes, in an emergency in South Africa, the courts will be performing a function which a post-apartheid constitution is likely to call on them to perform, in many contexts-the weighing of claims of constitutional or legal right against the needs of the State. Moreover, the courts will, at least in part, be applying specific constitutional provisions-such as the procedural and substantive limits, discussed earlier in this Section-which are meant to apply, in this very context. We can fairly expect, therefore, that they will be capable of playing a valuable role, in adjudicating such issues in emergencies as well.

(3.) THE CERTIFICATION JUDGEMENT:

On 6 September 1996, the South African Constitutional Court,⁴⁹⁴ in an unequivocal and jurisprudentially penetrating judgement, declined to certify the proposed draft of the new National Constitution, indicating that in certain defined respects, it did not comply with the Constitutional Principles.⁴⁹⁵ One such area being Section 37, which dealt with states of emergency. In regard to Section 37, the Constitutional Court, made the following observations:

"NT 37 envisages national legislation authorising the temporary and partial curtailment of the Bill of Rights, in limited circumstances and subject to detailed conditions. In principle, there can be no objection to such authorisation. Partial curtailment of a Bill of Rights during a genuine national emergency, is not inherently inconsistent with "universally accepted fundamental human rights, freedoms and civil liberties". Nor can it be said that the safeguards provided by NT 37, against possible legislative or executive abuse of emergency powers, are inadequate. Two subsidiary points, relating to the section have, however, been raised.

The first, was that NT 37(1) authorises national legislation governing the declaration of an emergency without specifying who may be empowered to issue such a declaration. Although it is correct that the sub-section leaves it to Parliament to make the designation, that cannot found a valid objection to certification of NT 37. Constitutional Principle ii does not require constitutional designation of the entity which is to be empowered to declare an emergency, nor does universally accepted

human rights jurisprudence. None of the other Constitutional Principles does so either. The envisaged legislation will be subject to constitutional control and, insofar as the executive branch of government may be vested with the power, it is significant that NT 37(2) and (3) involve the legislature and the judiciary as watchdogs. That amply complies with international norms. In the result, the objection must fail.

The second point, which arose in the course of oral argument, relates to NT 37(4) and (5), which read as follows:

“(4) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that –

(a) the derogation is strictly required by the emergency; and

(b) the legislation –

(i) is consistent with the Republic’s obligations under international law applicable to states of emergency;

(ii) conforms to sub-section (5); and

(iii) is published in the national Government Gazette as soon as is reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise –

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of that table.”

The problem, lies in a provision, in the table referred to in NT 37(5), rendering derogable, *inter alia* the right of accused persons, guaranteed by NT 35(5), to have evidence obtained, in circumstances violative of the Bill of Rights, excluded if its admission, “would render the trial unfair, or otherwise be detrimental, to the administration of justice”.

Had sub-section (4) stood alone, paragraph (a) of it might well have sufficed for the protection of rights during states of emergency, to the extent commensurate with such situations of peril. The addition of sub-section (5), however, has introduced a differentiation between the

importance of various rights, which seems invidious and, in some instances at least, so inexplicable, as to be arbitrary. We think of no reason why some of the rights that are said to be derogable in states of emergency should be treated as such. A clear example, is the derogability of NT 35(5). Derogation from such a right cannot be justified even in an emergency. Any attempt at such justification would fail in terms of NT 37(4). No purpose is therefore served by this attempt to render derogable what can in practice, never be justified.

Although we accept that it is in accordance with universally acceptable human rights to draw a distinction between those rights which are derogable in a national emergency and those which are not, this should be done more rationally and thoughtfully than it is done in NT 37(5)".

The profound concern that the Court has, clearly manifested for individual rights, is apparent from the criticism it leveled at certain powers accorded to the executive in a state of emergency, unequivocally stating that the judiciary should not be bypassed especially, in times of national crisis or disaster. Briefly, the Court found that differentiation between certain rights that in a state of emergency are derogable, and others that are not "in some instances at least, so inexplicable as to be arbitrary."⁴⁹⁶ In this regard the Court held that "[a]lthough we accept, that in accordance with universally accepted fundamental human rights, to draw a distinction between those rights, which are derogable in a national emergency, and those which are not, this should be done more rationally and thoughtfully, than done in NT 37(5)".⁴⁹⁷

The above aspects were rectified and the "new and improved" Section 37 appears below.

(4.)THE JUSTIFICATION FOR SECTION 37 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996:

STATES OF EMERGENCY:

37.

- (1) A state of emergency may be declared only in terms of an Act of Parliament, 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.

- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that

declaration, may be effective only –

- (a) prospectively; and
- (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of –

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that –

- (a) the derogation is strictly required by the emergency; and
- (b) the legislation –

- (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
- (ii) conforms to subsection (5); and
- (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise –

- (a) indemnifying the state, or any person, in respect of any unlawful act;
- (b) any derogation from this section; or
- (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

The decision to include a provision on states of emergency and the suspension of fundamental rights in the 1993 Constitution, was controversial.

Many opposed its inclusion because of serious human rights abuses in the past. Some argued, that a Bill of Rights should not, allow for the suspension, of the very rights, it has to protect. There is also the disturbing tendency for states of emergency to become “perpetual”.⁴⁹⁸

Not all “emergencies” justify an official state of emergency and the suspension of fundamental rights. Only those, which threaten the life of a nation, require exceptional measures. The best way to prevent abuse of this power, and unlawful infringement of fundamental rights, is to provide for comprehensive constitutional checks in such situations. In times of emergency, the protection of fundamental rights becomes all the more important. Section 37 is such an emergency clause, which may only be implemented under the control of a supreme Constitution, which provides for extensive judicial and legislative controls.

The absence of such a provision in a Constitution, is no guarantee that exceptional powers will not be invoked. Even countries without explicit derogation clauses in their Constitutions, sometimes find it necessary to invoke emergency powers.⁴⁹⁹ Such measures are then justified by invoking “implied provisions”, common-law grounds, prerogative powers, martial law, the principle of *salus reipublicae suprema lex*, or the right of the state to self-defence, or necessity. The danger, is that these grounds may suggest some “extra-constitutional” source of executive power which is beyond normal constitutional and judicial control.

A clear and adequate provision in a justiciable Constitution, provides for a more satisfactory and transparent treatment of this subject-matter. It is also the best way to restrict emergency powers, to the truly exceptional instances when ordinary measures have become inadequate to protect the life of the nation. The 1996 Constitution, now governs this whole area. Concepts such as prerogative powers, martial law, and other common-law provisions, which, in the past excluded judicial control, can no longer apply.

(5.) THE RELATION OF SECTION 37 TO OTHER FUNDAMENTAL RIGHTS:

Section 37 forms a part of the Bill of Rights of the Constitution. This provides an important guideline with respect to its interpretation. Suspension of rights should be interpreted strictly, and the formalities and requirements should always be adhered to. The ultimate aim, remains the protection of society, by safeguarding fundamental rights, constitutionalism, and democratic government. The purpose is never to protect the government of the day.⁵⁰⁰

The interpretation of Section 37, should be based on the new and original basis provided for by the Constitution of 1996. Previous judgements have become largely irrelevant. New guidelines, in addition to the text of Section 37, are in terms of Section 39(1), to be gleaned from public international law and foreign case law. Most international human rights conventions, contain

derogation clauses.⁵⁰¹ Their implementation reveals useful guidelines and case law. The international-law requirements, with respect to public emergencies, do not flow from international agreements only. They are provided for in customary international law as well.⁵⁰²

As pointed out, in Section A of my dissertation, the International Law Association has approved a set of minimum standards, referred to as the Paris Minimum Standards of Human Rights Norms in a State of Emergency. These standards govern all aspects related to the declaration and administration of states of emergency. The Siracusa Principles, also dealt with earlier, deal with limitation and derogation, as developed under the International Covenant on Civil and Political Rights.⁵⁰³

The South African courts, have already indicated their preparedness to adhere to other international standards, such as the Standard Minimum Rules on the treatment of prisoners. In *S v Daniels*,⁵⁰⁴ this was done without any detailed analysis of their legal status. The Supreme Court, simply accepted them as “riglyne vir die behandeling van gevangenes wat deur talle lande as ‘n bloudruk vir hulle gevangenisstelsels beskou word”. It also took judicial notice, of the fact that prison authorities in South Africa already follow a policy of adhering to these guidelines. This seems to suggest that international state practice and standards, are acceptable as a yardstick for executive action. After the coming into effect of the 1996 Constitution, they may serve the additional purpose, of elaborating and explaining certain provisions of Chapter 2.

A suspension clause, should be distinguished from a limitation clause. The latter will not provide adequate legal guidance in times of public emergency.⁵⁰⁵ A limitation clause authorizes restrictions on fundamental rights under “normal” conditions. A suspension clause, on the other hand, provides for temporary suspension of rights, and operates only in exceptional situations, when a public emergency threatens the life of the nation.

The following discussion, will deal with the formal and substantive requirements applicable to a state of emergency and the suspension of fundamental rights.

(6.)THE EXISTENCE OF AN EXCEPTIONAL THREAT:

What is the precise definition of the kind of emergency, which justifies the suspension of fundamental rights? Section 37, requires that such an emergency, shall be declared only “when the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if the declaration is necessary to restore peace and order”.

The use of the word “where” (in Afrikaans “waar”) in the 1993 Constitution was unfortunate. At first glance, it suggested location, instead of the more logical requirement that *when* certain conditions prevail, *then* an emergency may be

declared. This was the type of formulation adopted with respect to a “national disaster” and has been reformulated in the 1996 Constitution, to read as, “when the security of the Republic ...”.

Certain exceptional conditions, must exist before an emergency may be declared. This is also the internationally accepted approach. Both the European Convention and the International Covenant on Civil and Political Rights (ICCPR) indicate *when* an emergency may be declared.⁵⁰⁶

The following requirements, with respect to, the nature of the threat, must be met:

- (a) The emergency must be actual or imminent. There must be a real threat of war, invasion, general insurrection or disorder, or a national disaster must already exist. A “preventive emergency” will be unlawful.⁵⁰⁷ Convincing proof of the existence of an imminent threat, will be required. This requires a factual judgement of the evidence available.⁵⁰⁸
- (b) The emergency must be of exceptional magnitude. This usually requires a threat to the whole of the population.⁵⁰⁹ An emergency experienced in one part of the country only, but affecting the whole nation will satisfy this requirement. A localized emergency affecting only the local population, may be problematic, although some commentators find it acceptable.⁵¹⁰ Chowdhury,⁵¹¹ provides the following useful discussion:

“Relying upon the decision of the European Court in *Ireland v UK*, Buergenthal points out, that a public emergency need not engulf or threaten the entire nation before it can be said to “threaten the life of the nation”. One must distinguish between the seriousness of a threat and the geographical boundaries, in which the threat appears or from which it emanates. A public emergency which threatens the life of a nation “could presumably exist even if the emergency appeared to be confined to one part of the country – for example, one of its provinces, states or cantons – and did not threaten to spill over to other parts of the country”. A contrary interpretation, argues Buergenthal, would be unreasonable “since it would prevent a state party from declaring a public emergency in one of its remote provinces, where a large-scale armed insurrection was in progress merely because it appeared that the conflict would not spread to other provinces”.

- (c) The life of the nation must be threatened. This requirement is found in both the European Convention and the ICCPR. This has been interpreted by the European Court, in the *Lawless* case, to “refer to an exceptional situation of crisis or emergency, which affects the whole population and constitutes a threat to the organized life of the community, of which the state is composed ...”.⁵¹² Another commentator interprets this requirement to mean “a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community, which forms the basis of the State”.⁵¹³

Section 34 of the 1993 Constitution, unfortunately, deviated from this requirement and employed a formulation of uncertain content: “the security of the Republic”. The concept of “state security” formed the basis for previous states of emergency, which were widely condemned because of wide executive discretion, human rights abuses, and lack of judicial protection.

“Security” was qualified in Section 34(1) by linking it to war, invasion, general insurrection or disorder, or national disaster. This created another problem. Lists are incomplete, (as this one was⁵¹⁴) and could not anticipate all possible manifestations. Each case has to be judged on its own merits, taking into account the overriding concern for the continuance of a democratic society.

This problem has been rectified by Section 37 of the 1996 Constitution, where the words “the security of the Republic is threatened ...” have been replaced with the words, “the life of the nation is threatened ...”. Moreover, the list of possible manifestations is not a closed list, and its scope has been increased with the insertion of the words “or other public emergency”.

The list provided in Section 34(1), created an additional and serious problem. A “state of war” was the first of the conditions listed, as justifying a public emergency. Section 82(4) empowered the President to declare a “state of national defence”.

Nowhere was any official, empowered to declare war, apparently with the objective in mind, of bringing the South African position in line with the United Nations Charter. Article 2(4) of the UN Charter, states that all members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”. Article 51 permits only individual or collective self-defence.

Section 34(1), should clearly have referred to a “state of national defence” and not “war”. As it stood, a state of war was possible because Section 34 foresaw it. However, nothing in the 1993 Constitution regulated its declaration. (It seemed that the technical committee drafting Section 82 of the 1993 Constitution, forgot to inform the drafters of Chapter 3). This introduced the danger of unwritten or prerogative powers being retained, which would have undermined the supreme character of the 1993 Constitution and its comprehensive control of executive powers.

Since the implications of the above problem were realized, and it was recognized that there are no powers beyond those provided for in the Constitution, Chapter 5 of the 1996 Constitution, dealing with the powers and functions of the President, has omitted the words “declare a state of national defence”.

The international standard used, is one, which puts the emphasis, on the

gravity of the circumstances.⁵¹⁵ That facilitates subsequent judicial scrutiny. As a result of the unfortunate formulation found in Section 34(1), another international standard, (“to the extent strictly required by the exigencies of the situation”), was lost. The *Siracusa Principles* deal with this standard in considerable detail, and list severity, duration, and geographic scope as requirements.⁵¹⁶ A more satisfactory application of the proportionality test, would then also have been possible. Proportionality is inherent in the words “strictly required”.

It should be possible to deal with certain events such as strikes, less severe natural disasters, or even internal strife by imposing “normal” restrictions on the freedom of movement or assembly, as provided for in a typical limitation clause. Such events, do not as a rule, constitute a threat to the life of the nation. The real test, is the gravity of the situation and whether the measures taken are necessary “to the extent strictly required by the exigencies of the situation”. Fortunately, the 1996 Constitution, rectified this problem and the words “strictly required” have been added to Section 37.

Economic difficulties *per se*, unaccompanied by an additional crisis, should not constitute a threat to the life of the nation. The opinion has also been expressed that “prolonged economic problems of underdevelopment are not inherently temporary phenomena, and are thus incompatible with the requirement that the threat to the life of the nation, be exceptional”.⁵¹⁷ It may conceivably be necessary to resort to emergency measures, in order to secure the supply of essential goods and services, under exceptional circumstances.⁵¹⁸ The lawfulness of such measures, will depend on the gravity of the situation, whether the measures are proportionate to the need, and whether the limitation powers are insufficient.

- (d) A state of emergency must be a measure of last resort. If the ordinary law of the land can deal with the needs of a situation, a state of emergency is not permissible. The normal provisions of the law should first be exhausted.⁵¹⁹ They include the limitation clause, providing for everyday constitutionally acceptable limits to the exercise of human rights.⁵²⁰ Section 37(1), seems to recognize this principle, by requiring that a state of emergency will be declared only when “necessary to restore peace and order”.
- (e) A state of emergency must be a temporary measure. This flows from its very nature. Suspension of rights, must therefore end, when the threat has disappeared. “Permanent states of emergency” are unlawful.⁵²¹ Section 37 is basically in conformity with this requirement. Once peace and order is restored, an emergency should end.⁵²² It shall be of force for not longer than twenty-one days “unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly”.⁵²³ Each such extension, will have to be justified in terms of the requirements for lawful emergencies and any superior court, shall be competent to examine each extension, in terms of all the substantive and procedural requirements provided for.

(7.)OFFICIAL PROCLAMATION AND JUDICIAL CONTROL:

A state of emergency cannot exist, unless officially declared. Its proclamation must be by an authority competent and legally empowered to do so. The reason for such a proclamation, is to announce publicly the existence of an exceptional situation and to inform the public about the special conditions, powers, suspension of rights, controls, and remedies which will apply. Such a declaration, and all subsequent regulations, should contain sufficient information to explain the reasons for the emergency, when it will come into effect, and the scope and effect of any suspension of rights. A *de facto* state of emergency is not permitted.

These requirements are to ensure respect for the rule of law, constitutionalism and a Bill of Rights. They also find support in public international law.⁵²⁴ Under international human rights agreements, states are in addition, required to inform other state parties and supervisory bodies in international organizations.

Public announcement and justification, will help to prevent arbitrariness, lead to a greater appreciation of the seriousness of such an exceptional state of affairs, and secure greater transparency. Judicial and political control, with respect to both announcement and implementation, are necessary to ensure the achievement of these goals.

Section 37 provides for practically all these requirements. The following may be pointed out:

- (a) All powers with respect to the proclamation of emergencies, flow from the Constitution and laws passed in terms thereof. Prerogatives and wide discretionary powers no longer exist.
- (b) A state of emergency is to be declared with future effect, ("A state of emergency shall be proclaimed prospectively ..."⁵²⁵).
- (c) No rights may be suspended unless a state of emergency is first proclaimed.
- (d) An Act of the new Parliament, will have to be adopted, to provide for the power to declare an emergency. The fact that emergencies are foreseen to be proclaimed "under" an Act of Parliament, suggests the passing of a general empowering Act, which provides for subsequent executive action.
- (e) Such an Act, will have to comply with all the requirements of Section 37 and the Constitution in general, in order to be valid. The Constitutional Court may decide its constitutionality, as it may do with respect to all bills and Acts of Parliament.⁵²⁶ Section 37(3), provides for a critical role for the judiciary: "Any competent court, may decide on the validity, of a declaration of a state of emergency, any extension of a declaration of a state of

emergency; or any legislation enacted, or other action taken, in consequence, of a declaration of a state of emergency.”

May judgement be passed on the substance of the proclamation, (the need for it, its justification), or only on procedural matters? Does the “political” nature of the decision to proclaim an emergency, exclude judicial control?

The “validity” of a state of emergency must inevitably include those substantive grounds justifying its proclamation. Sufficient factual proof of the existence of the threat of war, invasion, insurrection, etcetera should be supplied, in order to justify the extraordinary device, which a state of emergency is. In addition it will also have to show that “a state of emergency is to restore peace and order” and why less severe measures will not suffice. Such facts are constitutional preconditions, for declaring an emergency.

Care should be taken, not to continue with former practices and approaches inhibiting judicial control or to introduce new doctrines, which compromise the Constitution. It is a supreme Constitution, which has to give effect to the objectives of the constitutional state and an enforceable Bill of Rights. The judiciary has a constitutional obligation to protect and enforce this Constitution. This inevitably entails effective control over all exercise of power, which may violate the Constitution.

Section 37 forms a part of the Bill of Rights, the ultimate purpose of which is to protect fundamental rights. Suspension is an extraordinary power and decisions to proclaim emergencies, should be subjected to strict judicial scrutiny. All the organs of the State, now have to respect and promote the new constitutional order, which is based on the “sovereignty” of the Constitution. The sovereignty of Parliament is over.

- (f) The executive branch, will be responsible for the actual proclamation of an emergency and for specific regulations, in order to give effect to it. This is a decision to be taken by the President in consultation with the Cabinet.
- (g) A state of emergency shall last not more than twenty-one days. Extension for periods not exceeding three months, or consecutive periods of three months, is possible. Such an extension, requires a resolution by a two-thirds majority, of all the members of the National Assembly. This provides for control by the legislature, and is an important example of checks and balances. An elected legislature, is to demand convincing proof before an extension will be granted.
- (h) Certain substantive constitutional limits are set for law, regulations, or executive action dealing with public emergencies. No retrospective crimes may be created, state responsibility cannot be avoided, and certain fundamental rights, are considered non-derogable, and may therefore, not be suspended during an emergency.⁵²⁷
- (i) Judicial remedies and relief are provided for, covering all aspects of an

emergency, its declaration, and all steps taken thereunder. This, *inter alia*, includes issues such as the constitutionality of the Act proclaiming an emergency, referred to in Section 37(1), the declaration of an emergency, control over subsequent action, (including the *ultra vires* principle), and relief for individuals, acting under Section 38.

Section 37 provides an important yardstick for judicial review. Rights may be suspended only “to the extent necessary to restore peace and order”. This is a clear proportionality test⁵²⁸ and permits judicial investigation into the object and effect of suspension and of the cause of the emergency. The State will, by necessity, have to provide proof justifying its measures.

- (j) The Constitution’s jurisdictional provisions must be taken into account. Only a “competent court”, may enquire into the validity, of a declaration of a state of emergency, its extension, and “any legislation enacted, or other action taken, in consequence, of a declaration of a state of emergency”. This latter formulation is unfortunate. It apparently excludes the jurisdiction of lower courts with respect to executive acts and human rights protection otherwise enjoyed. The lower courts do, however, have jurisdiction with respect to at least, those aspects of an emergency dealing with detained people.⁵²⁹
- (k) The position of persons detained during an emergency, (the term “detention without trial” is avoided), is dealt with extensively. Provision is made for notification of relatives, publication of the names of detainees, judicial review of the duration of detention, access to legal representatives, and medical services. The state “must present written reasons ...”justifying detention or extension thereof.⁵³⁰ This suggests, that the executive branch is required to provide reasons, and to provide substantive grounds for the further detention of a detainee.

(8.) NON-DEROGABILITY OF CERTAIN FUNDAMENTAL RIGHTS:

TABLE OF NON-DEROGABLE RIGHTS:

<u>1</u> <u>SECTION NUMBER</u>	<u>2</u> <u>SECTION TITLE</u>	<u>3</u> <u>EXTENT TO WHICH</u> <u>THE RIGHT IS</u> <u>PROTECTED</u>
9	EQUALITY	WITH RESPECT TO UNFAIR DISCRIMINATION SOLELY ON THE GROUNDS OF RACE, COLOUR, ETHNIC OR SOCIAL ORIGIN, SEX RELIGION OR LANGUAGE.
10	HUMAN DIGNITY	ENTIRELY.
11	LIFE	ENTIRELY.
12	FREEDOM AND SECURITY OF THE PERSON	WITH RESPECT TO SUB-SECTIONS (1)(d) AND (e) AND (2)(c).
13	SLAVERY, SERVITUDE AND FORCED LABOUR	WITH RESPECT TO SLAVERY AND SERVITUDE.
28	CHILDREN	WITH RESPECT TO: - SUB-SECTION (1)(d) AND (e). - THE RIGHTS IN SUB-PARAGRAPHS (I) AND (II) OF SUB-SECTION (I) (g); AND - SUB-SECTION 1(I) IN RESPECT OF CHILDREN OF 15

1 SECTION NUMBER	2 SECTION TITLE	3 EXTENT TO WHICH THE RIGHT IS PROTECTED
		YEARS AND YOUNGER.
35	ARRESTED, DETAINED AND ACCUSED PERSONS	WITH RESPECT TO: - SUB-SECTIONS (1)(a), (b) AND (c) AND (2)(d); - THE RIGHTS IN PARAGRAPHS (a) TO (o) OF SUB- SECTION (3), EXCLUDING PARAGRAPH (d); - SUB-SECTION (4); AND - SUB-SECTION (5) WITH RESPECT TO THE EXCLUSION OF EVIDENCE IF THE ADMISSION OF THAT EVIDENCE WOULD RENDER THE TRIAL UNFAIR.

Even in times of emergency, there are certain rights that may not be suspended. The State has to refrain from suspending certain non-derogable rights. Extra care should be taken during a public emergency, to ensure strict respect for the law. The Constitution and the law in general, do not cease to apply during an emergency. It is a legal condition, governed by those provisions in the Constitution, provided by Section 37. The courts and other organs of the State will continue to function, and responsibility for unlawful behaviour will still ensue.

Apart from the obligation not to suspend certain fundamental rights, a state must also:

“[t]ake special precautions, in a time of public emergency, to ensure,

that neither official nor semi-official groups, engage in a practice of arbitrary, and extra-judicial killings, or involuntary disappearances, that persons in detention, are protected against torture, and other forms of cruel, inhuman, or degrading treatment, or punishment, and that no persons, are convicted under laws or decrees, with retroactive effect”⁵³¹.

Public international law, is of considerable importance in this regard. Under customary international law, no state, may suspend or violate the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation; the right not to be held in slavery or involuntary servitude; and the right not to be subjected to retroactive criminal penalties,⁵³² which is generally recognized, as one of the most fundamental human rights, never to be suspended.

This is an extensive list, and requires some clarification. A suspension clause, is based on a principle which limits the right of the state, to take measures suspending certain human rights standards when it faces an emergency. Why should certain fundamental rights be non-derogable? In terms of what criteria should they be selected? It is difficult to detect any single set of criteria from the wide list provided in Section 37.

The first important consideration, is that Section 37 provides for all emergencies – from a localized natural disaster to a full-scale war.⁵³³ There remain no extra-constitutional powers, such as martial law which will allow stricter emergency measures.

To argue that such rights may be limited under Section 36, is to miss the important difference between a limitation and a derogation, (suspension) clause. The former is of permanent application – in normal and “peaceful” times. It provides for the regulation by the state, of the exercise of fundamental rights, never for their suspension. Suspension is only possible under Section 37. If the latter, singles out certain rights and puts them beyond the reach of suspension, then they are permanently non-derogable.

To make the list of non-derogable rights as wide as possible, in the belief that a pro-rights approach is thereby displayed, is mistaken. The exact opposite may be achieved. To include rights, which are not particularly at risk in emergencies, could have an adverse psychological effect.⁵³⁴ In the case of war, which is the gravest emergency, more extreme needs, are experienced, than in situations of less gravity. The temptation may then arise to resort to “implied” powers going beyond Section 37, in order to suspend certain rights, because of extreme need, despite the fact that they are listed in Section 37 as non-derogable. Justifications may be “discovered” elsewhere in the Constitution. That will undermine the effect and finality of Section 37, as well as the supreme nature of the Constitution, as a whole. It should be accepted, as is clearly shown by the practice under international human rights treaties, that not all rights have the same relevance with regard to suspension and public emergencies. Those rights, which are more important, also need closer and stricter scrutiny when the necessity for suspension, (and proportionality) is

determined.⁵³⁵

The approach should rather be to identify a criterion, in terms of which to determine non-derogability. That is why “a threat to the life of the nation”, which is found in most international instruments,⁵³⁶ (including Section 37), is such a central concept. If some examples are still to be included, a shorter list is to be preferred. It will give strength to the category of such rights. Only those rights, which are absolutely fundamental and permanently indispensable for the protection of human beings, should be included. They are the rights whose suspension, can never be justified, because their exercise will not hamper the protection of the life of the nation.

International instruments contain four common non-derogable rights: the right to life; the right to be free from torture or inhuman or degrading treatment; “freedom from slavery or servitude”; and the right to be free from a retroactive application of penal laws. These rights are generally accepted to be, not only norms of customary international law, but also norms of *jus cogens*.⁵³⁷

Certain international agreements, such as the 1949 Geneva Conventions on the Laws of War for the protection of war victims, (to which South Africa is a party) and its 1977 Protocols, (to which South Africa is not a party), contain important principles and indications of non-derogable rights. Under the 1977 Additional Protocol II, the following rights with respect to penal prosecution, shall be respected under all circumstances by state parties to the Protocol:

- (a) The duty to give notice of charges without delay and to grant the necessary rights and means of defence;
- (b) Conviction only on the basis of individual penal responsibility;
- (c) The right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation;
- (d) The presumption of innocence;
- (e) Trial in the presence of the accused;
- (f) No obligation on the accused to testify against himself or to confess guilt; and

(g) The duty to advise the convicted person on judicial and other remedies.⁵³⁸ Some ILO Conventions, contain a number of rights, dealing with such matters as forced labour, freedom of association, equality in employment, and trade union and workers’ rights, which are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary, to meet the exigencies of the situation.⁵³⁹

(8.1) Detainees :

Chapter 2 of the Constitution provides for two categories of detainees. Section

35 deals with “arrested, detained and accused persons” under the fair trial provisions. Section 37 deals with detainees held under emergency powers. Only this latter category of detainees, is considered in this Section.

Persons detained under a state of emergency, should be protected against arbitrary detention and the right to due process of the law, should be provided for. Section 37(6) provides for most of what is required, in this regard. Although the protection is listed as “conditions” of detention, it amounts to rights, which “must” be protected. The broad provisions of Section 38, will allow for the necessary *locus standi*, to ensure compliance. That is why “an adult family member or friend of the detainee must be notified of the detention as soon as is reasonably possible”. The other conditions relate to the official publication of the names of detainees, access to courts, legal representation and access thereto, and access to a medical practitioner of the detainee’s choice.

Further protection, should include safeguards against incommunicado detention and to ensure humane treatment, judicial review of the period of detention and of its lawfulness, notification, general due process standards, and protection against interrogation abuses and against changes in the application of the law of evidence. Not all of these safeguards appear in Section 37.

When the due process provisions of Section 35, or those recognizing the freedom and security of the person under Section 12 are suspended, the detention has to be reviewed by a court of law, within ten days. The court “must release the detainee, unless it is necessary to continue the detention to restore peace and order”.⁵⁴⁰ This amounts to full substantive judicial control. “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”.⁵⁴¹

These are minimum guarantees, which have to ensure the correct application of a suspension clause, with respect to detainees, as required by the principle of proportionality.⁵⁴² The right of the State to take measures in times of an emergency, is always conditioned by the principle of proportionality, which holds that measures must be strictly required, by the exigencies of the situation.

It is important to emphasize the non-derogable character of these remedies. Many of them are based on the minimum guarantees contained in the four 1949 Geneva Conventions on the Laws of War and its subsequent Protocols. South Africa is a party to the 1949 Conventions. The principles of public international law contained in the Conventions, has become domestically applicable, especially through customary international law, in terms of Sections 232 and 233 of the 1996 Constitution. International humanitarian law, increasingly includes human rights standards applicable to internal strife and uprisings.⁵⁴³

(9.) THE RULE OF PROPORTIONALITY:

Proportionality is a general principle of law, that finds application in several areas, especially in human rights. It is of particular importance, in the context of the suspension, (derogation of rights). Here, it is the main substantive criterion to assess the legality of the suspension measures, taken by the State in situations of emergency. Suspension measures must be proportionate to the threat. That is why a central criterion such as “a public emergency threatening the life of the nation” is so important. Its absence from Section 34, of the Interim Constitution was detrimental to the meaningful operation, of the requirement of proportionality and the use of comparative case law. Practically all, international human rights instruments, employ this concept. However, as pointed out earlier, this problem has been rectified in Section 37 of the 1996 Constitution.

Proportionality applies after the first suspension measures have been taken. Circumstances change during the existence of an emergency, and the gravity of the situation can vary. Measures dealing with the emergency, must also vary accordingly. Proportionality must exist in each of the phases. Once the emergency has ended, or its gravity diminishes, the suspension measures no longer have any justification. International practice, has generated the following principles, with respect to the proportionality of suspension measures:

- “1 Measures derogating from human rights standards can be taken only when the ordinary provisions of the law and the limitations foreseen for peacetime, are not enough to deal with the emergency.
- 2 The mere existence of a public emergency threatening the life of the nation, within the meaning of the derogation clause, does not justify *ipso facto*, every derogation from human rights standards. Each measure of derogation, taken in a lawfully declared emergency, should be necessary and proportionate to the threat.
- 3 Each measure of derogation, has to bear a relation to the threat; in other words, there must be a link between the facts of the emergency and the measures taken.
- 4 The measures of derogation, taken by the government, should potentially be able to overcome the emergency. This, however, does not mean that the judgement on the strict necessity of the measures, will depend on the fact that the measures actually overcome the emergency.
- 5 At the same time, the fact that a government did not take preventive measures before the emergency arose, or at an earlier stage, does not affect its right to take derogating measures once the emergency has arisen. The necessity and the proportionality of the measures should be judged, in the light of the current state of emergency.

- 6 As far as the rights recognized, in the human rights treaties are concerned, not all rights have the same relevance. Therefore, those rights, which are more important, need closer and stricter scrutiny, when the necessity for derogation and the proportionality to the threat are judged.
- 7 In assessing whether a derogating state has complied with the principle of proportionality, the monitoring organs, have to take into account, not only the need for bringing the derogating measures into operation, but also the manner in which the derogating measures have been applied in practice.
- 8 In analysing the principle of proportionality, the monitoring bodies, should take into account, not only the necessity and proportionality of a given measure, for example, administrative detention, but also the necessity and proportionality, of the suspension, of some of the guarantees, linked with the derogated right, for example, the writ of *habeas corpus*.
- 9 In order to assess the proportionality of the derogating measures, the monitoring bodies, should analyse the other less grave alternatives open to the government, in dealing with the emergency.
- 10 In assessing the compliance, with the principle of proportionality, special importance should be attached to the necessary safeguards taken by governments in order to avoid abuses.
- 11 In order to analyse the proportionality of the measures, and the sufficiency of the safeguards against abuses, attention should be paid to every different phase of the emergency.
- 12 ... [s]tates of emergency are essentially temporary; in other words, they are only justified, as long as, the emergency lasts. Consequently, all measures of derogation are justified, only as long as the emergency lasts. Therefore, a derogating measure, is not strictly required by the situation, if it continues to be in force once the emergency has ended.⁵⁴⁴

(10.)THE PRINCIPLE OF NON-DISCRIMINATION:

The principle of non-discrimination, finds application in the context of suspension clauses too. Some international instruments prohibit discrimination on the ground of race, colour, sex, language, religion, or social origin. It is also a requirement of customary international law. A general non-discrimination clause, elsewhere in a Bill of Rights, should be adequate to ensure respect for equality, also when public emergencies are declared and suspension measures are taken.

(11.) CONSISTENCY WITH OTHER INTERNATIONAL LEGAL OBLIGATIONS:

International instruments, often determine that the right of a state to take suspension measures, in times of emergencies is limited by the condition that such measures, must not be inconsistent with the state's other obligations under international law.⁵⁴⁵ This will have the effect of raising requirements, to the most optimal standards, contained in other such instruments or in customary international law.

CONCLUSION:

It is not easy to devise universal norms, for regulating the conduct of the ruling elites, in different states of emergency. Emergency situations create an insurmountable dilemma for democratic governments because, on the one hand, such a government is under an obligation to protect the integrity of the state, while on the other, it is under an obligation to protect human rights. It is because of such a dilemma, that even in the liberal democracies of the West, suspension of basic human rights, during a public crisis, has received constitutional sanction.

However, in my dissertation, I have attempted to illustrate, without minimizing, the gravity of the problems, that states of emergency pose, that it is possible to devise the norms, and mechanisms of a viable international system, to regulate the behaviour of public authorities, in a state of emergency, in conformity with the common legal aspirations, of the world's community, of legal scholars and practitioners. In a nutshell, the hurdle that needs to be overcome, by a state facing a public crisis, (particularly where, the executive branch of government, assumes more power, than is healthy for a state, as occurred in South Africa), will meet the same difficulty, as Alice met, in the dialogue with Humpty Dumpty:

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean, neither more or less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all.”⁵⁴⁶

If we are to believe in the rule of law, and have a successful system of government under the law, we cannot ignore violations of a gross, systematic and egregious nature, which took place in our recent past. The events did not happen either by accident or in a vacuum. They have left behind aggrieved individuals, families and loved ones. They have torn the fabric of our society. They have demeaned South Africa internationally. However, as writer and philosopher, Laurens van der Post, importantly points out:

“Everything in life is a story. And the story of mankind is history: without history we have no meaning. The story of man, and of life made flesh in man, is the soul of its own perceptions. It provides us with the sense of living mystery in life. And it helps to heighten our sensitivities, our perceptions, our awareness. And it carries us on.”

Our new Constitution, is one law for one nation. It ensures that no government may abuse its power. And it has given us the foundations for a true democracy.

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ENDNOTES:

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² See the remarks by Mr. Prado Vallejo, a member of the UN HR Committee, in CCPR/C/SR. 351 (1982), p. 8, para 32. See also the remarks of the Attorney General of Ireland in the case of *G. Lawless v Ireland* (Counter-Memorial of the Government of Ireland), Ser. B: Pleadings, p. 224.

³ N. Questiaux, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc E/CN 4/Sub 2/1982/15, 27 July 1982.

⁴ C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton University Press, (1948) at 9.

⁵ Fairman, *The Law of Martial Rule* (2nd ed. 1943) at 47.

⁶ 1980 Report of the HR Committee, para 241.

⁷ 1979 Report of the HR Committee, paras 74, 95, 98.

⁸ The *Greek case supra*. Both the definition and its application in the Greek case can be regarded as classic standards of the European Convention's jurisprudence. For instance, as Hartman, in his book: *Derogation from Human Rights Treaties in Public Emergencies*, (1981) 22 HARV INT'L L.J. 27., explains, the Greek case "is significant because the Commission defined a public emergency with precise and stringent meaning, and then concluded that the government's assessment of emergency was unjustified. The *Greek* majority paid a lip service to the margin of appreciation, reducing it to a nearly imperceptible minimum."

⁹ Questiaux, *supra* note 3.

¹⁰ Stephen Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts", in *The International Dimensions of Human Rights*, Vasak and Alston ed. vol 1, 175 (UNESCO, 1982).

¹¹ Brownlie, *Basic Documents of Human Rights*, 2nd ed. Oxford (1981), 177. Also Stephen Marks *supra* note 10, paras 25 and 26.

¹² Questiaux, *supra* note 3.

¹³ Stephen Marks, *supra* note 10, 186-7.

¹⁴ *Ibid.*

¹⁵ 1983 Report of the HR Committee paras 263, 279.

¹⁶ Questiaux, *supra* note 3; Stephen Marks, *supra* note 10.

¹⁷ Stephen Marks, *supra* note 10. Professor Paul J.I.M. de Waart of the Netherlands in his oral intervention at the Seoul Conference on 25 August 1986 regretted that the report of the Committee dealing with monitoring states of emergency was limited only to civil and political rights. He expressed the hope that in its future work, the Committee would include the enforcement of economic, social and cultural rights because the latter rights are "also full-fledged human rights" and that "all human rights are interdependent and inseparable". See 1986 ILA Seoul report at 196.

¹⁸ Working paper on derogation provision in Article 4 of the ICCPR by Professor Joan F. Hartman, (hereinafter referred to as the Siracusa symposium).

¹⁹ *Ibid*, paras 67-71 at 106-7.

²⁰ *Ibid*, para 57, at 104.

²¹ *Ibid*, para 52, at 102.

²² *Ibid*, para 53, at 102-3.

²³ *Ibid*, para 55; at 103.

²⁴ ILA's Manila report (1978), 147.

²⁵ Judge Elias, *supra*. This statement was adopted as Conclusion 6 of the Committee I of the Lagos conference on the rule of law, 1961, see Brownlie, *Basic documents on Human Rights*, *supra* note 11, 428. Keba Mbaye noted that "all these developing States constantly threatened by disorder and economic difficulties, considered themselves to be permanently in an emergency situation". In his view, what is involved, is not so much justifying exceptions, to the exercise of certain human rights, on account of the conditions of underdevelopment, but rather, issuing a warning, against the abuses, which may result, from using a limited emergency situation, as an excuse, which is perpetually invoked: "One must not wait for underdevelopment to be throttled, for once and for all, (if ever it can be) in order subsequently, to attempt to observe the rules, governing human rights and freedoms." Quoted by Stephen Marks, *supra* note 10.

²⁶ Questiaux, *supra* note 3. The Questiaux study is only limited to the international political crisis for two reasons. First, international armed conflicts, wars of national liberation and, to some extent, non-international armed conflicts are areas of application *par excellence* of the humanitarian law of war as established by the Geneva Conventions of 1949 and the Protocols relating thereto. Although the humanitarian law, is considered by many, as a branch of the international law of human rights, and consequently, applicable to the human rights problems, in a public emergency, arising out of purely internal political crisis, yet that branch of law, has been researched in depth, and resulted in well organized international standards and hence, further study, in the area, was not envisaged. Second, the Sub-Commission's Resolution 10 (XXX) of 31 August 1977 authorizing the Questiaux study, refers to "situations known as state of siege or emergency"; accordingly it is clear from this wording, as also from *travaux préparatoires*, that situations of war in terms of humanitarian law are not envisaged.

²⁷ 10 GAOR Annexes, UN Doc A/2929, para 39 (1955). Also see Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966", in A. Eide and A. Schou, eds, *International Protection of Human Rights* 103, 116 (Nobel Symposium 7, 1968); also see Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations" in *The International Bill of Rights*.

²⁸ *Ibid*, UN Doc A/2929 para 39; see Buergenthal, *supra* note 27. Also see Higgins, *Derogations under Human Rights Treaties*, (1976-77), 48 BRIT YB INT'L L 286-7. ILA identifies at least four types of war-related emergencies: (a) a state of emergency, declared in the unoccupied areas of a nation, which has been invaded by a foreign power; (b) a martial law regime, imposed in occupied areas, of an invaded nation by the occupying power; (c) an

emergency declared, due to internal armed conflict and (d) an emergency declared, due to internal armed conflict, supported by foreign intervention, on behalf of rebel belligerents.

However, the outbreak of war, need not necessarily, lead to an imposition of emergency, for example, the government of Cyprus, did not declare a state of emergency, after the Turkish invasion of 1974.; again, the islands of the Falklands/Malvinas, were the only part of Argentine territory, which was not under the state of siege, during the 1982 war: para 14 of ILA's Seoul report (1986).

An example of the fourth type of war-related emergency can be found in the case of Nicaragua. In the report review session, before the Human Rights Committee in 1983, the representative of Nicaragua, pointed out that, the attacks of counter-revolutionary bands, and the foreign aggression, to which Nicaragua was being subjected, was "the sole obstacle, to the full exercise of civil and political rights, in his country, since it was those attacks, which had forced his government, to declare the state of emergency." It appears that this explanation of Nicaragua was accepted by the entire Committee which was impressed by "the great willingness and determination" of the country in fulfilling its human rights commitments, "... despite the great external economic and military pressures and threats aimed at destabilizing the government and undermining its achievements.

In this connection, it was pointed out, that the impact of destabilization, on the enjoyment of human rights, was bound to be *negative*, resulting, as it did, in the declaration of a state of emergency, in Nicaragua., that it was the right of all people, to manage their internal affairs without external interference; that the continuing outside interference, in Nicaragua's affairs, violated that right; that international law, did not recognize spheres of influence, and that its strict observance, was fundamental to the internal order, of the countries. It was obvious that it could only be imagined what favourable results would have been achieved if Nicaragua would not have been forced to protect itself against subversive operations financed and organized from abroad." (See 1983 Report of the HR Committee, paras 223 and 224).

The view expressed by the Committee seems to have been endorsed by the International Court of Justice in its recent judgement on the merits, in the case of *Nicaragua v The United States of America* delivered on 27 June 1986. The two points, which may be relevant, in the present context are: the Court held, firstly, that while Nicaragua, could not with impunity, violate human rights, where human rights are protected by international conventions, the monitoring procedure, must be in conformity with the mechanism, provided for in the conventions themselves; secondly, the use of force, could not be the appropriate method, to monitor, or to ensure respect for human rights. (See paras 267 and 268 of the judgement). See also the intervention of this writer at the Seoul conference on 25 August 1986: ILA 1986 report 190.

²⁹ Higgins, *ibid*, 302.

³⁰ See the dissenting opinion of Susterhenn in the *Lawless* case, *supra*. The application of such a strict construction induced the dissenters in the *Lawless* case to deny the existence of a public emergency. A different view of strict construction appears to suggest that a non-war public emergency must result in a complete breakdown of the constitutional regime. Thus, as Ermacora puts it, according to the principles of public international law, a NOTSTAND (state of emergency) exists if constitutional rules can no longer be applied, in other words, when the legislature, the judiciary and the administration are no longer functioning. *Ibid*, para 96 at 101.

³¹ Hartman, Siracusa symposium, *supra* note 18. With regard to the state of siege in Columbia, see The International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), (hereinafter cited as ICJ *Emergency*); also Inter-American Commission on Human Rights, Report on the Situation on Human Rights in the Republic of Columbia, OAS Doc OEA/Ser LV/III/53, doc 22, 30 June 1981 at 40-9.

³² (1978) 17 *International Legal Materials* (ILM) para 205, p 707. As Higgins points out, if Northern Ireland, is viewed constitutionally, as an integral part of the United Kingdom, it is very hard to see, that the situation, really threatens the life of the whole nation; the reality seems to be, that for the purposes of Article 15 of the European Convention, the "whole nation" is, simply Northern Ireland. Higgins, *supra* note 28.

³³ Buergenthal, *supra* note 27.

³⁴ Chowdhury SR, *Rule of Law in a State of Emergency*, London, Printer Publishers 1989.

³⁵ Daes, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, UN Doc E/CN 4/Sub 2/432/Rev 2 (1983) at 192. 1980 Report of the UN Special Rapporteur on Chile, UN Doc A/35/522, para 31.

³⁶ Hartman, Siracusa symposium, *supra* note 18.

³⁷ ICJ, *Emergency*, *supra* note 31 at 414-417; Hartman, Siracusa symposium, *supra* note 18 at 93-94.

³⁸ Daes, *supra* note 35 at 197.

³⁹ Questiaux, *supra* note 3.

⁴⁰ *Lawless* case, *supra* note 2 at 486.

⁴¹ Questiaux, *supra* note 3.

⁴² UN Doc A/2929 para 41 (1955).

⁴³ Siracusa symposium, *supra* note 18; also see Buergenthal, *supra* note 27 at 80: "More important, "proclamation" implies publication and publicity, indicating that a public announcement must accompany the official proclamation of the public emergency."

⁴⁴ Questiaux, *supra* note 3; Daes, *supra* note 35 at 192. Higgins, *supra* note 28 at 286-7.

⁴⁵ H.M. Seervai, *Constitutional Law of India* (3rd ed. 1984), vol II, at 2617-18.

⁴⁶ *G.R. Lawless v Republic of Ireland*, (Eur Com) *supra.*; *Lawless case (Merits) supra* (Eur Court); *The Greek case, supra*; *Ireland v United Kingdom*, Report of the European Commission (1976) 19 YB-ECHR, 512; *Ireland v United Kingdom: Judgement of the European Court, supra.*

⁴⁷ *Lawless case, supra*; at 82-3.

⁴⁸ *Ibid*, at 474.

⁴⁹ *The Greek case, supra*, at 72 (burden of proof), paras 158-65 at 73-6 (the analysis of the evidence and the findings of the Commission).

⁵⁰ *Ireland v United Kingdom, supra*, (European Commission) at 584, 586.

⁵¹ 1984 Paris report of the ILA, 59; *Daes, supra* note 35, para 64 at 193.

⁵² H. Lauterpacht, *Recognition in International Law* (Cambridge, 1947) at 172-3: "In an international society, in which the right of man, to political freedom, and to government by consent, will become part of the law of nations, *recognition will be denied* – in addition, to other means of enforcement – *to a dictatorial regime*, which has come to power, by way of revolution and which, even if, to all appearances effective, *declines to submit* its rule, to the test of *clearly expressed popular approval*. That consummation may be far off. Yet we are not at liberty to regard it as lying in the infinite future. In fact, we are entitled to say that in so far as effectiveness based on and evidenced by the consent of the governed has become part of international practice, the *right of man to government by consent* has, to that extent, become *part of international law*. That connection is revealing in its significance in as much as it brings to mind the ultimate place of the law of recognition in the system of jurisprudence.

"It is independent of the significant, though still indefinite and elastic, acknowledgement of "human rights and fundamental freedoms" in the various provisions of the Charter of the United Nations. Of these rights and freedoms, the right to government by consent is not the least fundamental. We are not likely, to do justice, to a weighty issue, by the plausible retort, that the insistence on an international plane, and through the medium of the weapon, of recognition, based on the test of democratic legitimacy, constitutes intervention, in denial of the self-determination, and of the independence of nations.

There is no self-determination, and no independence, under the rule of tyranny, and there is no intervention, except in a sense, dangerously approaching an abuse of language, when, by means of procedure, which is international and disinterested in character, safeguards are provided, for ensuring freedom, from a rule of violence, which may be more destructive, of national independence, than any foreign intervention." (Emphasis added); also see Subrata Roy Chowdhury, *The Genesis of Bangladesh: A study in International Legal Norms and Permissive Conscience* (Asia, 1972), Chapter VI: Recognition in International Law, 288-310.

⁵³ Lauterpacht, *supra* note 52.

⁵⁴ With reference to the work of the HR Committee in such cases as Chile, and drawing a distinction between the stability of the regime and the stability of the state, Questiaux points out that, significantly, in most cases a state of emergency is proclaimed by a government that has come into being as a result of an act of force outside the constitutional provisions and

“not in conformity with Article 25 of the Covenant, as was admitted by the Representative of the Chilean government in the Human Rights Committee.” Such examples show that “paradoxically, emergency legislation, which is theoretically designed to overcome internal disturbances, is most often invoked by those responsible for such disturbances, that is, by the perpetrators of *coup d’état* and hence of acts which by their nature are a source of exceptional internal disturbances. Where a state of emergency should be implemented in order to prevent an act of force, it is used to foster it and perpetuate its effects.”

This, according to Questiaux, has a double purpose. First, to utilize the rule of law – even where this is of an emergency character – “in order to legitimize action: if the authorities, cannot base this legitimacy, on the exercise of popular sovereignty, as suggested by Article 25 of the Covenant, they resort to the sovereignty they derived – without any reciprocal concession – from the “legalized” monopoly of force.”

Second, “to take advantage of the perpetuation of the “state of emergency” in order to set up a repressive “legislative” arsenal designed to remove all prospect of a return to normality, contrary to the very purpose of the theory of exceptional circumstances.” (Questiaux, *ibid*, paras 160, 161).

With reference to the fact, that derogations are sometimes made, by regimes which have themselves, created the emergency by seizing power, in a *coup d’état*, (for example Greece in 1967 and Chile in 1973), Hartman, is of the view, that these governments, can accede to the international obligations and privileges of their predecessors, and may invoke Article 4, “*but only if their motivation, in imposing emergency measures, is a return to the democratic process, in the shortest possible time*. In other words, revolutionary governments are not disqualified from use of the derogation privilege, but they may not abuse it to consolidate power rather than to reflect the will of the people”. (Emphasis added). *Ibid*, Siracusa symposium, 118-19.

⁵⁵ Daes, *supra* note 35, para 67(a) at 193.

⁵⁶ Conclusion 5 of Committee I, Lagos Conference on the Rule of Law, 1961, Brownlie, *supra* note 11 at 427-8.

⁵⁷ UN Seminar on Effective Realization of Civil and Political Rights, Kingston, Jamaica, 1967, ST/TAO/HR-29, para 173 at 40. Certain speakers at the Seminar felt that the legislature should be “automatically convened” by the declaration of a state of emergency by the executive.

⁵⁸ Conclusion 5 of Committee I, *supra* note 56. Also, Ganshof van der Meersch said: “The state of emergency in principle should be declared by

Parliament and, if Parliament should not be able to do so, it should approve the state of emergency within a certain time limit.” See Council of Europe, the Consultative Assembly, *Parliamentary Conference on Human Rights, Vienna, 18-20 October 1971* (Strasbourg 1972) Chapter III, Section B, summary of the first working sitting, p 34. Much earlier, in 1959, at the Buenos Aires seminar of the UN it was decided that

“...in principle, the declaration of a state of siege should come from the legislative body, and that the executive can make such declaration only when that body is not in session and for reasons provided in the constitution. The duration of the state of siege must be expressly limited, as it is essential to specify concretely those rights and guarantees whose enjoyment cannot be fully ensured.” See 1959 Seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority, Buenos Aires 1959, UN Doc ST/TAO/HR/6 para 37 at 13.

⁵⁹ Daes, *supra* note 35, para 76 at 194.

⁶⁰ Recommendation 4, ICJ, *Emergency*, *supra* note 31 at 459.

⁶¹ Questiaux, *supra* note 3, para 80.

⁶² ILA's Belgrade report, para 50, at 101, also see, paras 46-40 at 100-1.

⁶³ ICJ study, *supra* note 31, recommendation 3 at 459.

⁶⁴ Questiaux, *supra* note 3, paras 103-45; 1984 ILA Paris report, Section A, para 5 at 60.

⁶⁵ *Ibid*, paras 107-11. Report of the UN *Ad Hoc* Working Group of Experts on violation of human rights in Southern Africa, UN Doc E/CN 4/1429 paras 375 *et seq*. Also see, George J. Alexander, “The Illusory Protection of Human Rights by National Courts during Periods of Emergency”, *Human Rights Journal*, 5 (1984) at 32-6 for details of emergency legislation and court decisions in South Africa.

⁶⁶ *Mission to South Africa: The Commonwealth Report: The Findings of the Commonwealth Eminent Persons Group on Southern Africa* (Penguin, 1986) at 64. Some of the relevant findings of the EPG are as follows:

- (a) In 1960 a state of emergency was declared throughout the country. This gave wide powers to prohibit gatherings, to search people and premises and to resort to force. New powers of detention without trial were introduced; it became an offence to make any statement likely to subvert the authority of the government or to incite others to resist; newspapers could be banned. When the state of emergency was lifted, many of the new powers became prominent features of the South Africa laws.
- (b) The lifting of the 1960 state of emergency did not end the scope of detention without trial. The security laws were extended and were consolidated in the Internal Security Act of 1982. This, among other formidable powers, allowed for indefinite preventive detention for “interrogation”, a power, much abused, by the security forces. The same Act also contained the power for a Minister to “ban” organizations and individuals. The banned individual could be required to stay for years in a certain place, prohibited from attending gatherings and prevented from

being quoted. A typical example of the extensive scope of the banning orders would appear from those served on Mrs Winnie Mandela.

- (c) (annex 5 to the report) which covered the period from 2 July 1983 to June 1988). Such an array of state powers, many of which, were not subject to review, by the courts, coupled with the extraordinarily wide definitions of “communism”, “terrorism”, “treason” and sedition, rendered the country, in the experience of the Blacks, *a police state, with a permanent state of emergency*, so much so, that the lawyers with whom members of the EPG spoke, had been surprised, that the government found it necessary, to impose a formal state of emergency, in 1985, unless it were to placate, its right wing.
- (d) According to the EPG, this move saw three developments. First, the power to make mass arrests and detention without trial was extended to every single member of the police force, the railway police, the prison service and the army. Second, the final vestiges of legal control, over the authorities, were removed, by preventing the courts, from setting aside orders, made under the emergency regulations, and in advance, all State officials were made immune from liability, both civil and criminal, for all unlawful acts, (except those, in which a complainant, could prove bad faith). Third, press censorship was provided for, with bans on photographs and access to affected areas.
- (e) The emergency was lifted on 7 March 1986 during the visit of the EPG. However, when announcing the lifting of the emergency, the government foreshadowed increased powers for the security forces.
- (f) There had been serious violations of the right to life and liberty. Since the unrest at the time began, over 1700 people had been killed; another twenty people were killed while in police custody, most of them under the age of twenty-five, one was only thirteen. During the state of emergency alone, the security forces admitted having killed about half of the 792 people whose deaths were recorded in official figures; many of them were under the age of eighteen.
- (g) Again, during the state of emergency, an estimated 11,500 persons, were detained without charge, including 2000 children, under the age of sixteen; an additional 25000 people, many of them young, were arrested on charges of so-called “public violence” – very few of them were ever convicted, as most of those charges, were dropped. Most of the political leaders detained during the emergency were not released even after it was lifted. (It would be pertinent to recall that Nelson Mandela, the undoubted leader of the overwhelming majority of the people in South Africa, completed his twenty-five years of imprisonment on 5 August 1987).
- (h) The Supreme Court, shortly after the emergency was lifted, invalidated a number of banning orders which did not comply with the technical formalities of the Internal Security Act; the Court had no power to inquire into the

substance of the order. *Ibid*, pp 48-64.

⁶⁷The executive decrees passed by the South African government in June 1986 gave the security forces the right to take virtually whatever action they pleased and made their action unaccountable in the courts. To name a few, people could be arrested without warrants in the interest of public safety and held indefinitely; the detainees might not have access to their lawyers. The security forces could make searches without warrants, close businesses and impose curfews. Further, severe restrictions were imposed on the freedom of expression.

The press, television and radio were forbidden to cover "any public disturbance, disorder, riot, public violence, strike or boycott or any damaging of any property, or any assault on or killing of a person", unless coverage was authorized by the police; penalties were 5000 pounds or ten years" imprisonment. Moreover, it was also an offence to make subversive statements, such as calls for boycott, unlawful strike, demonstration, protest, civil disturbance or opposition to military conscription. The definition of "subversive statement" also included any opposition to the government or promoting sanctions or disinvestments. The only public places where free speech was still being allowed were Parliament and the Churches. (*Guardian Weekly*, London, 22 June 1986).

The Supreme Court of the Transvaal declared invalid a wide range of restrictions introduced by the new decrees, such as, orders gagging a 119 organizations opposing apartheid and the banning of many meetings. The court ordered that only the Minister of Law or a Commissioner of Police could issue such orders under the emergency regulations; they could not delegate this authority to the ordinary Police Chiefs. This judicial attempt to regulate emergency powers was however nullified when President Botha, overruling the Court's decision, issued a new decree, early in August, which specifically empowered the local Police Chiefs to issue orders invalidated by the Court. (*Guardian Weekly*, London, 10 August 1986).

⁶⁸ Questiaux, *supra* note 3, paras 112-17.

⁶⁹ *Ibid*, paras 118-27.

⁷⁰ Also see Daes, *supra* note 35, paras 66-81 at 193-4 (discussing the general principle of the need for legislative control over the declaration, duration and termination of emergency). ICJ, *Emergency*, *supra* note 31 at 433-4, (highlighting the importance of Parliamentary control with regard to the declaration, duration and the review of emergency measures at regular intervals). Lagos conference, Brownlie *supra* note 11 at 426-32 (particularly Conclusions 5 and 6 of Committee II). Seminar on Judicial and Other Remedies Against the Illegal Exercise or Abuse of Administrative Authority: Buenos Aires, Argentina, UN Doc ST/TAO/HR/6, at paras 36-7 (1959). Seminar on the Effective Realization of Civil and Political Rights at the National Level: Kingston, Jamaica, UN Doc ST/TAO/HR/29 at paras 171-85 (1967).

⁷¹ 1984 ILA Paris report, Section B, para 6 at 60-1.

⁷² *Ibid*, Section B, para 20 at 71. 1980 ILA Belgrade report para 13 at 92.

⁷³ Questiaux, *supra* note 3, para 75(d). Also see, Francis G. Jacobs, *The European Convention on Human Rights* (Oxford, 1975) at 209 for the effect of a far-reaching reservation to Article 15.

⁷⁴ 1983 Report of the HR Committee, para 320 at 75.

⁷⁵ Some examples are: Dahomey (Article 27 of the Constitution of 5 January 1964), Algeria (Article 59), Morocco (Article 35), Tunis (Article 32). See, *L'Article 16 de la Constitution due 4 October 1958* by Michele Voisset, *Bibliothèque Constitutionnelle et de Science Politique* (Paris, 1969), at 38.

⁷⁶ Questiaux, *supra* note 3, para 75 (a), (b) and (c). Under the first category (emergency regimes proper), there is no transfer of competence from the legislature to the executive and the main purpose is to effect transfer of competence *within* the executive power (civil powers —military powers), and the judicial power (ordinary courts – special courts), or *between* these two powers. The legal regime in this respect is determined in advance and in principle it does not authorize the executive to legislate by decrees.

The second category (measures of legislative empowerment), on the one hand, is designed to transfer to the executive all or part of the powers of the legislature except, in principle, the power to amend the constitution. The empowerment procedure prescribed by the constitution sets general limits to the delegation of power. Within such limits, the executive is authorized to introduce measures variously described as “emergency laws”, “decree laws”, “regulatory laws”, “proclamations” etcetera. That apart, emergency powers, may also be exercised by the executive, subject to legislative ratification *a posteriori*, which is the third form, described in the Questiaux study.

⁷⁷ Thus, in the *Lawless case supra*, as the European Commission states, the impugned Act of 1940 (permitting detention without trial), itself contemplated that “both Houses of Parliament, were to be put in a position, by the government, to enable them to keep a watchful eye, on the government’s use of the power, to detain, without trial, under the Act.”

The Irish government, was required to furnish to Parliament, at least every six

months, detailed returns of the persons detained, including particulars of those still detained, those reported on by the Detention Commission, those whose detention, the Commission considered to be no longer justified, those released in consequence, of the Detention Commission's report, and those released by the government, on its own initiative. *Lawless case, supra*, at 123.

The European Court, also took the view, that constant supervision, by Parliament, which not only received precise details, of the enforcement of the law, at regular intervals, but also could, at any time, by a resolution, annul the government's proclamation, which had brought the Act into force, was a very important safeguard. *Lawless case, supra*, para 37, at 478.

⁷⁸ ILA Paris report (1984) Section B, para 21 at 71. ICJ, *Emergency, supra*, at 437-8: "In Northern Ireland, the combined effect of Parliamentary debate and questioning of Ministers, freedom of the press and the activity of non-governmental organizations and interest groups has encouraged continuing review of governmental policies and their effect. There is no convincing evidence that the existence of an elected legislature is incompatible with a legitimate state of emergency."

⁷⁹ Hans Klecatsky "Reflections on the Rule of Law and in Particular on the Principle of the Legality of Administrative Action" (1962-3) 4 *Journal of the International Commission of Jurists* (Summer 1963) 209. See also Goodhart, quoted by AS Mathews, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society*, Cape Town, Juta 1986, who regards the submission of the executive to the rule of law as the crucial factor. Norman S Marsh, quoted by Mathews, *ibid*, also sees the control of the executive as the most important test of observance of the rule of law.

⁸⁰ The International Commission devoted a full congress to the taming of executive power: see *Executive Action and the Rule of Law, Report of the International Congress* held at Rio de Janeiro, Brazil, 11-15 December 1962.

⁸¹ Goodhart, *supra* note 79. See also *Executive Action and the Rule of Law, supra* note 80.

⁸² Hans Klecatsky, *supra* note 79 at 217.

⁸³ Such exceptions should generally be admitted only under emergency rule: see the discussion of the executive and emergency rule later in this Section.

⁸⁴ Report on the Proceedings, *African Conference on the Rule of Law*, Lagos, Nigeria, 3-7 January 1961 (Geneva, 1961) at 15. The qualification of the principle in times of emergency is discussed below.

⁸⁵ Professor Goodhart, *supra* note 79, gives a pivotal significance to control of the executive and argues that in the absence of such control the whole system breaks down: *op cit* 962. French writers, on the rule of law tend to make it stand, for control of the executive, above all else.

⁸⁶ The *habeas corpus* writ has been exhaustively discussed in legal literature. There is little point in going over the ground again here. There is a good South African study in the (1962) 79 *SALJ* 283.

⁸⁷ *Op cit* 300.

⁸⁸ *Op cit* 79.

⁸⁹ *Executive Action and the Rule of Law, supra* note 80.

⁹⁰ There are obviously many forms, which such controls could take. Some of the forms adopted in England during the Second World War are discussed by

Wade and Phillips in Constitutional Law 6 ed (Longmans, 1963) at 673.

⁹¹ Conclusion 5 of Committee I, see Brownlie, *supra* note 11.

⁹² Seminar on Amparo, Habeas Corpus and Other Similar Remedies: Mexico City, Mexico, UN Doc ST/TAO/HR/12, para 92 at 26, (1961).

⁹³ Seminar on Effective Realization of Civil and Political Rights at the National Level, Kingston, Jamaica, - ST/TAO/HR/29, para 237(g) at 51, (1967).

⁹⁴ Daes, *supra* note 35, paras 90, 91 at 196.

⁹⁵ ICJ, *Emergency*, *supra* note 31 at 435.

⁹⁶ George J. Alexander, *supra* note 65, 1-65 at 1.

⁹⁷ *Ibid.*, 1-4.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ In *Sterling v Constantin*, 287 US 378, 400-1 (1932), the US Supreme Court, was of the view, that whether or not declaration of martial law, was justified, in the facts and circumstances of the case, was a judicial question, and hence, the decision of the executive, was subject to review, by the judiciary. The court held that in declaring martial law to control oil production, the Governor of Texas had exceeded his authority.

On the other hand, a different view was taken in the *Hirabayashi* case, 320 US 81 at 93 (1943) where, upholding curfew regulations for Japanese-Americans in the West Coast, the negative judicial role, was emphasized by the Supreme Court, stating that, where "the choice of means by those branches (political) of government, on which the constitution has placed, the responsibility for war-making, it is not for this court, to sit in review of their wisdom, or substitute its judgement for theirs."

Some of the views expressed, in the much criticized decision, of *Korematsu v United States*, 323 US 214 (1944), (where evacuation and detention, of Japanese-Americans from the West Coast area, was upheld by the Supreme Court), support a theory of total abdication, of the role of the judiciary, during wartime emergency. Thus, Justice Jackson, though of the view that the evacuation programme was unconstitutional, nevertheless, held that the courts were powerless to prevent the abuse of war and emergency powers and the responsibility must be left "to the political judgements of their contemporaries and to the moral judgements of history." *Ibid* at 248; see also Alexander, *supra*, at 14-27.

Like the British courts, Canadian courts are loath to look behind executive declarations of emergencies: see Alexander, *ibid*, 42. In Malaysia, the courts have consistently taken the view that the determination by the government that an emergency exists and the issuance of proclamation of emergency, are non-justiciable. See, ICJ, *Emergency*, *supra* note 31 at 207.

In India, the position is regulated by Article 352 of the Constitution. A proclamation of emergency, can be made, if the President, on the basis of the decision, of the Council of Ministers, is satisfied that a grave emergency exists, whereby the security of India, or any part of the territory thereof, is

threatened, whether by war, or external aggression, or armed rebellion. The Constitution (42nd Amendment) Act, 1967 inserted a clause making the issue or continuance of emergency immune from judicial review in all respects; this has however been substituted by the (44th Amendment) Act, 1978.

One distinguished judge, of the Supreme Court, (Bhagwati J as he then was), was of the view, that any provision debarring judicial review, of a proclamation of emergency, would be contrary to the basic structure, of the Constitution of India, and accordingly, unconstitutional and void: *Minerva Mills Ltd v Union of India*, AIR (1980) SC 1789, para 105. Although not directly in issue, Bhagwati J in the same case, expressed his view whether or not a proclamation of emergency was justiciable. According to him, there is no bar to judicial review of the validity of a proclamation of emergency merely because the question has a political complexion. The court should not decline to examine whether it involves any constitutional violation. He concedes, however, that the power of judicial review is of a limited nature and would not extend to an examination of the correctness or adequacy of the facts on which the satisfaction of the central government is based.

But the existence, of the satisfaction, is a condition precedent, to the exercise of the power; where therefore, the satisfaction is absurd or perverse, or *mala fide* or based on a wholly extraneous, and irrelevant ground, it would be no satisfaction at all, and would be liable, to be challenged, before the court: *Ibid*, paras 103-5.

¹⁰² For instance, one writer suggests both the need for a review and the appropriate standard to do so: "To prevent the abuse of emergency powers, courts must review both whether an emergency existed, and more important, whether the measures taken were *necessary* to restore order. The best standard to adopt would be a strict standard of necessity, which would require that there not be available to the government, alternative means of coping with the emergency that were as effective as the measures employed but less restrictive of individual liberties." *The National Security Interest and Civil Liberties*, 85 HARV L REV 1130, 1296-7 (1972). Also see, Alexander, *supra* note 65 at 20.

¹⁰³ LR (1980) AC 458 at 470-74. Also see the intervention of this writer in the Montreal Report of the ILA (1982) at 114-15.

¹⁰⁴ ICJ, *Emergency*, *supra* note 31 at 176-7.

¹⁰⁵ *G. Sadanandan v State of Kerala* (1966) 2 SCJ 725; also see ICJ, *Emergency*, *supra* note 31 at 186.

¹⁰⁶ ICJ, *Emergency*, *supra* note 31 at 178.

¹⁰⁷ (1981) 2 Supreme Court Reports 1 (decided 9 May 1980/13 November 1980).

¹⁰⁸ *Ibid*, 45.

¹⁰⁹ (1967) 2 SCALE 1322, 1328-30, 1337-8.

¹¹⁰ For example, Bhagwati J, in the case of *Minerva Mills v Union of India*, *supra*, at para 107, expressed his view, that there was nothing in the Constitution, saying that a proclamation of emergency, validly issued, under Article 352(1), should cease to operate, as soon as the circumstances, warranting its issue, have ceased to exist; so long as the proclamation, is not

revoked by another proclamation, under the Constitution, it would continue to be in operation, irrespective of change, of circumstances.

¹¹¹ 335 US 160 (1948). In *Hamilton v Kentucky Distilleries* 251 US 146 (1919), the Supreme Court held that the Wartime Prohibition Act would apply until Congress determined that the need no longer existed. See also Alexander, *supra* note 65 at 16 .

¹¹² 264 US 543 (1924). Also see, Alexander, *ibid*, at 22.

¹¹³ Also see ILA Paris report para 22 at 71; ILA Belgrade report paras 19, 20 at 93. In its Seoul report (1986) the ILA points out that the judiciary, in a state of emergency, is often impaired in three ways:

the loss of jurisdiction to special courts or military tribunals;

the suspension of the writs of amparo or habeas corpus; and

(c) the creation of a climate of fear, sometimes by mass dismissals of judges, leading to judicial timidity and ineffectiveness. Attorneys may also be threatened or punished, further impairing the availability of judicial remedies against excessive emergency measures (para 16).

¹¹⁴ ICJ, *Emergency*, *supra* note 31 at 437.

¹¹⁵ *Ibid* at 16-18. Also see Hartman, Siracusa symposium *supra* note 18 at 107.

¹¹⁶ Subrata Roy Chowdhury, *Rule of Law in a State of Emergency*, *supra* note 34 at 89.

¹¹⁷ UN Doc E/CN 4/SR 127, 14.6, (1949).

¹¹⁸ 1984 Report of the HR Committee, para 75 at 14.

¹¹⁹ UN Doc A/2929 at 47 (1955).

¹²⁰ Siracusa symposium, *supra* note 18 at 25-6 (O'Donnell), Daes *supra* note 35.

34 para 185 at 203.

¹²¹ Daes, *ibid*, para 189 at 204.

¹²² Questiaux, *supra* note 3, para 44.

¹²³ Buergenthal, *supra* note 27 at 84; according to this view, a twelve-day delay, (which was not found fatal in the *Lawless* case, under the ECHR), would not ordinarily satisfy the standard required by Article 4(3) of the ICCPR.

¹²⁴ Daes, *supra* note 35, para 57 at 193; Questiaux, *supra* note 3, para 45.

¹²⁵ Buergenthal, *supra* note 27 at 84-5.

¹²⁶ Questiaux, *supra* note 3, para 46.

¹²⁷ Daes, *supra* note 35, para 186 at 203. The *travaux preparatoires* of the ICCPR does not clarify the reason for the change from an amended Belgian proposal, (which introduced the idea of the "provisions" derogated from to "measures" taken), it however, seems that "a change of substance was probably not intended". Hartman, Siracusa symposium *supra* note 18 at 104-5. Also see UN Doc E/CN 4/497 (1950), (for the Belgian proposal); UN Doc E/CN 4/528 at 32 (1951), (New Zealand was critical of the notification of "provisions" rather than "measures").

¹²⁸ Questiaux, *supra* note 3, para 47.

¹²⁹ 1981 Report of the HR Committee at 110, for the text of general comment 5/13.

¹³⁰ Questiaux, *supra* note 3, paras 48-54, ILA's Paris report (1984), Section B, para 3 at 65-6. While noticing the deficiencies in the ICCPR, compared to the ECHR, points out Hartman, if the inherent role of a depository, includes a power to review submissions, for technical adequacy, as Questiaux suggests, then the authorization of the Secretary-General, as a depository under Article 4, of the ICCPR, should be sufficient, to sustain the suggested procedure, even without the two broader provisions, of the European Convention, namely, Articles 15(5) and 57. The adequacy of a notice of derogation, can be examined in a continuous and immediate manner, by the Human Rights Committee, by appointing and delegating appropriate powers to rapporteurs under Rule 62 of the Provisional Rules of Procedure. Siracusa symposium, *supra* note 18 at 102-4.

¹³¹ 1983 Report of the HR Committee, para 228.

¹³² Communication no. 34/1978, *Jorge Landinelli Silva v Uruguay*, (decision dated, 8 April 1981), 34/1981 Selected Decisions under the Optional Protocol, New York, 1985, para 8.3 at 66.

¹³³ 1984 Report of the HR Committee, para 104 at 21.

¹³⁴ Siracusa Principle 47, *supra* note 18 at 8.

¹³⁵ Buergenthal, *supra* note 27 at 86. See also the Report of the European Commission in the *De Becker* case, *supra*, para 271, and the conclusions of the Inter-American Commission on Human Rights in its 1974 report on Chile, relied upon by Buergenthal.

¹³⁶ Buergenthal, *supra* note 27 at 87.

¹³⁷ Daes, *supra* note 35, para 390 at 135.

¹³⁸ Brownlie, *supra* note 11 at 430.

¹³⁹ Questiaux, *supra* note 3, para 60.

¹⁴⁰ This writer considers that it is doubtful if the Caroline doctrine, in so far as it permits preventive action in view of the imminence of danger, is still good law. The right of self-defence, as recognized in Article 51 of the Charter of the United Nations has to be read with the other provisions of the Charter, particularly Articles 2(3), 2(4), 24, 33 and 37. So read, it can be argued, that the right of preventive action in self-defence, considered in the background of the prohibition, against the use or threat of force, on the one hand, and the virtual monopoly of the United Nations, of the right to the use of force, on the other, is subject to a restrictive interpretation. See Subrata Roy Chowdhury, *Military Alliances and Neutrality in War and Peace*, (Orient Longmans, 1966), 97-115.

¹⁴¹ See Siracusa Principles 51-7, *supra* note 18 at 9; O'Donnell and Hartman at 27-8 and 105-12 respectively.

¹⁴² ILA, Paris report, (1984), para 6 at 66. Questiaux, *supra* note 3, para 63.

¹⁴³ UN Doc A/2929 at 68.

¹⁴⁴ Summary Records of Commission on Human Rights, sixth session, UN Doc E/CN.4/SR.195 at 12, (1950); Summary Records of the Third Committee of the General Assembly, 17 UN, GAOR C.3, (1261st meeting). UN Doc A/C.3/SR.1261 at 255, (1963). Also, see Hartman, *Siracusa symposium*, *supra*, at 111-12.

¹⁴⁵ ILA Paris report, (1984), para 9 at 67.

¹⁴⁶ Daes, *supra* note 35, paras 50-3 at 193. Fawcett JES *The Application of the European Convention on Human Rights*, Oxford, 1969, at 250. Jacobs,

supra note 73 at 207-8.

¹⁴⁷ Buergenthal, *supra* note 27 at 82.

¹⁴⁸ Siracusa Principle 66, Siracusa symposium, *supra* note 18 at 11, 30-1, (O'Donnell), and 119, (Hartman).

¹⁴⁹ Lawless, *supra*, para 40 at 480, 482.

¹⁵⁰ 1985 Report of the HR Committee, Annex VI, para 6.

¹⁵¹ Apart from national constitutions, the principle of non-discrimination, is enshrined in many international instruments such as the UN Charter, (1945); the Universal Declaration of Human Rights, (1948); the Charter of the OAS, (1948); the American Declaration of the Rights and Duties of Man, (1948); the International Law Commission's Draft Declaration on the Rights and Duties of States, (1949); the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950); the ILO Convention and Recommendation Concerning Discrimination in Respect of Employment and Occupation, (1958); the International Convention on the Elimination of All Forms of Racial Discrimination, (1966); the International Covenants on Human Rights, (1966); the American Convention on Human Rights, (1969); and the UNESCO Declaration on Race and Racial Prejudice, (1978). See B.G. Ramcharan: "Equality and Non-discrimination" in, *The International Bill of Human Rights: The Covenant on Civil and Political Rights*, (Louis Henkin, ed, Columbia, 1981), at 248-9. This important publication contains fourteen articles, by eminent authors dealing with different aspects of the ICCPR.

¹⁵² Subrata Roy Chowdhury, "Equality before the Law", in the *Cambridge Law Journal*, (1961), 223, where the application of the principle, in the Indian Constitution, is examined in the larger international perspective.

¹⁵³ European Court of Human Rights, (23 July 1968), case "Relating to certain aspects of the laws on the use of languages in education in Belgium", (Merits), (1968), 11 YB-ECHR 832 at 864, 866. Daes has summed up the ratio of the decision: "The Court, thus adopted the thesis that differential treatment is justified, if it has an objective aim, derived from the public interest, and if the measures on differentiation do not exceed a reasonable relation to that aim." Daes, *supra* note 35, para 370 at 133.

¹⁵⁴ Summary records of the Commission on Human Rights, Sixth Session, UN Doc E/CN 4/SR 195, at 22, (1950); UN Doc E/CN 4/SR 196, at 3, 6, (1950); UN Doc E/CN 4/SR 331, at 6, (1952). Also see, Hartman, Siracusa symposium, *supra* note 18 at 118.

¹⁵⁵ Ramcharan, *supra* note 151 at 269.

¹⁵⁶ Buergenthal, *supra* note 27 at 82-3.

¹⁵⁷ Questiaux, *supra* note 3, paras 65-6. It has been said, that differential measures, can be taken against a minority, which poses a singular threat to the nation, but not against a minority which is simply unpopular, Hartman, *supra* note 8 at 118.

¹⁵⁸ Questiaux, *supra* note 3, para 64.

¹⁵⁹ Daes, *supra* note 35, paras 165-70 at 202, (a comparative review of Article 4, of the ICCPR, Article 15 of the ECHR, and Article 27 of the ACHR).

¹⁶⁰ Buergenthal, *supra* note 27 at 83.

¹⁶¹ Hartman, Siracusa symposium, *supra* note 18 at 113. A brief reference to *travaux préparatoires* may be useful, although, it does not throw much light on the reasons for the choice of the listed rights in the Convention.

¹⁶² Questiaux, *supra* note 3 at para 68. This is also recognized, in Siracusa Principle 69, which provides, in the context of these four rights, that customary international law prohibits, “in all circumstances, the denial of such fundamental rights.” Article 53, of the Vienna Convention, provides that “a peremptory norm of general international law, is a norm accepted and recognized by the international community of States, as a whole norm, from which no derogation is permitted, and which can be modified, only by a subsequent norm, of general international law, having the same character.”

¹⁶³ Questiaux, *ibid*.

¹⁶⁴ *Ibid*, para 203. Recommendations, B at 45. Hartman, on the other hand, expressed her reservation, that Questiaux’s recommendation “might seriously risk diluting the moral force of a short, but solemn list, of absolutely inalienable rights.” Hartman is of the view, that the following five principles would be an appropriate response:

Emphasize the binding nature of all the rights insulated by Article 4(2), on states parties to the Covenant.

Express heightened concern, for the principle of non-discrimination.

Recognize the special nature of the rights, which have become *jus cogens*, by adopting the principle, that even states which are not parties, to any of the human rights treaties, are bound to respect the inviolability of those four rights.

Emphasize the desperate need for states parties to conform to their obligation, under Article 2, of the Covenant by controlling the actions of security forces, and by providing effective domestic remedies for violations of non-derogable rights.

Delineate irreducible minimum guarantees of due process, and humane treatment for detainees and others, subject to emergency measures. See Hartman, *supra* note 8 at 113-14.

¹⁶⁵ See generally, ILA Paris report, (1984), paras 15-19 at 69-70.

¹⁶⁶ *Ibid*, para 18 at 70.

¹⁶⁷ *Barcelona Traction (Judgement)*, 1970 ICJ Reports at para 33, (p 32). The Court observed:

“In particular, an essential distinction, should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state, in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.” The Court, further observed: “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also, from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection, have entered into the body of general international law, (*Reservations to the Convention on the Prevention and*

Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports, 1951, p 23); others are conferred by international instruments of a universal or quasi-universal character”.

¹⁶⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 ICJ Reports pp 15, 23. In its advisory opinion, the Court traced the origin of the convention, and observed, that it was the intention, of the United Nations, to condemn and punish genocide, as a crime under international law, involving “... a denial of the right of existence, of entire human groups, a denial, which shocks the conscience of mankind, and results in great losses to humanity, and which is contrary to moral law, and to the spirit and aims of the United Nations, (Resolution 96(1) of the General Assembly, December 11th 1946).”

The Court, then pointed out two important consequences: “The first consequence, arising from this conception, is that the principles underlying the Convention, are principles, which are recognized by civilized nations, as binding on states, even without any conventional obligation. A second consequence, is that the universal character, both of the condemnation of genocide and of the co-operation required, “in order to liberate mankind from such an odious scourge”, (Preamble to the Convention)... The Convention, was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult, to imagine a convention that might have this dual character to a greater degree, since its object on the one hand, is to safeguard the very existence of certain human groups and on the other, to confirm and endorse the most elementary principles of morality.” *Ibid.*

¹⁶⁹ ILA Paris report, para 19 at 70.

¹⁷⁰ David Bonner, *Emergency Powers in Peacetime*, (Sweet & Maxwell, London 1985), at 15.

¹⁷¹ Rossiter, *supra* note 4 at 8.

¹⁷² *African Conference on the Rule of Law*, Report of the Conference of the International Commission of Jurists, held in Lagos, Nigeria, 3-7 January 1961, (Geneva, 1961), at 16.

¹⁷³ Act 3 of 1953.

¹⁷⁴ Section 5 read with Section 1.

¹⁷⁵ Section 2(1).

¹⁷⁶ *Ibid.*

¹⁷⁷ *Stanton v Minister of Justice* 1960 (3) SA 353 (T) 357. Though the declaration of a state of emergency is usually a matter for executive discretion, judicial control on objective grounds was not unthinkable. See “Note, The Internal Security Act of 1950” 51 (1951) *Columbia Law Review* 406, 646-57 in relation to a declaration of an “internal security emergency” by the United States President under legislation now repealed. British courts have always been unwilling to review the necessity for the declaration of an emergency.

¹⁷⁸ Section 2(1).

¹⁷⁹ Section 3(2)(b); *R v Manthutle* 1960 (4) SA 827 (C).

¹⁸⁰ Section 2(2).

¹⁸¹ Section 3(1). The regulations had to be promulgated in the *Gazette*. The words, “for as long as the emergency remains in force”, did not prohibit a prosecution, after the withdrawal of the emergency, for an offence committed

during the emergency: *R v Sutherland* 1961 (2) SA 806 (A).

¹⁸² Section 3(1).

¹⁸³ The regulations may not create retrospective crimes, impose compulsory military service, or affect the laws relating to the membership, powers and sessions of the President's Council, Parliament or a Provincial Council: Section 3(3).

¹⁸⁴ 1960 (3) SA 793 (N). See also *Ex parte Hathorn: In re OC Durban Prison Command* 1960 (2) SA 767 (D).

¹⁸⁵ 1986 (2) SA 264 (W).

¹⁸⁶ *Metal & Allied Workers Union v State President of the Republic of South Africa* 1986 (4) SA 358 (D) and *Natal Newspapers (Pty) (Ltd) v The State President* 1986 (4) 1109 (N).

¹⁸⁷ *Momoniati & Naidoo v Minister of Law and Order*, *supra*.

¹⁸⁸ Section 5B introduced by Section 4 of the Public Safety Amendment Act 67 of 1986.

¹⁸⁹ See Bonner *supra* note 170 at 52.

¹⁹⁰ At p 276 of the judgement.

¹⁹¹ H W R Wade, *Administrative Law*, 5 ed, (Oxford 1982), 38-9.

¹⁹² 1986 (3) SA 306 (C), (minority judgement).

¹⁹³ Lawrence Baxter, *Administrative Law*, 307 et seq; *Natal Newspapers (Pty) Ltd v The State President*, *supra*.

¹⁹⁴ Section 5B.

¹⁹⁵ Section 3(2)(b) – subject to the aforementioned prohibition on retrospective crimes.

¹⁹⁶ Section 3(1)(b).

¹⁹⁷ Section 3(2)(a)(i). This included the authority to prescribe penalties.

¹⁹⁸ Section 3(2)(a)(ii). The power of confiscation was specifically authorised as a penalty.

¹⁹⁹ Section 3(2)(c).

²⁰⁰ *UDF v Die Staatspresident* 1988 (4) SA 830 (A), and *The United Democratic Front v The State President*. In the first judgement, the Court was prepared to uphold the sub-delegation to unspecified persons of administrative acts, as opposed to rule-making authority.

²⁰¹ Proclamation No. R140 of 1986, (*Reg Gaz* 3986 of 1 August 1986).

²⁰² Section 3(4). The names of detainees held for longer than thirty days, had to be tabled in Parliament within fourteen days, after the expiration of such period, or if Parliament was not in session, within fourteen days of the commencement of the next session.

²⁰³ Section 3(4) *bis*.

²⁰⁴ See, for example, A.S. Mathews, *Law, Order and Liberty in South Africa*, 224: *A Survey of Race Relations in South Africa 1959-1960*, 73 et seq.

²⁰⁵ Proclamation No. R121 of 1985, (*Reg Gaz* 3849 of 21 July 1985), (amended by Proclamation Nos. R199, R201, R207 and R208 of 1985).

²⁰⁶ Proclamation No. R109 of 1986, (*Reg Gaz* 3964 of 12 June 1986), (amended by Proclamation Nos. R110, R121, R125, R131 and R140 of 1986).

²⁰⁷ Section 5A introduced by Section 4 of the Public Safety Amendment Act 67 of 1986.

²⁰⁸ *Supra*.

²⁰⁹ 1986 (4) SA 1150 (N).

²¹⁰ 1992 (3) SA 37.

²¹¹ Even the more enlightened and activist Natal court, had balked at the idea of controlling the Minister's power: *Metal and Allied Workers Union v Castell NO*, 1985 (2) SA 280 (D) 283-4.

²¹² Section 2(5). This was similar to the blanket of silence, which fell upon a person "banned" under the Suppression of Communism Act. Because it followed automatically, upon an order prohibiting a person from attending gatherings, the silencing provision was also unchallengeable.

²¹³ In the police or defence forces, or appointed under certain Railway and Harbour legislation: see the definition of "commissioned officer" and "forces" in Regulation 1.

²¹⁴ Regulation 2(1).

²¹⁵ Section 1.

²¹⁶ Ibid.

²¹⁷ See, *A Survey of Race Relations in South Africa*, (1967), at 45.

²¹⁸ See Regulation 2(1) for the full list of exclusions.

²¹⁹ Regulation 2(1). The onus was on the accused to prove this. The penalty was a fine, not exceeding R1000 or imprisonment for a period not exceeding five years, or either or both the fine and the imprisonment: see Regulation 25(1) which applied to other offences as well.

²²⁰ Regulation 3(1).

²²¹ Regulation 3(2).

²²² *A Survey of Race Relations in South Africa*, (1961), at 52.

²²³ *The Weekly Mail*, 14-20 March 1986.

²²⁴ *The Weekly Mail*, 1-7 August 1986. At the resumption of the adjourned session of Parliament in August 1986, the Minister tabled eight and a half thousand names: *The Natal Witness*, 18 August 1986.

²²⁵ Regulation 3 of the regulations, published as Proclamation No. R109 of 1986, (*Reg Gaz* 3964 of 12 June 1986). The Regulations are referred to below as "the regulations". Similar provision for detention was made during the 1985 emergency by Regulation 3 of the Regulations promulgated in Proclamation No. R121 of 1985, (*Reg Gaz* 3894 of 21 July 1985), (referred to below as the 1985 emergency regulations).

²²⁶ *Nkwinti v Commissioner of Police* 1986 (2) SA 421 (E).

²²⁷ *Supra*.

²²⁸ Though the Cape Court in, *Omar v Minister of Law and Order* 1986 (3) SA 306 (C), upheld the validity of the Regulation making access to the detainee, including access by lawyers, subject to official permission, Didcott J in *Metal & Allied Workers Union v State President of the Republic of South Africa*, *supra*, declared the Regulation, (and the corresponding rule made by the Minister of Justice), to be ultra vires, to the extent that it covered access to lawyers.

²²⁹ *Dempsey v Minister of Law and Order* 1988 (4) 530 (C) and *Radebe v Minister of Law and Order* 1987 (1) SA 586.

²³⁰ GN No. 1196 (*GG* 10281 of 12 June 1986, (referred to below, as the, "detention rules".)

²³¹ Regulation 3(10). Visits by lawyers, have been dealt with above.

²³² Regulation 3(5).

²³³ Rule 6.

²³⁴ Rule 21.

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- ²³⁵ Regulation 13. Once the authorities had disclosed the name and identity of a detainee to any person, the prohibition appeared to fall away.
- ²³⁶ See Section 3(4).
- ²³⁷ 1986 (2) SA 756 (A).
- ²³⁸ Regulation 5(1).
- ²³⁹ See Regulation 1.
- ²⁴⁰ Regulation 6.
- ²⁴¹ For the penalties, see footnote 414, above.
- ²⁴² Regulation 14(1).
- ²⁴³ Regulation 24(4).
- ²⁴⁴ The Regulation spoke of a charge, “arising out of any act, done at a lawful gathering or procession”. It did not require, that the act, which was the basis of the charge, had to be done by the accused.
- ²⁴⁵ Regulation 23.
- ²⁴⁶ Regulation 23(1)(g).
- ²⁴⁷ Section 15 of Act 74 of 1982.
- ²⁴⁸ Under Section 5 of Act 74 of 1982.
- ²⁴⁹ Section 2 of the Newspaper and Imprint Registration Act 63 of 1971.
- ²⁵⁰ See definition of “newspaper” in Section 1 of Act 63 of 1971. It was irrelevant that the publication in question, was with or without advertisements or illustrations. On the meaning of “newspaper” and “published”, see *Ritch v Jane Raphaely & Associates (Pty) Ltd* 1984 (4) SA 334 (T) and *S v Davidson and Bernhardt Promotions (Pty) Ltd* 1983 (1) SA 676 (T).
- ²⁵¹ Section 4 of Act 63 of 1971.
- ²⁵² A further limitation was introduced by Section 1 of the Registration of Newspapers Amendment Act 98 of 1982, which in effect, gave the Minister the power to cancel the registration of a newspaper, which did not submit itself to discipline by the Media Council.
- ²⁵³ Section 15(1) of Act 74 of 1982.
- ²⁵⁴ Section 5.
- ²⁵⁵ Section 15(1).
- ²⁵⁶ In terms of Section 15(3), interest was payable at the expiration of each five-year period.
- ²⁵⁷ Section 15(4).
- ²⁵⁸ Section 15(5).
- ²⁵⁹ Where a newspaper was not distributed to the general public for more than a month, the Court held that registration had lapsed, even though some copies were printed in that period, and delivered to libraries and state institutions: *Argus Printing and Publishing Co Ltd v Minister of Internal Affairs* 1981 (2) SA 391 (W).
- ²⁶⁰ Section 3(1). The failure to comply with a prohibition constituted an offence, in terms of Section 3(4).
- ²⁶¹ Section 1.
- ²⁶² Regulation 14.
- ²⁶³ 1950 (3) SA 579 (W) at 581.
- ²⁶⁴ Section 3(2).
- ²⁶⁵ Section 3(3).
- ²⁶⁶ *Supra*.
- ²⁶⁷ Section 6 of Act 44 of 1950.

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- ²⁶⁸ Regulation 12. The ban had to be imposed by notice in the *Gazette*.
- ²⁶⁹ Section 3(5).
- ²⁷⁰ Section 1(12) of Act 27 of 1914.
- ²⁷¹ 1934 AD 11 at 37.
- ²⁷² Section 4.
- ²⁷³ *Sachs v Minister of Justice*, *supra* note 270; *R v Ngwevela* 1954 (1) SA 123 (AD).
- ²⁷⁴ Section 10(1).
- ²⁷⁵ Section 3(8). A person convicted under this sub-section, who was born outside the Republic, could be deported: see Section 5.
- ²⁷⁶ Section 3(7).
- ²⁷⁷ Regulation 11.
- ²⁷⁸ Regulation 12.
- ²⁷⁹ *Ibid.* See also Regulation 23(3).
- ²⁸⁰ Regulations 8, 9 and 10.
- ²⁸¹ Regulations 17 and 18.
- ²⁸² Regulation 5.
- ²⁸³ Regulation 2. There were prerequisites for the validity of the use of force and they appeared to be that an opinion, held by the designated officer, that the circumstances were such, as to endanger the public safety etcetera and that the necessary order must have been properly announced and not obeyed forthwith, by those present. Those were jurisdictional prerequisites, and, in their absence, the use of force would be illegal and not protected by the indemnity, in Regulation 16.
- ²⁸⁴ Regulation 16(4).
- ²⁸⁵ This incident is briefly reported in *A Survey of Race Relations in South Africa* 1980 p550.
- ²⁸⁶ J Neethling op cit 221; D J McQuoid-Mason op cit 154.
- ²⁸⁷ See for example, *Goodman v Von Moltke* 1938 CPD 153, 157 and the comment thereon, of J Neethling op cit 183.
- ²⁸⁸ One of the complicating factors, was that the informer would usually have become a member of the organisation which he had penetrated. It was conceivable that a member who had a right to receive information at meetings, may nevertheless have acted illegally, if he conveyed it outside the organisation. There seems to be no direct authority on the point.
- ²⁸⁹ Regulation 24(1).
- ²⁹⁰ Regulation 16(1). A similar Regulation was enacted for both the 1960 and 1985 emergencies.
- ²⁹¹ See, particularly, Nicholas Haysom, *Mabangalala: The Rise of Right-Wing Vigilantes in South Africa*, Center for Applied Legal Studies, Johannesburg, 1986), at 137.
- ²⁹² 1961 (4) SA 806 (C).
- ²⁹³ P O' Higgins "Wright v Fitzgerald Revisited", (1962) 25 MLR, at 413.
- ²⁹⁴ See *Brief on the Legal Regime Operative in Areas Subject to a Proclamation of a State of Emergency and Areas Declared to be Unrest Areas under the Public Safety Act 3 of 1953*, (Faculty of Law, University of Cape Town, June 1986), at 25. Referred to below as, "Cape Town Law Faculty Brief".
- ²⁹⁵ *Ibid.*

²⁹⁶ At 27.

²⁹⁷ Regulation 7(1)(d).

²⁹⁸ *Report of the Commission Appointed to Enquire into the Incident Which Occurred on 21st March 1985 at Uitenhage*, (RP 74-1985), at 95. This instruction, in the original Afrikaans text read: "Wanneer suurbomme en/of petrolbomme na polisievoertuie, privaatvoertuie en geboue gegooi word, moet daar onder alle omstandighede, gepoog word, om die skuldiges te elimineer."

²⁹⁹ *Supra*.

³⁰⁰ Cape Town Law Faculty Brief, *supra* note 294 at 25. Regulation 29 introduced by amending Proc 167, (GGE 6452 dated 17 May 1960), declared that no court, of law was competent to entertain, any application or action, arising out of anything done under the Regulations.

³⁰¹ Quoted by P O'Higgins, (1962), 25 *MLR* 413 at 422.

³⁰² It has been pointed, out that prospective indemnities, frustrate parliamentary scrutiny and are contrary to parliamentary and democratic government: see Cape Town Law Faculty Brief 24.

³⁰³ The words are Machiavelli's, and are quoted with approval, by Bernard Crick, *In Defence of Politics*, (Penguin Books, 1962), at 179.

³⁰⁴ In South Africa, there were drastic, temporary and permanent emergency powers, a fact which pointed to fundamental defects in the administration of the country.

³⁰⁵ 10 and 11 Geo V c.55.

³⁰⁶ Section 1(2).

³⁰⁷ Section 2(2).

³⁰⁸ Section 3(6).

³⁰⁹ The Emergency Detention Act, was a part of the Internal Security Act of 1950.

³¹⁰ Thus, giving the courts power to determine, whether emergency regulations or orders, are within the statutory power.

³¹¹ Section 2(3).

³¹² See Wade and Phillips, *supra* note 90 at 670.

³¹³ See Edwards, "Special Powers in Northern Ireland", (1956), *Criminal Law Review*, at 9.

³¹⁴ Edwards *op cit* 8.

³¹⁵ See, for example, Calvert's very fair-minded assessment in, *Constitutional Law in Northern Ireland*, (Stevens, 1968), at 380-6.

³¹⁶ Sections 3 and 90.

³¹⁷ Section 92(1).

³¹⁸ Section 92(2) and (3).

³¹⁹ *Ibid*. The period for which the Minister could mobilize, was four days where there was general mobilization, and 24 hours where the mobilization was local.

³²⁰ Section 92*bis*.

³²¹ Sections 100 and 102.

³²² Section 103*bis*.

³²³ Which included the Police Reserve: see the definition of "the Force" in Section 1.

³²⁴ Section 7.

³²⁵ *Ibid*.

³²⁶ These words are taken from the long title of the Act. The long title, was

amended by Section 9 of the Civil Defence Amendment Act 5 of 1969.

³²⁷ See Section 1(1) of Act 44 of 1957.

³²⁸ The Minister referred to, is the Minister of Defence. Though the administration of the Civil Defence was formerly under the Minister of Justice, the Civil Defence Amendment Act 5 of 1969, brought it under the Defence Department.

³²⁹ Section 1.

³³⁰ Ibid.

³³¹ Section 3.

³³² Ibid.

³³³ The information is detailed in Section 3(1)(aa)).

³³⁴ That is, those listed in sub-paragraphs (i)-(x) of Section 3(1).

³³⁵ Sub-paragraphs (aa), (bb) and (cc) of Section 3(1). These sub-paragraphs bound the State: see Section 16.

³³⁶ Section 4. See however, Section 6 which permitted the Minister to grant financial assistance to persons, who had carried out certain acts, related to the administration of the Act.

³³⁷ Section 5.

³³⁸ Section 7.

³³⁹ Which are specified in Section 9(2). The Minister was authorized by the proviso, to Section 9(1), to exempt other persons.

³⁴⁰ Section 9(1).

³⁴¹ Section 11.

³⁴² Section 12.

³⁴³ Section 10.

³⁴⁴ Section 13.

³⁴⁵ Section 14.

³⁴⁶ Section 17. The penalties were a fine not exceeding R200, or imprisonment for a period not exceeding six months, or to imprisonment without the option of a fine.

³⁴⁷ Section 18(1).

³⁴⁸ Section 18(2) and (3).

³⁴⁹ Section 19.

³⁵⁰ Act 67 of 1977. For a more detailed description of this Act, see *Law of South Africa*, volume 21, para 350.

³⁵¹ Section 3 of Act 67 of 1977. Such ordinances could not make provision for armed action or the combating of crime.

³⁵² The Civil Defence Ordinance 20 of 1977 (T); The Civil Defence Ordinance 10 of 1977 (OFS); The Civil Defence Ordinance 8 of 1977 (C); The Civil Defence Ordinance 5 of 1978 (N). The four ordinances were almost identical and empowered the Administrator to activate civil defence programmes, *inter alia*, by giving directions to local authorities.

³⁵³ Section 1.

³⁵⁴ Section 5.

³⁵⁵ See *Law of South Africa*, volume 21, para 353.

³⁵⁶ The Civil Defence Act of 1951. See 50 App U.S.C. 2251-97.

³⁵⁷ The Civil Defence Act 1948, (12, 13 and 14 Geo VI, c.5), read with the Air-Raid Precautions Act 1937, (1 and 2 Geo VI, c.6), and The Civil Defence Act of 1939, (2 and 3 Geo VI, c.31).

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- ³⁵⁸ The criminal provisions of this Act have already been dealt with.
- ³⁵⁹ These provisions may not be read as derogating from any other legislation, or from the common law, which governed riotous gatherings and riotous and seditious acts: see Section 9.
- ³⁶⁰ The first two of these powers, were introduced in 1962 and did not form a part of the original Act: see Act 76 of 1962.
- ³⁶¹ Act 92 of 1970.
- ³⁶² It was not specifically stated during the second reading debate, that the measure was introduced for this purpose, but student processions were referred to during that debate: see *House of Assembly Debates*, volume 30 cols 4823-42, (23 September 1970).
- ³⁶³ Section 15. The Section came into operation on 21 October 1970: see Proc R.248 of 1970 (GG 2892 of 16 October 1970). The operation of the provision could be suspended in areas specified by the Minister of Justice in the *Gazette*: sub-section (3).
- ³⁶⁴ As defined in Section 84(1)(f) of the Republic of South Africa Constitution Act 32 of 1961.
- ³⁶⁵ As happened on 21 July 1985 and again on 12 June 1986.
- ³⁶⁶ The definition of "subversive statement" in Regulation 1 of the Regulations, published in Proclamation No. R109, (*Reg Gaz* No. 3964 of 12 June 1986). These particular aspects of the definition, were struck down by the Natal Supreme Court on 16 July 1986.
- ³⁶⁷ Particularly, Regulations 7(1)(c), 7(3), 9, 11 and 12.
- ³⁶⁸ Section 5 A of the Public Safety Act 3 of 1953, was introduced by Section 4 of the Public Safety Amendment Act 67 of 1986.
- ³⁶⁹ Bob Fine, *Democracy and the Rule of Law*, (Pluto Press, London 1984), at 9.
- ³⁷⁰ T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", (1985), 44 *Cambridge Law Journal*, at 111, 129.
- ³⁷¹ *Ibid*, at 130.
- ³⁷² L.J. Boule, *South Africa and the Consociational Option: A Constitutional Analysis*, (Juta & Co. Ltd, Cape Town, 1984), at 73-96.
- ³⁷³ Heribert Adam, *Modernizing Racial Domination*, (University of California Press, 1971).
- ³⁷⁴ Theo Hanf et al *South Africa: The Prospects of Peaceful Change*, (Rex Collings, London, 1981), at 41.
- ³⁷⁵ McDonald Report, volume 2, para 1064.
- ³⁷⁶ Quoted by Frederick Vaughan in "The Trial of Socrates: Recent Reflections", (1976), 14 *Osgoode Hall Law Journal*, at 407, 408.
- ³⁷⁷ Sammy Smooha, "Control of Minorities in Israel and Northern Ireland" 22 *Comparative Studies in Society and History*, at 256 and "Existing and Alternative Policies Towards the Arabs in Israel" (1982) 5 *Ethnic and Racial Studies*, at 71.
- ³⁷⁸ Rabie Report, para 3.18.
- ³⁷⁹ Paragraph 3.33.
- ³⁸⁰ Paragraph 3.25.
- ³⁸¹ Paragraph 3.31.
- ³⁸² Kenneth W Grundy, *The Militarization of South African Politics*, (Taurus & Co Ltd, London, 1986), at 1.

³⁸³ See Section 4 of the Security Intelligence and State Security Council Act 64 of 1972.

³⁸⁴ See, for example, Kenneth W Grundy *supra* note 381 *op cit*, 49 *et seq.* D Geldenhuys and H Kotze, "Aspects of Political Decision-making in South Africa" (1983) 10 *Politikon* 33; Simon Jenkins, "Destabilisation in Southern Africa" *The Economist*, 16 July 1983; and Allister Sparks, "Hawks Back on Top after White Deaths" *The Observer*, Sunday 29 December 1985. Defence Force raids into Zimbabwe, Botswana in May 1986 were apparently carried out without Cabinet approval, (*Sunday Tribune*, 25 May 1986), despite the predictable enormous foreign policy damage which they caused.

³⁸⁵ Similar aid given by the World Council of Churches and other bodies to the ANC was regularly denounced by the South African government on the ground that it furthered the military struggle against apartheid.

³⁸⁶ *The Weekly Mail*, 20-26 September 1985.

³⁸⁷ *S v Hoare* 1982 (4) SA 865 (N), especially at 876.

³⁸⁸ An interim order restraining the police from assaulting detainees was granted by Mr. Justice Eksteen on 25 September 1985: *Natal Witness*, 26 September 1985.

³⁸⁹ See, for example, *Nordien v Minister of Law and Order* 1986 (2) SA 511 (C). The Natal court granted three such orders early in July 1986: *The Weekly Mail*, 11-17 July 1986.

³⁹⁰ One of the frightening things about official street justice, was that the victims could easily be innocent bystanders or participants in a demonstration, and who did not throw stones. Justice meted out in this way was indiscriminate and excessive; it converted stone-throwing, or participation in a demonstration where stone-throwing occurred, into a capital offence.

³⁹¹ Three persons were shot dead and three seriously injured in the "Trojan horse" shooting. One of those killed was a child of approximately 12 years old: see *The Weekly Mail*, 18-24 October 1985.

³⁹² His interrogator received a prison sentence of ten years for culpable homicide; but this could not recall the life of the victim of this terrible act.

³⁹³ Regulation 11 in Schedule II to proclamation No R121 of 1985, (*Reg Gaz* 3849 of 21 July 1985) and Regulation 16 in the Schedule to Proclamation No R109 of 1986, (*Reg Gaz* 3964 of 12 June 1986).

³⁹⁴ Paul Wilkinson, *Terrorism and the Liberal State*, (Macmillan, London, 1977), at 80.

³⁹⁵ 1950-1, *Survey of Race Relations in South Africa*, at 21.

³⁹⁶ Consisting chiefly of the Internal Security Act 74 of 1982.

³⁹⁷ 1984 *Survey of Race Relations in South Africa*, at 65 and 92.

³⁹⁸ *The Weekly Mail*, 11-17 July 1986 reported 879 deaths for 1985.

³⁹⁹ The figure for January to June 1986 was 969 deaths: *The Weekly Mail*, 11-17 July 1986.

⁴⁰⁰ D P de Villiers, "Change in Respect of Security Legislation", in D J van Vuuren *et al.*, (eds), *Change in South Africa*, (Butterworths, Pretoria, 1983), at 393 and 415.

⁴⁰¹ See 1984 *Survey of Race Relations in South Africa*, at 92.

⁴⁰² John de St Jorre, *The Observer*, Sunday, 4 May 1986.

⁴⁰³ Figures supplied by a research officer of the South African Institute of Race Relations.

⁴⁰⁴ Information supplied by the Northern Ireland Office, Whitehall, London.

⁴⁰⁵ Lourens M du Plessis, "Thoughts on Law, Order and State Security", (1985), 3 *Tydskif vir die Suid-Afrikaanse Reg*, at 233, 236 and 241. Cf Frederik van Zyl Slabbert, *The Last White Parliament*, (Jonathan Ball, Johannesburg, 1985), at 126: "But there is a direct correlation between the extension of coercive Government and the use of violence, by those who experience such coercion...."

⁴⁰⁶ *Sunday Tribune*, of 8 December 1985.

⁴⁰⁷ Louise Arbour, "The legitimacy of the judiciary in constitutional adjudication." 1992 *Consultus*, at 13-14.

⁴⁰⁸ Professor G.E. Devenish, "The Interpretation of Justiciable Rights in South Africa's Interim Constitution." April 1996.

⁴⁰⁹ Ellmann, "A Constitution for all Seasons: Providing Against Emergencies in a Post-Apartheid Constitution" 1989 *Columbia Human Rights Law Report*, 163 at 167.

⁴¹⁰ 3 Complete Works Of Abraham Lincoln 2, (J. Nicolay & J. Hay, eds.), 1894.

⁴¹¹ Ellmann, "A Constitution for all Seasons: Providing Against Emergencies in a Post-Apartheid Constitution" *supra* note 410.

⁴¹² Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Nicaragua*, OAS/Ser, LV/III, 53, doc. 25, (1981), quoted in T. Buergenthal, R. Norris & D. Shelton: "Protecting Human Rights in the Americas: Selected Problems", (1982), at 201.

⁴¹³ American Convention on Human Rights, November 22, 1969, Article 8(1), 1144 U.N.T.S. 123, 147.

⁴¹⁴ *Observations and Comments of the Government of Nicaragua on the Report of the Inter-American Commission on Human Rights on the Status of Human Rights in that Country*, OEA/Ser, P, AG/doc., 1369/81, (1981), quoted in T.

Buergenthal, R. Norris & D. Shelton, *supra* note 412 at 203, (original in Spanish).

⁴¹⁵ Hatchard, *The Implementation of Safeguards on the Use of Emergency Powers: A Zimbabwean Perspective*, 9 *Oxford Journal, Legal Study*, 116, 117, (1989), (citing *Parliamentary Debates*, July 14, 1983).

⁴¹⁶ C. Rossiter, *supra* note 4 at 294.

⁴¹⁷ ICJ *Emergency*, *supra* note 31 at 415.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*, at 413.

⁴²⁰ C. Rossiter, *supra* note 4 at 298-99.

⁴²¹ Lobel, *Emergency Powers and the Decline of Liberation*, 98 *Yale Law Journal*, (1989), at 1385, 1401.

⁴²² *Ibid.* Lobel also notes that a declaration of emergency by Franklin D. Roosevelt in 1933, directed at the banking crisis of the Depression, remained in force until the mid-1970s. *Ibid.*, at 1401, note 75.

⁴²³ *Ibid.* at 1385, (citing *Reagan Advisers on Secret Government*, *Miami Herald*, July 5, 1987, at 1, column 1). North denied this charge. *Ibid.*, at 1385, note 2.

⁴²⁴ Hatchard, *supra* note 415 at 117. Africa Watch, a human rights monitoring group, charged last year, that Zimbabwe was employing its emergency powers against people whose only offence appeared to be their peaceful opposition to the Government. See Africa Watch, *News from Africa Watch*, October 25,

1989.

⁴²⁵ Hatchard, *supra* note 415 at 118. Hatchard also reports that “in Zambia a constitutional amendment in 1969 made the previously mandatory six-month renewal of the state of emergency, by the legislature, unnecessary. As a result, the state of emergency remained in force, for an indefinite period and was not subject to scrutiny by any other body.” *Ibid.*, at 126.

⁴²⁶ *Ibid.*, at 118.

⁴²⁷ The Federalist No. 10, at 80, (J. Madison), (C. Rossiter, editor, 1961).

⁴²⁸ I assume the greatest danger of abuse in emergencies lies in the expansion of executive authority. A well- designed system of “checks and balances,” however, ideally would limit the authority of each branch of government.

⁴²⁹ U.S. Constitution, Article 1, Section 9, Clause 2.

⁴³⁰ U.S. Constitution, amendment III.

⁴³¹ U.S. Constitution, amendment V. Certain special provisions growing out of the Civil War, may also be seen as explicit deviations. See U.S. Constitution, amendment XIV, sub-sections 3 and 4.

⁴³² U.S. Constitution, Article I, Section 8, clause 11.

⁴³³ U.S. Constitution, Article II, Section 2.

⁴³⁴ U.S. Constitution, Article I, Section 8, clause 15. This provision is noted in Lobel, *supra* note 420 at 1387.

⁴³⁵ U.S. Constitution, Article IV, Section 4.

⁴³⁶ U.S. Constitution, Article II, Section 1.

⁴³⁷ U.S. Constitution, Article II, Section 3.

⁴³⁸ See Hevesi, *Storm, Losing Force, Does Wide Damage, New York Times*, September 23, 1989, at 29, column 5, (continuing a story begun on page 1, column 6, under the title, *Hurricane Lashes Coastlines, Leaving Wide Devastation*); Appleborne, *For Storm Victims, a Day of Slow Agony After a Day of Fear, New York Times*, September 23, 1989, at 29, columns 2-4.

⁴³⁹ Comment, *The Riot Curfew*, 57 *California Law Review*, 450, 461, (1969).

⁴⁴⁰ *Ibid.*, at 464.

⁴⁴¹ Note, *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 *Harvard Law Review*, 1163, 1164, note 7, (1984).

⁴⁴² *Scotland v Pennsylvania*, 398 U.S. 916, (1970), (dismissing an appeal for want of a substantial federal question).

⁴⁴³ Comment, *The Riot Curfew, supra*, at 454.

⁴⁴⁴ *Korematsu v United States, supra*. See generally 50 U.S.C.A. sub-sections 1989a(a), 1989b to 1989d, (Supp. 1989), (apologising for the World War II treatment of people of Japanese ancestry and authorizing payments in restitution to the victims).

⁴⁴⁵ Three possible positions in this debate, could impose much more radical limits on emergency powers, than have in fact evolved in the United States. First, it could be argued, that the framers of the Constitution, intended to make emergency action illegal, not in order to prevent government officials from ever taking such steps, but in order to impress on them, the seriousness of their decisions. A responsible government official, on this view, must decide when his or her duty, requires a violation of the law, and when a violation is called for, the official must - in Thomas Jefferson’s words - “[t]hrow himself on the justice of his country and the rectitude of his motives.” Letter from T. Jefferson

to J. Colvin, (September 20, 1810), in 11 *The Works of Thomas Jefferson* 146, 149, (P. Ford, editor, 1905), discussed in Lobel, *supra* note 421 at 1392-97.

Second, it might be claimed that the normal powers conferred on the government, are sufficient to meet even its emergency needs, and therefore that no additional powers are needed. *Ibid*, at 1387, note 13.

Third, it might be contended that if the normal powers should ever prove insufficient, the only remedy would be to amend the Constitution. In effect, each of these arguments would mean that the Constitution's failure to authorize emergency powers is, in context, not silence but prohibition.

⁴⁴⁶ This resolution is codified at 50 U.S.C. sub-sections 1541-1548, (1982).

⁴⁴⁷ See Lobel, *supra* note 421 at 1412-18.

⁴⁴⁸ *Ibid*, at 1414.

⁴⁴⁹ See, for example, *Ex parte McCardle*, 74 U.S., (7 Wall.) 506, (1869), (giving effect to a congressional statute divesting the Court of jurisdiction to hear a constitutional challenge to post-Civil War Reconstruction legislation). More recently, "There were numerous efforts to obtain some answers to the constitutional questions during, [and posed by], the Vietnam War. Most courts held the issue, to present a non-justiciable political question." G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law*, 427, (1986).

⁴⁵⁰ See *Sterling v Constantin*, *supra*, (describing the executive as vested with "conclusive" discretion to decide whether military force is required to enforce the law); *Moyer v Peacody*, 212 U.S. 78, 85, (1909), (Holmes, J.) ("When it comes to a decision by the head of the State, upon a matter involving its life, the ordinary rights of individuals, must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."); *Luther v Borden*, 40 U.S. (7 How.), 1, 42-45, (1849), (United States Constitution and laws confer on the President, the exclusive authority to determine, on request from a state, whether to call out the militia to suppress insurrection).

⁴⁵¹ *Scheuer v Rhodes*, 416 U.S. 232, 250, (1974).

⁴⁵² *Sterling*, *supra* at 401.

⁴⁵³ *Ibid*, at 399-400.

⁴⁵⁴ See *Duncan v Kahanamoku*, 327 U.S. 304, (1946); *Sterling*, *supra* at 401-04; *Ex parte Milligan*, 71 U.S. (4 Wall.), 2, (1866). But compare with *Dames & Moore v Regan*, 453 U.S. 654, (1981), (upholding the constitutionality of Presidential "suspension" of pending civil claims against Iran, as part of the international settlement of the hostage crisis).

⁴⁵⁵ *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579, (1952), (the *Steel Seizure Case*). See also *Mitchell v Harmony*, 54 U.S. (13 How.), 115, 134, (1852).

⁴⁵⁶ Vincent Blasi, has emphasized the court's role in fostering a liberal, popular culture during normal times that could help to withstand the intolerant pressures of "pathological" periods. Blasi, *The Pathological Perspective and the First Amendment*, 85, *Columbia Law Review*, 449, (1985). Courts may also be able to stem the effects of such pathologies with seemingly modest, even technical, decisions, that buy time for the apparent demands of the moment to be more calmly reassessed.

⁴⁵⁷ U.S. Constitution, amendment I, (“Congress shall make no law ... abridging the freedom of speech”).

⁴⁵⁸ Two stages of this evolution are reflected in *Abrams v United States*, 250 U.S. 616, 627-31, (1919), (Holmes, J. dissenting), and *Brandenburg v Ohio*, 395 U.S. 444, (1969), (per curiam).

⁴⁵⁹ Lawrence M. Friedman notes that “[t]he Seditious Law of 1798, passed by a nervous, partisan federal government, showed that historical fears [of government overreaching through a broad definition of crimes against the state] were not groundless.” L. Friedman, *A History of American Law*, (1973), at 257.

⁴⁶⁰ See American Convention on Human Rights, *supra*, Article 27, at 152; International Covenant on Civil and Political Rights, opened for signature on December 19, 1966, Article 4, 999 U.N.T.S. 171, 6 I.L.M. 368, 369-70; European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, Article 15, 213 U.N.T.S. 221, 232 & 234. See also the Universal Declaration of Human Rights, G.A. Resolution 217, 3 U.N. GAOR (Resolutions, Part I) at 71, Article 29(2), U.N. Doc. A/810 (1940). Hatchard points out that the African [Banjul] Charter on Human and Peoples’ Rights, adopted on June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58, (hereinafter referred to as the Banjul Charter), does not have a derogation provision. Hatchard, *supra* note 415 at 116, note 1. Haysom notes, however, that this Charter “does make provision for derogation or limitation of specific rights by reference to considerations of national security or other factors.” Haysom, *States of Emergency in a Post-Apartheid South Africa*, *supra* note 290 at 143.

⁴⁶¹ For a survey of such provisions, see the United Nations Economic and Social Council Commission on Human Rights, *Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN. 4/826, at 257-71 (1962).

⁴⁶² An alternative technique for limiting rights, is to include restrictions in the very provisions declaring the rights. The Bophuthatswana Declaration of Fundamental Rights, makes extensive use of this technique. See, for example, the Declaration of Fundamental Rights, Articles 13-16, reprinted in the South African Law Commission’s Working Paper 25, Project 58, Group and Human Rights 241-42, (1989), (hereinafter referred to as the South African Law Commission). The Bill of Fundamental Rights and Objectives proclaimed for Namibia in Proclamation R. 101 of 1985, also uses this technique, in Articles 5-10, reprinted in *ibid*, at 224-26. The European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, Articles 6, 8, 9, 10 & 11, at 228, 230 & 232, does so as well, as does the Banjul Charter, *supra*, Articles 8, 11, 12(2) & 14, at 60-61. In this Section, I will not focus on this method of restricting rights, other than to say that it can generate problems similar to those presented by separate provisions for derogation from rights.

⁴⁶³ See the International Commission of Jurists, *supra* note 31 at 432. Rossiter believes that “all uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements,” C. Rossiter, *supra* note 4 at 300, but he does not encourage “too much provision for constitutional dictatorship.” *Ibid*, at 301.

⁴⁶⁴ I.N. Machiavelli, Discourses, in N. Machiavelli, *The Prince and the Discourses*, 203, (1950).

⁴⁶⁵ South African Law Commission, *supra*, at 479. The “restriction of rights and freedoms” section, (Section 14), of the Bill of Rights drafted by the Natal/KwaZulu Indaba, would permit even wider interferences with constitutional rights. See *ibid*, at 252.

⁴⁶⁶ Nicholas Haysom offers a valuable and somewhat different, set of safeguards, *supra* note 460 at 150-59.

⁴⁶⁷ John Hatchard urges the requirement of legislative approval. Hatchard, *supra* note 415 at 125-28.

⁴⁶⁸ See C. Rossiter, *supra* note 4 at 302.

⁴⁶⁹ The International Commission of Jurists comments that “[t]here is no convincing evidence, that the existence of an elected legislature is incompatible with a legitimate state of emergency.” International Commission of Jurists, *supra* note 31 at 438. If suspension of the legislature *is* warranted, the same source urges restoration “with the briefest possible delay, under conditions which ensure that it is freely chosen and representative of the entire nation.” *Ibid*.

⁴⁷⁰ *Ibid*, at 459.

⁴⁷¹ The International Commission of Jurists notes that “enhanced majority” vote is required in some nations.” *Ibid* at 433.

⁴⁷² See Hatchard, *supra* note 415 at 129.

⁴⁷³ This language is quoted from the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, Article 15(1), at 232.

⁴⁷⁴ I would also urge, that courts be empowered to review the question of whether the circumstances facing the country, constitute a threat to the life of the nation. An alternative, would be to make the executive proclamation of a state of emergency, confirmed by the legislature, conclusive-but this course is open to abuse.

⁴⁷⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, Article 15(1), at 232.

⁴⁷⁶ International Covenant on Civil and Political Rights, *supra*, Article 4(1), at 369-70.

⁴⁷⁷ Additional constraints on the scope of emergency powers, might also be helpful. Hatchard recommends, that the government be required to specify the type of emergency it faces, and that it be limited to those emergency powers appropriate, to that emergency. He would also have the government limit any declaration of emergency, to the part of the country actually affected. Hatchard, *supra* note 415 at 126-27. The International Commission of Jurists similarly recommends that “[v]arious types of emergencies should be distinguished.” International Commission of Jurists, *supra* 31 at 433.

⁴⁷⁸ International Commission of Jurists, *supra* note 31 at 438.

⁴⁷⁹ *Ibid*.

⁴⁸⁰ International Covenant on Civil and Political Rights, *supra*, Article 4(2), at 370.

⁴⁸¹ *Ibid*, Article 4(1), at 369-70. It might well be argued, that derogations should be prohibited, if they involve discrimination that is even *partly* motivated by such considerations.

⁴⁸² American Convention on Human Rights, *supra*, Article 27(2), at 683.

⁴⁸³ Ibid.

⁴⁸⁴ See International Commission of Jurists, *supra* note 31 at 424-29.

⁴⁸⁵ See *ibid*, at 426.

⁴⁸⁶ *Ibid*, at 429.

⁴⁸⁷ *Ibid*, at 435.

⁴⁸⁸ *Ibid*, at 436.

⁴⁸⁹ *Ibid*, at 469, note 63.

⁴⁹⁰ This recommendation would entail the rejection of such doctrines as the “political question” doctrine in the United States, to the extent that they might otherwise operate, to divest the courts of authority to review these issues. It would also prohibit the enforcement of statutory “ouster clauses” which would have the same effect. South Africans were all too familiar with the statutory ouster clause of the nation’s emergency legislation. Section 5B of the Public Safety Act 3 of 1953. See *State President v United Democratic Front supra*.

⁴⁹¹ 1989 (2) SA 180 (C).

⁴⁹² Another safeguard which might be enforced, but still be of value is suggested by the International Covenant on Civil and Political Rights, which expressly declares that its provisions do not imply “any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.” International Covenant on Civil and Political Rights, *supra*, Article 5(1), at 370. For a discussion of this provision, see Buerghenthal, *supra* note 27. It may be rare, that a court will be willing or able to discern that the government of its country, is engaged in such an effort. Yet it does seem reasonable to include in domestic law, a safeguard to which many nations have subscribed as a matter of obligation.

⁴⁹³ See, for example, *Metal and Allied Workers Union and Another v State President and Others supra*.

⁴⁹⁴ Case CCT 23/96.

⁴⁹⁵ Professor G.E. Devenish, “A Critical Analysis and Comparison of the New National Constitution of South Africa and the Provincial Constitution of South Africa and the Provincial Constitution of Kwa-Zulu Natal”, November 10, 1996.

⁴⁹⁶ At paragraph 94.

⁴⁹⁷ At paragraph 95.

⁴⁹⁸ Ellmann, “A Constitution for all Seasons: Providing Against Emergencies in a Post-Apartheid Constitution” *supra* note 409.

⁴⁹⁹ See the US case of *Korematsu v United States, supra*, where it was stated, *per* Frankfurter J: “Therefore the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless, because like action in times of peace would be lawless.”

⁵⁰⁰ D van Wyk, J Dugard, B de Villiers and D Davis, *Rights and Constitutionalism: The New South African Legal Order*, 1994 at 650.

⁵⁰¹ See Oraa, *Human Rights in States of Emergency in International Law*, (1992), 7-10. The African Charter is one of the exceptions.

⁵⁰² *Ibid*, at 209.

⁵⁰³ For a discussion, see Ghandi, “The Human Rights Committee and Derogation in Public Emergencies” 1989 *GYIL* 323 at 350 et seq.

⁵⁰⁴ 1991 (2) SACR 403 (C). See also *S v Staggie* 1990 (1) SACR 669 (C).

⁵⁰⁵ Higgins, “Declaration under Human Rights Treaties” (1976-77) *XLVIII BYIL*

281 at 286.

⁵⁰⁶ Article 15, European Convention: “In time of war or other public emergency ...”; Article 4, ICCPR: “In time of public emergency ...”.

⁵⁰⁷ Ghandi, *supra* note 503 at 352.

⁵⁰⁸ In the *Lawless* case, *supra*, an Irish declaration of emergency was accepted as lawful, in the light of the “imminent danger to the nation” caused by the IRA in Northern Ireland. In the *Greek* case, *supra*, it was rejected.

⁵⁰⁹ *Lawless* case, *supra*, para 29.

⁵¹⁰ Oraa, *supra* note 501 at 28-9.

⁵¹¹ Chowdhury, *Rule of Law in a State of Emergency*, *supra* note 34 at 25.

⁵¹² *Lawless* case, *supra*, para 28.

⁵¹³ Questiaux, quoted by Chowdhury, *supra* note 34. See also Ghandi, *supra* note 503 at 351.

⁵¹⁴ Civil wars and internal unrest, generally viewed as states of emergency when justified by the exigencies of the situation, are omitted. See Oraa, *supra* note 501 at 33.

⁵¹⁵ The international standard referred to here, includes Articles 15 and 4 of the European Convention and ICCPR respectively and subsequent judicial practice and academic commentaries. The European Convention, Article 15(1), reads:

“(1) In time of war or other public emergency, threatening the life of the nation, any High Contracting Party, may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

The ICCPR, Article 4(1), reads:

“1. In time of public emergency which threatens the life of the nation and the existence of which, is officially proclaimed, the States Parties to the present Covenant, may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

⁵¹⁶ Ghandi, *supra* note 503 at 355.

⁵¹⁷ From the discussion on the adoption of the Siracusa Principles, quoted by Ghandi, *supra* note 503 at 352. See also the next requirement under (e).

⁵¹⁸ Oraa, *supra* note 501 at 31 and the sources mentioned there.

⁵¹⁹ *Ibid*, at 29-30.

⁵²⁰ Ghandi, *supra* note 503 at 355.

⁵²¹ Oraa, *supra* note 501 at 30.

⁵²² Section 37(1).

⁵²³ Section 37(2).

⁵²⁴ Oraa, *supra* note 501 at 34; Ghandi, *supra* note 503 at 352-3; ICCPR, Article 4(1).

⁵²⁵ Section 37(2).

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- ⁵²⁶ Under Section 167(4)(b).
- ⁵²⁷ Section 37(5). The non-suspendable rights will be discussed in due course.
- ⁵²⁸ On proportionality, see further below.
- ⁵²⁹ Section 37(6) and (7). See further below.
- ⁵³⁰ Section 37 (6)(h).
- ⁵³¹ Siracusa Principle 59.
- ⁵³² Siracusa Principle 69.
- ⁵³³ Section 37(1).
- ⁵³⁴ Oraa, *supra* note 501 at 125.
- ⁵³⁵ Oraa, *supra* note 501 at 169.
- ⁵³⁶ The ICCPR, (Article 4(1)), the European Convention on Human Rights, (Article 15(1)), and the European Social Charter, (Article 30(1)).
- ⁵³⁷ Oraa, *supra* note 501 at 125.
- ⁵³⁸ Siracusa Principle 67.
- ⁵³⁹ Siracusa Principle 68.
- ⁵⁴⁰ Section 37(6)(e).
- ⁵⁴¹ Section 37(7).
- ⁵⁴² See further below.
- ⁵⁴³ See for example, Meron, *Human Rights in Internal Strife: Their International Protection*, (1987).
- ⁵⁴⁴ Oraa, *supra* note 501 at 169-70.
- ⁵⁴⁵ See ICCPR, Article 4(1); European Convention on Human Rights, Article 15(1).
- ⁵⁴⁶ Lewis Carol, *Through the Looking Glass*.

ANNEXURE 1:

**POLITICAL DEVELOPMENT AND THE FOUNDING OF
THE REPUBLIC, 1948 TO 1961:**

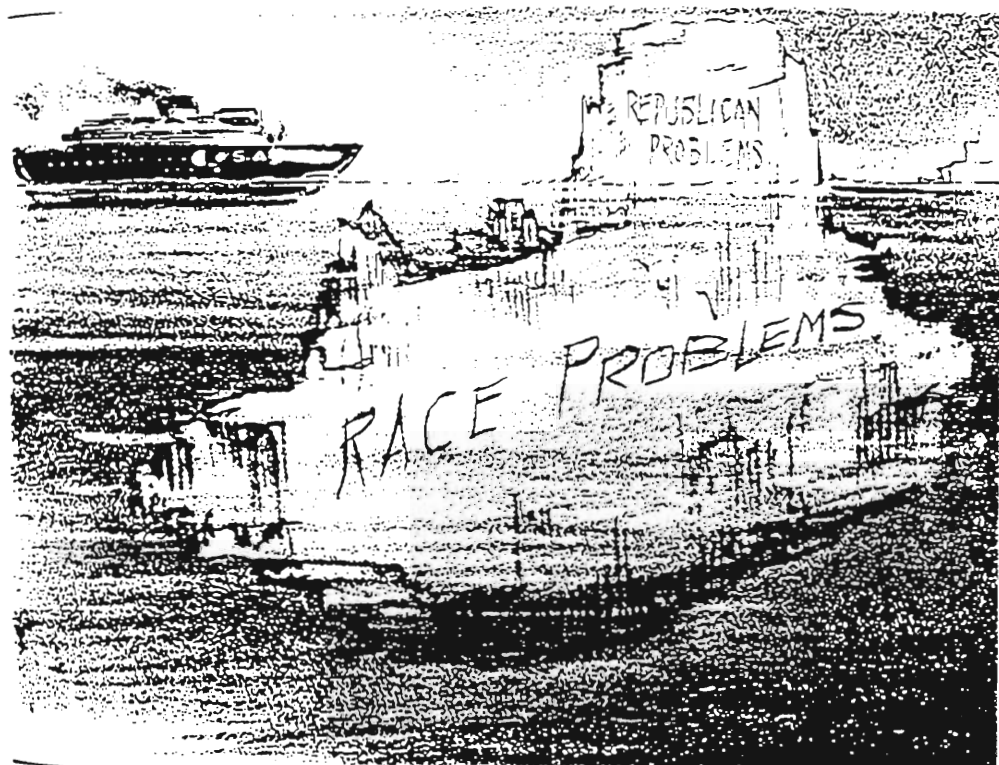
The day dawns: 31 May 1961



The birth of the Republic



The 13 March 1961 Commonwealth Conference in London



The Republic of South Africa's problems

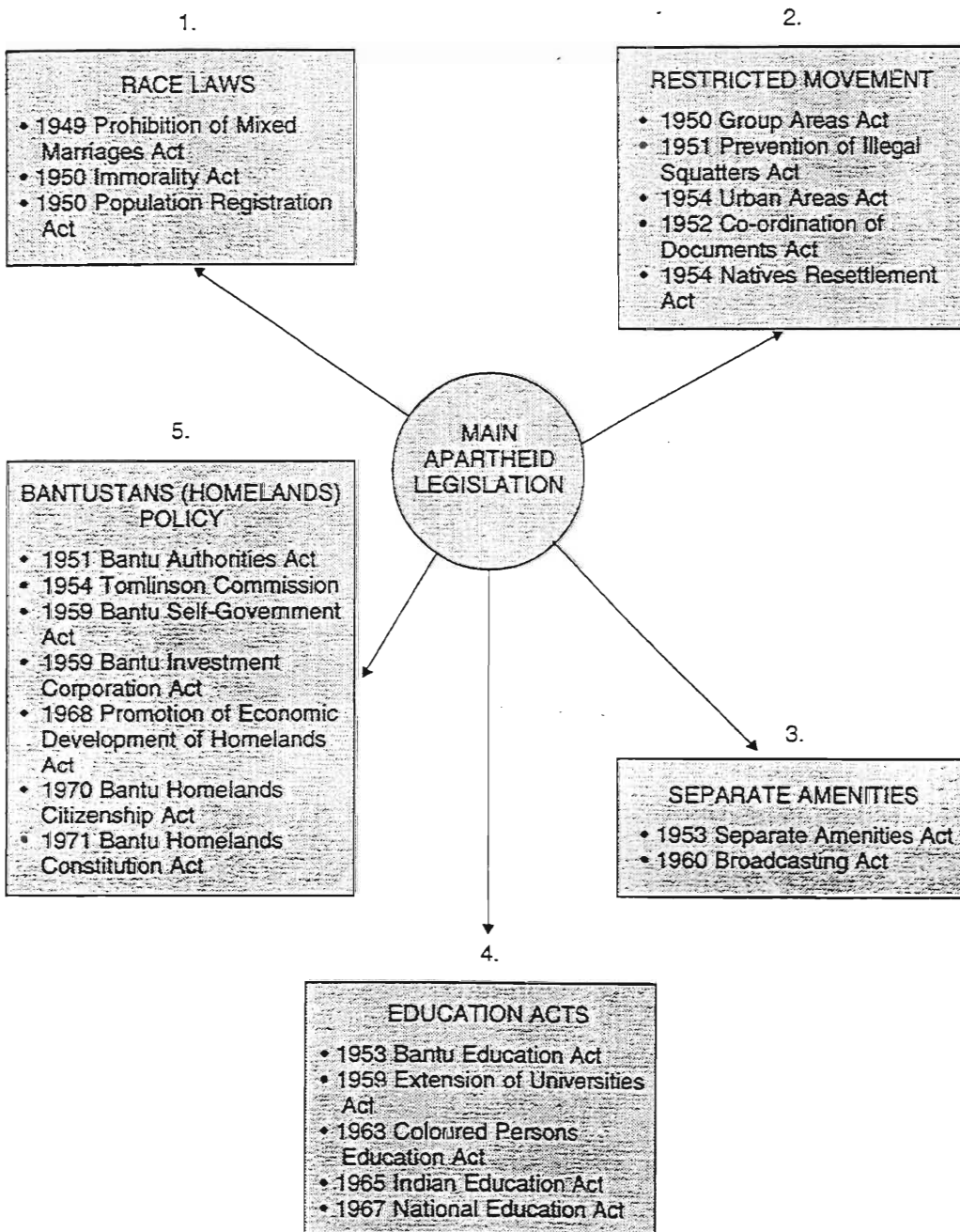
ANNEXURE 2:

THE POLICY OF APARTHEID FROM 1948 TO 1976: LEGISLATION:

MAJOR LEGISLATION

The Implementation of Apartheid:

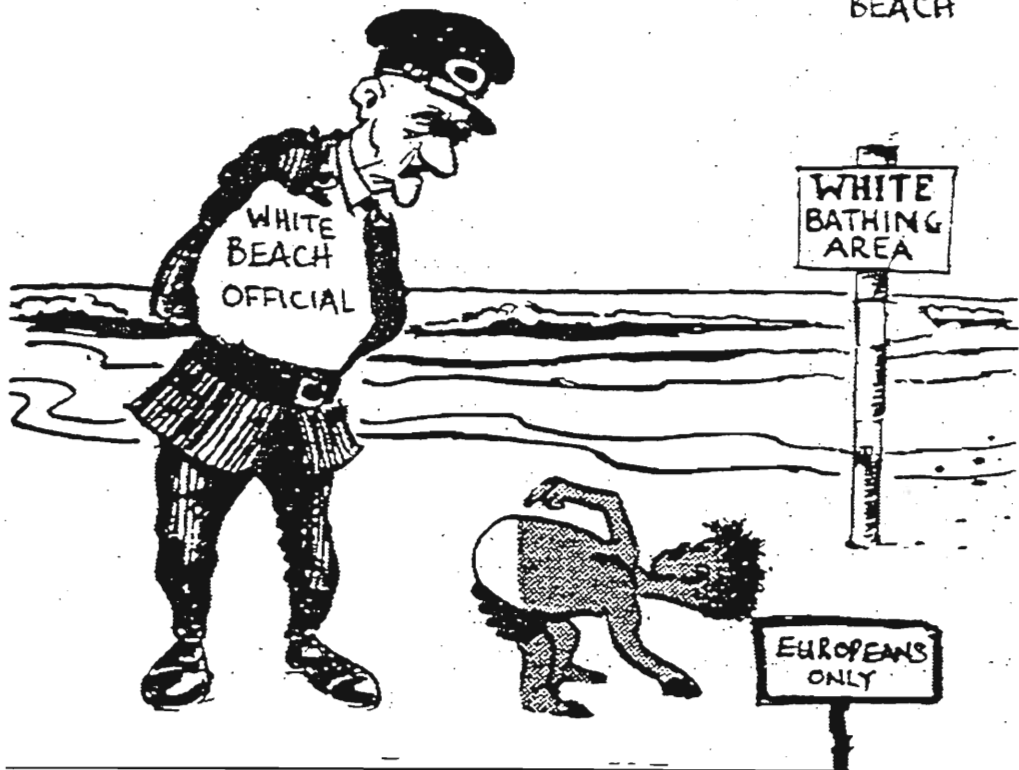
“THE PILLARS OF THE HOUSE OF APARTHEID”





Typical display of apartheid signs

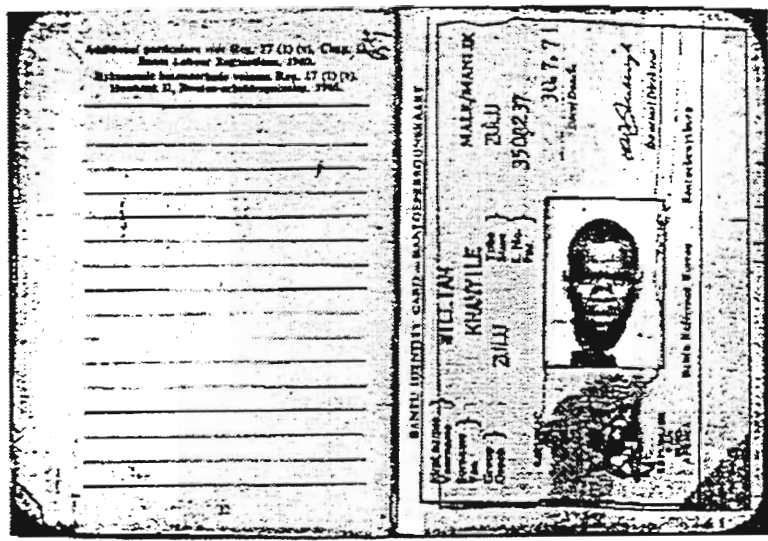
DURBAN: ADDINGTON
BEACH



The irony of race classification

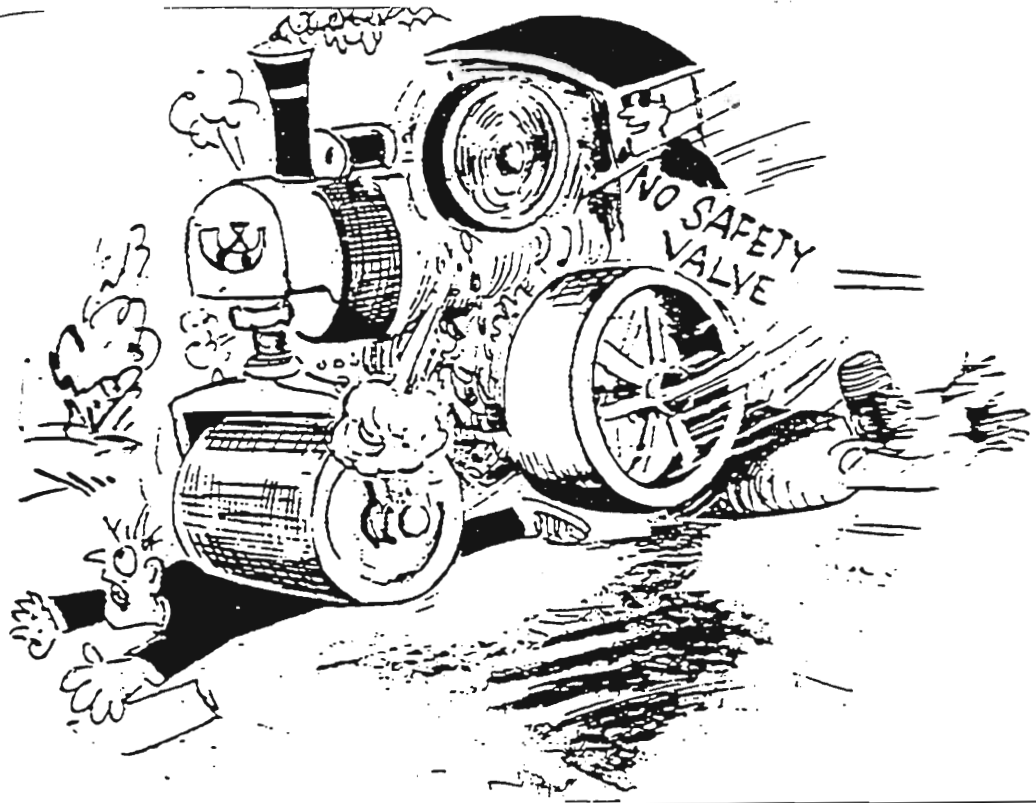
GROUP AREAS REMOVALS AS AT 31 DECEMBER 1971

<i>Races</i>	<i>No. of families disqualified</i>	<i>No. of families resettled</i>
WHITES	1 598	1 433
COLOURED	76 544	41 199
INDIANS	38 561	26 294
CHINESE	1 233	68



An example of a Dompas (Passbook)

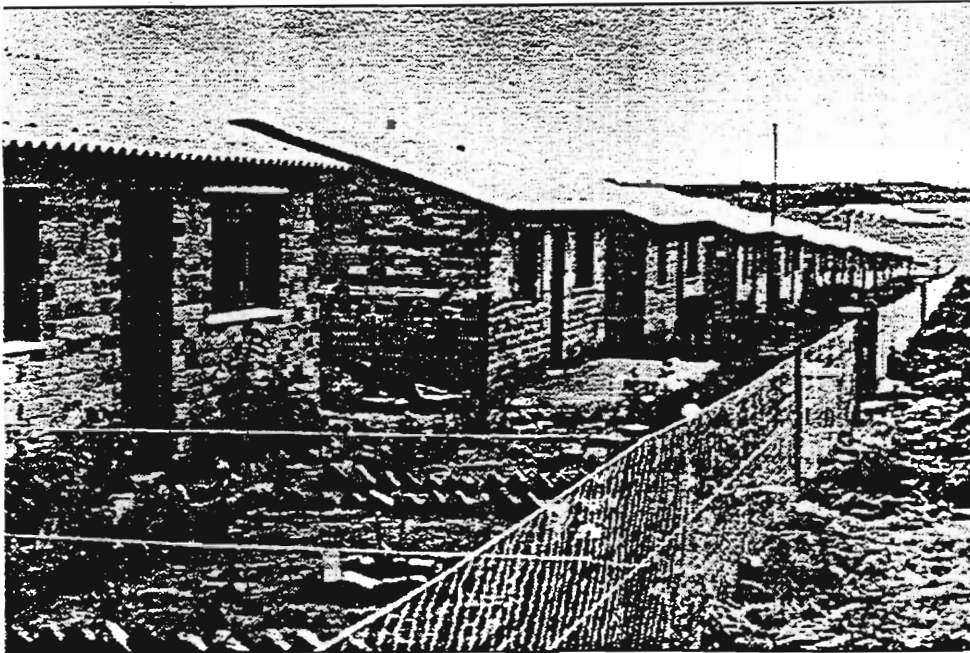




Apartheid bulldozer



Forced removals from Sophiatown (1955)



The Black township of Soweto: "Matchbox homes"

DEPARTEMENT VAN BOSBOU
PIEKNIKTERREIN VIR BLANKES
TERREIN VIR NIE-BLANKES 3 MYL LAER AF
VURE SLEGS IN VUUR-MAAKPLEKKE TOEGELAAT
SWEM VERBODE

DEPARTMENT OF FORESTRY
PICNIC SITE FOR WHITES ONLY
SITE FOR NON-WHITES 3 MILES LOWER DOWN
FIRES ALLOWED IN FIRE-PLACES ONLY
SWIMMING PROHIBITED

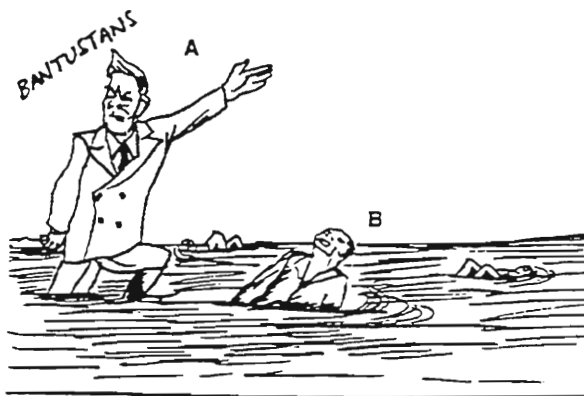
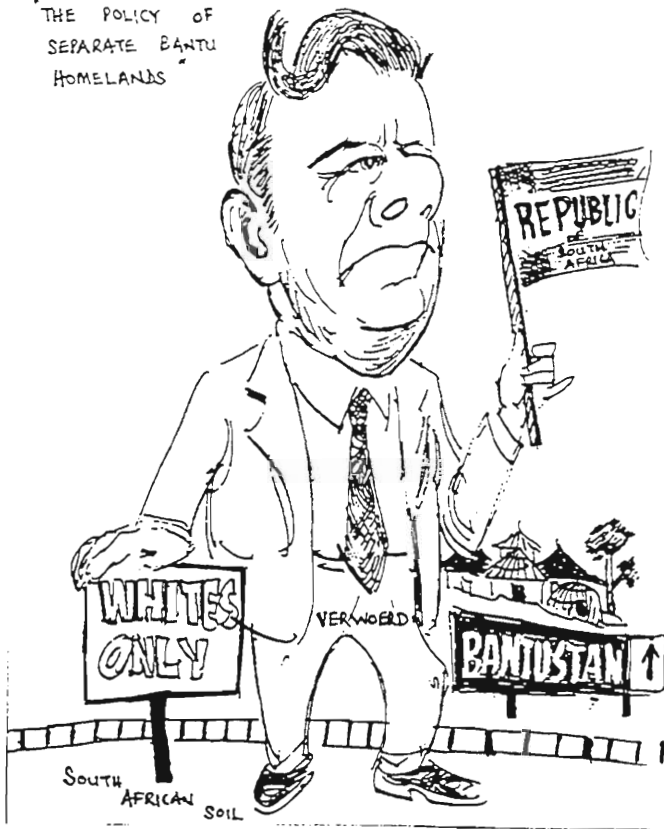
- Missionary bodies would no longer administer Black schools as this would now be done by the Native Affairs Department.

Dr Verwoerd explained the reasons for the passing of this Act as follows:

"There is no place (for the Bantu) in the European community above the level of certain forms of labour ... Until now he has been subjected to a school system which drew him away from his own community and misled him by showing him the green pastures of European society in which he was not allowed to graze."

PER CAPITA EXPENDITURE ON EDUCATION				
Year	Africans	Coloured	Indian	White
1953/4	R 17	R 40	R 40	R 128
1969/70	17	73	81	282
1975/76	42	140	190	591
1977/78	54	185	276	657
1980/81	139	253	513	913
1982/83	146	498	711	1211

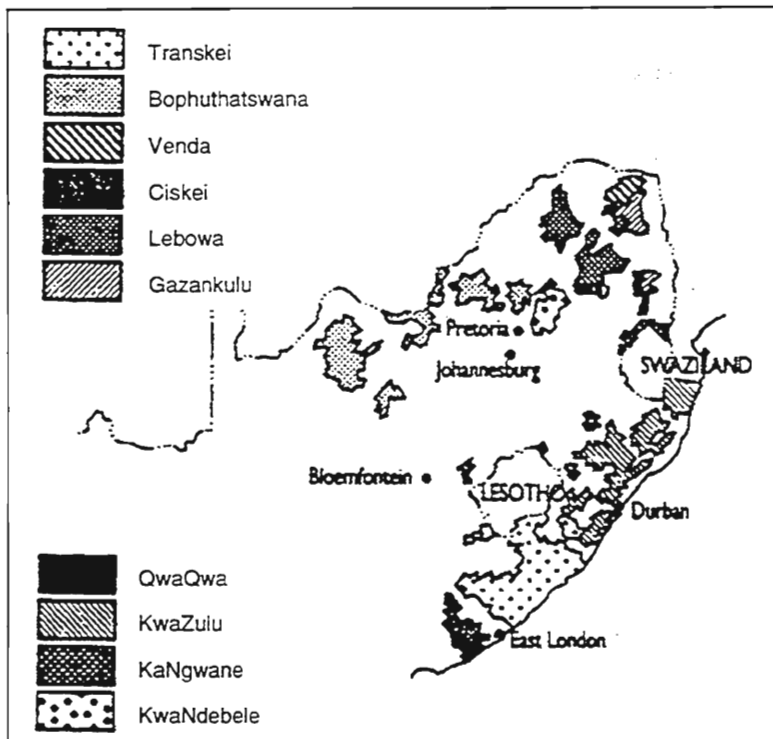
THE POLICY OF
SEPARATE BANTU
HOMELANDS



"Look! I'm saving White civilisation ..."

HOMELAND	PEOPLE/LANGUAGE	LEADER
1. Bophuthatswana	Tswana	Lucas Mangope
2. Gazankulu	Shangaan (Tsonga)	Hudson Ntsanwisi
3. Ciskei	Xhosa	Lennox Sebe
4. KwaZulu	Zulu	Mangosuthu Buthelezi
5. Lebowa	Pedi (Northern Sotho)	Cedric Phatudi
6. QwaQwa	Southern Sotho	Tsiame Mopeli
7. Transkei	Xhosa	Kaizer Matanzima
8. Venda	Venda	Patrick Mphephu

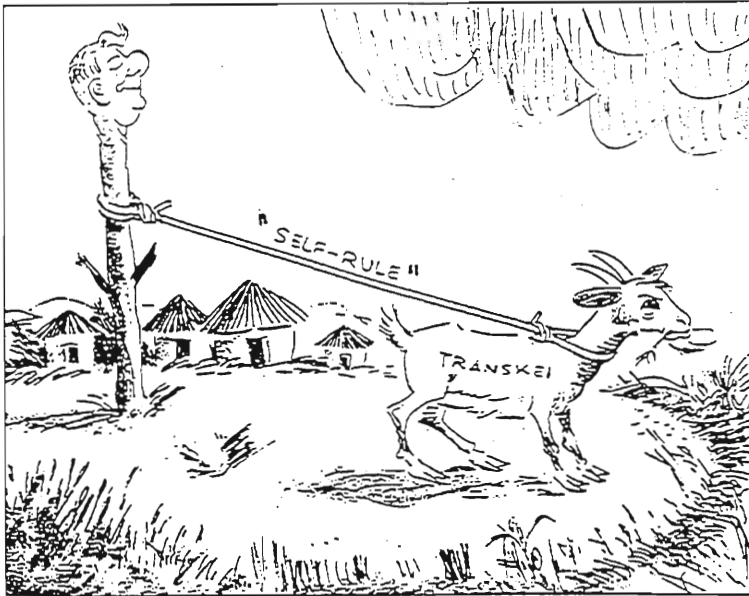
Other national states were KaNgwane (Swazi) and Kwa N'debele (Ndebele). These homelands constituted 15.3 million hectares which was a mere 12,5 per cent of the total land in South Africa.



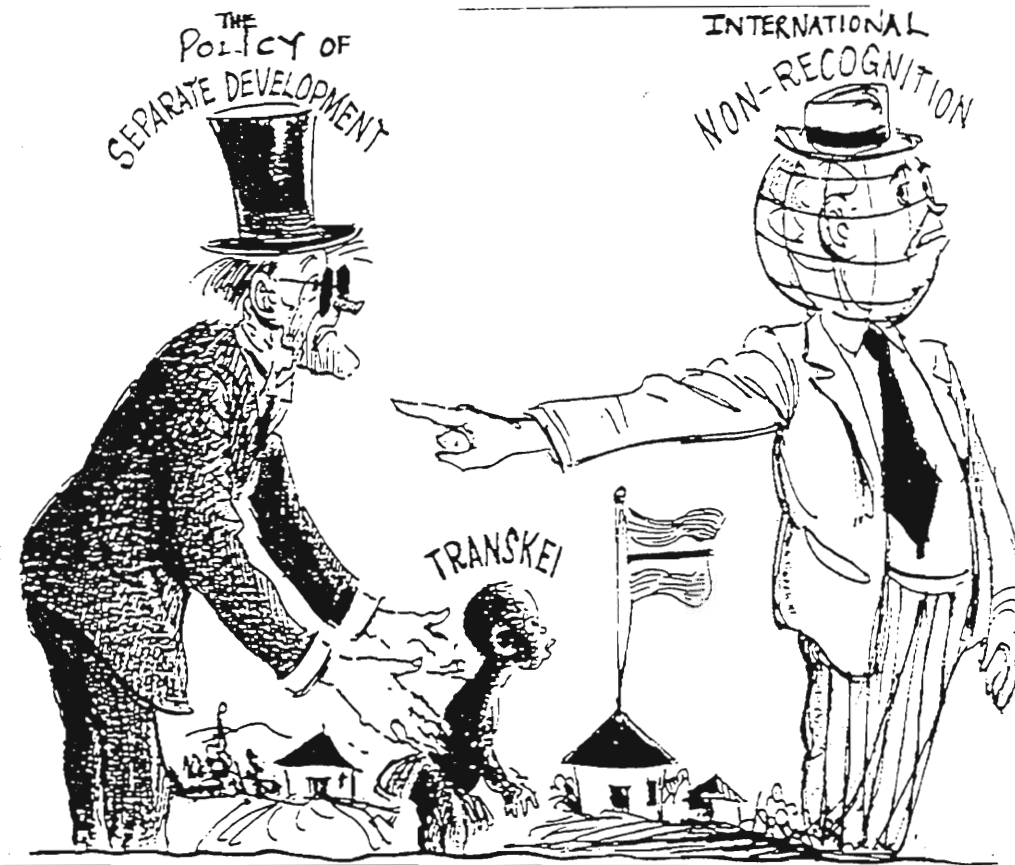
Bantu Homelands (1986)

The Bantu Homelands Citizenship Act of 1970

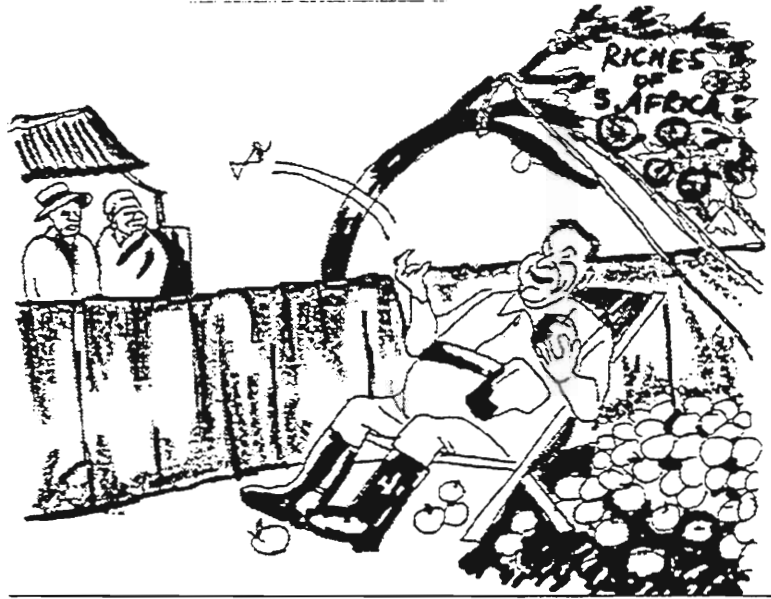
This act stipulated that all Africans would not be considered citizens of South Africa but of a particular national homeland.



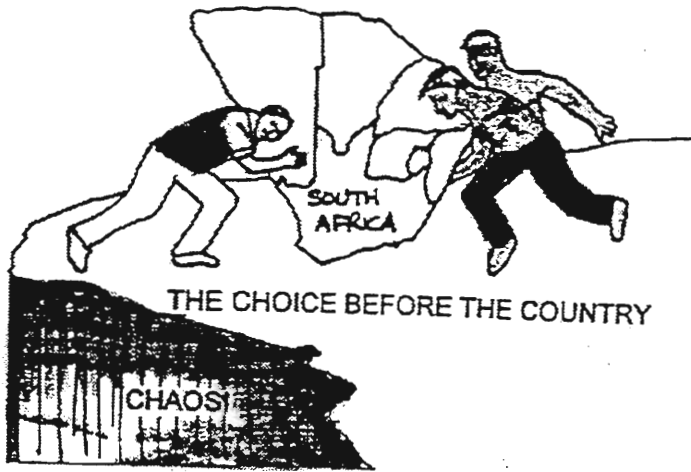
Independent Transkei:
The irony of "self rule"



"The sins of a father"

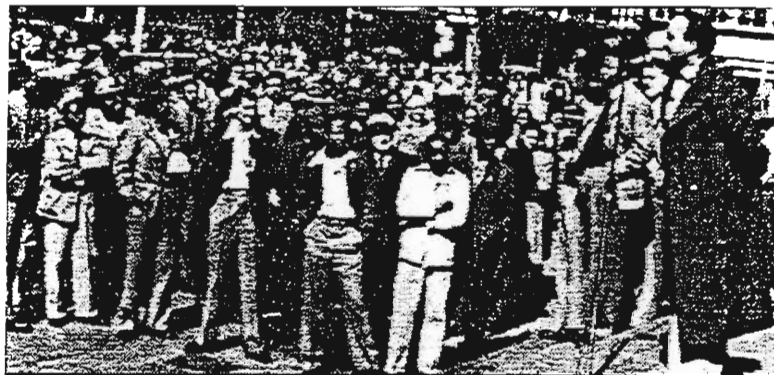


Reality of Apartheid



ANNEXURE 3:

RESISTANCE TO APARTHEID, 1948 TO 1976:



Yusuf Dadoo, President of the TIC, addressing a huge crowd.
Take note of Nelson Mandela to the right of Dadoo



A rally held to protest the 300th anniversary of Van Riebeeck's arrival at the Cape



The Congress of the people in 1955 at Kliptown. People voiced their demands by displaying huge placards



Part of the crowd from all national groups and many walks of life that adopted the Freedom Charter at the Congress of the People in Kliptown, 26 June 1955

An extract from The Freedom Charter

"WE, THE PEOPLE OF SOUTH AFRICA, DECLARE FOR ALL OUR COUNTRY AND THE WORLD TO KNOW:

That South Africa belongs to all who live in it, Black and White, and that no government can justly claim authority unless it is based on the will of the people;

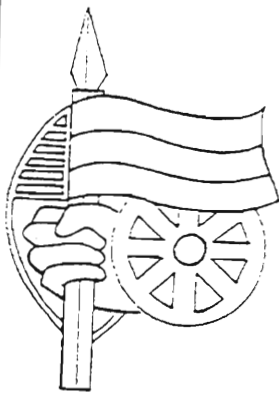
That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

That our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;

That only a democratic state, based on the will of the people, can secure to all their birthright without distinction of colour, race, sex or belief;

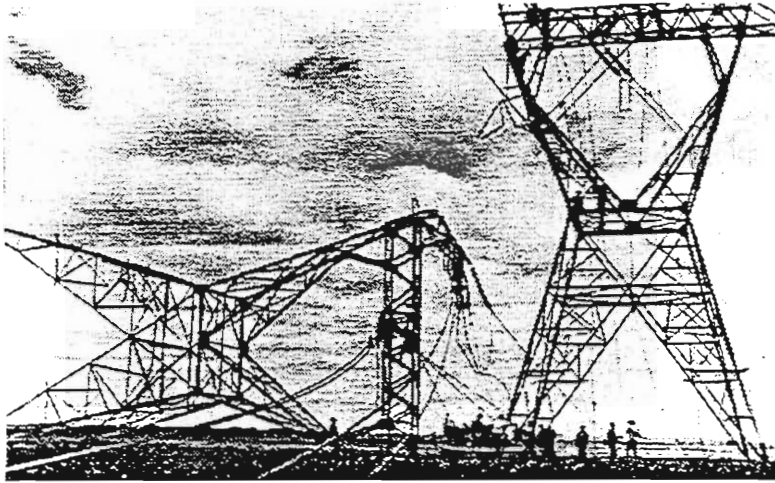
And therefore, we the people of South Africa, Black and White, together equals, countrymen and brothers, adopt this Freedom Charter. And we pledge ourselves to strive together, sparing nothing of our strength and courage, until the democratic changes here set out have been won."

From the Umkhonto we Sizwe Manifesto, 1961



"It is ... well known that the main national liberation organisations in this country have consistently followed a policy of non-violence. They have conducted themselves peaceably at all times, regardless of Government attacks and persecutions upon them, and despite all Government-inspired attempts to provoke them to violence. They have done so because the people prefer peaceful methods of change to achieve their aspirations without the suffering and bitterness of civil war. But the people's patience is not endless.

The Government has interpreted the peacefulness of the movement as weakness; the people's non-violent policies have been taken as a green light for Government as an invitation to use armed force against the people without any fear of reprisals. The methods of Umkhonto we Sizwe mark a break with that past."



Electric pylons damaged after the ANC's military wing Umkhonto launched its attack against the State

BIKO AND SOLIDARITY

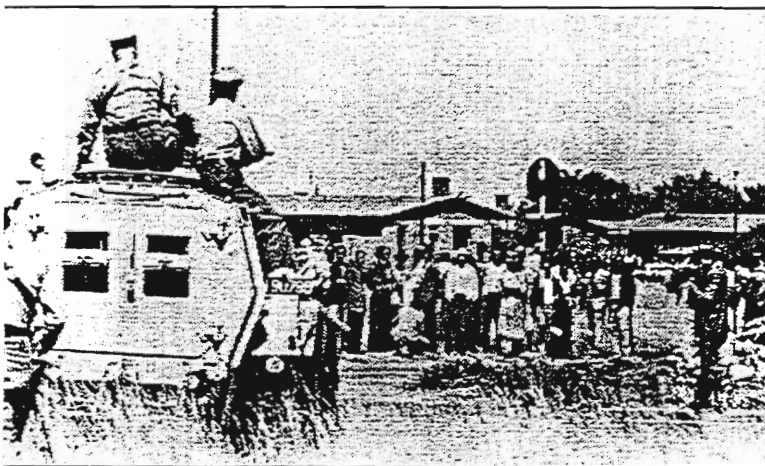


**BLACK PEOPLE'S CONVENTION
TRIBUTE TO THE LATE
HONORARY PRESIDENT
BANTU STEPHEN BIKO**

The making of mass politics: The 1960s



Hamba dompas: Angry residents burn their reference books in public at the height of the pass protests



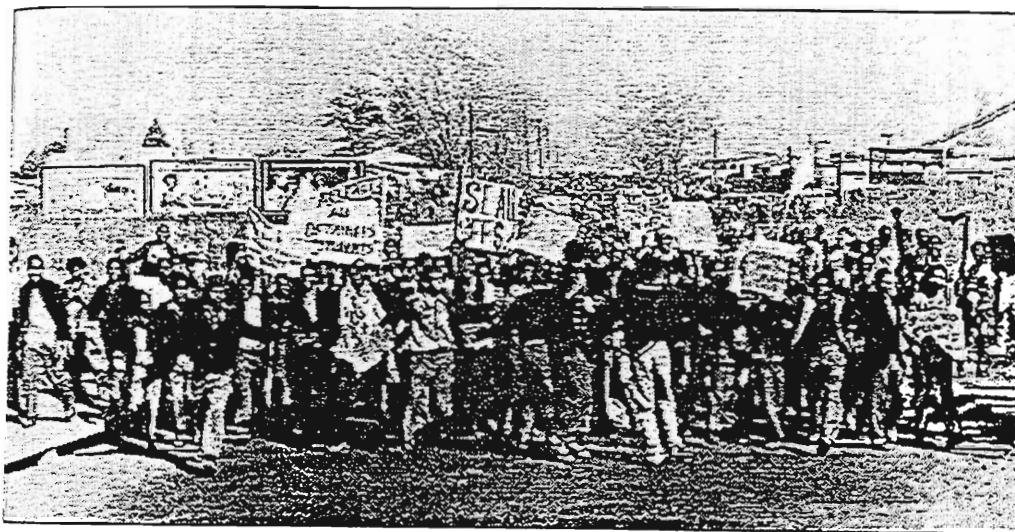
Police standing on armoured vehicles shoot at the Sharpeville protestors

Racist arrogance

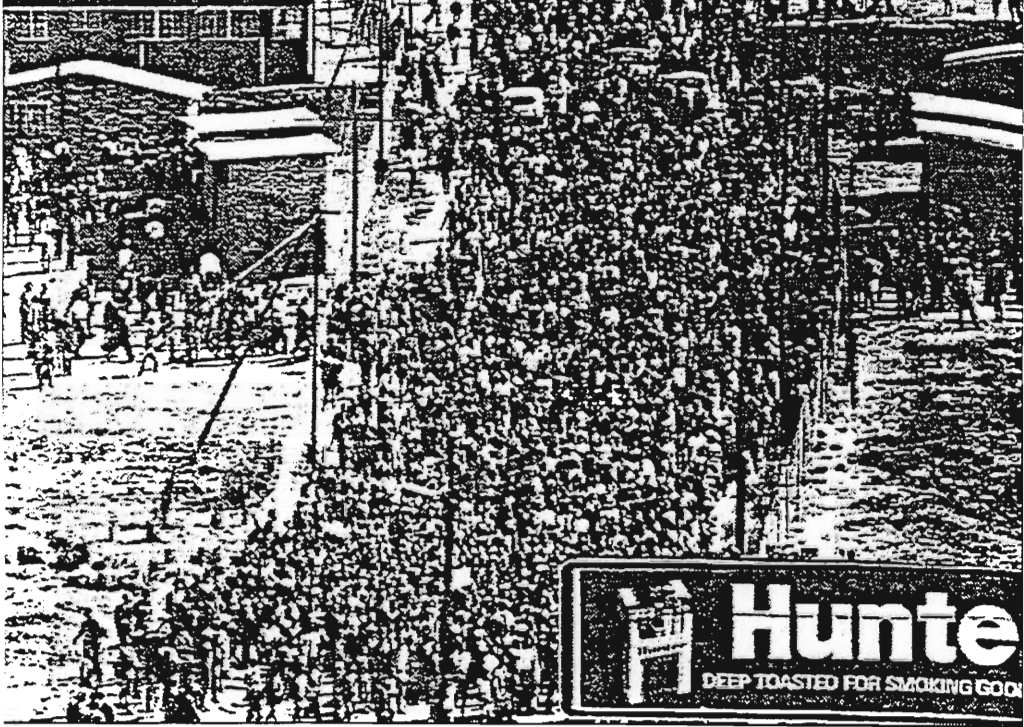
This is what Punt Jansen, Deputy Minister of Bantu Education, stated in parliament in 1975 when asked whether he had consulted the African people on language policy, he replied, "No, I have not consulted them and I am not going to consult them." He added that he thought "it a good thing that everyone should learn as many languages as possible. An African might find that 'the big boss' only spoke Afrikaans or only spoke English. It would be to his advantage to know both languages."

Andries Treurnicht, who became Deputy Minister of Bantu Education, said on 17 June 1976: "In the white areas of South Africa, where the government pays, it is certainly our right to decide on the language division".

THE PROTEST MARCH



Students demonstrate against Afrikaans (Soweto, 16 June 1976)



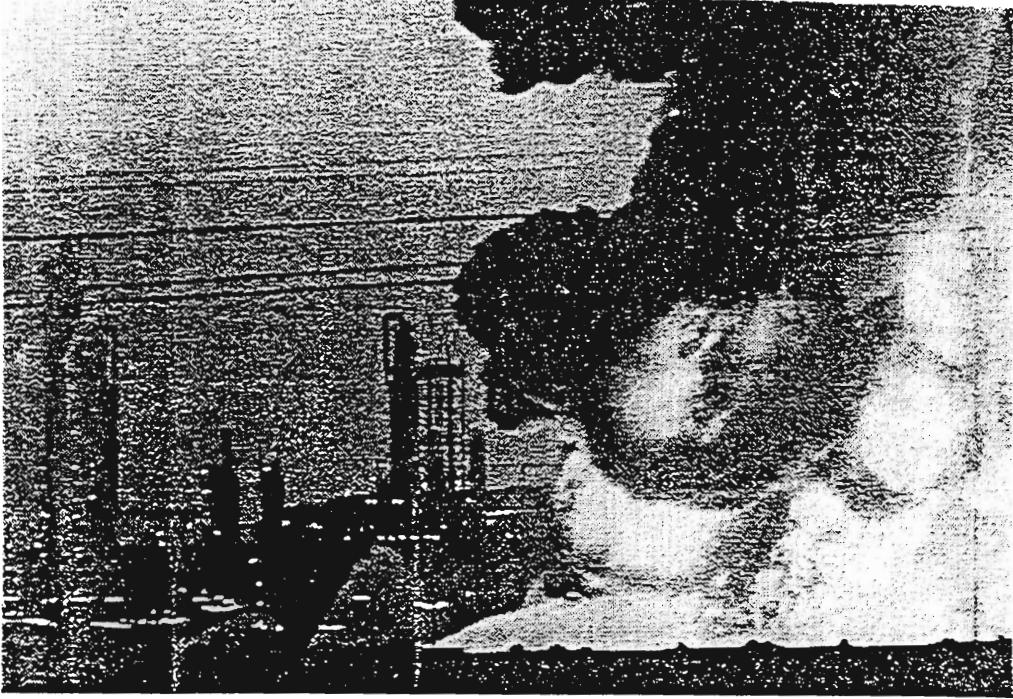
20 000 Soweto pupils take to the streets



Hector Peterson, first casualty
of the Soweto uprising, 1976

ANNEXURE 4:

**THE WALK TO FREEDOM AND DEMOCRACY, 1976 TO
1994:**

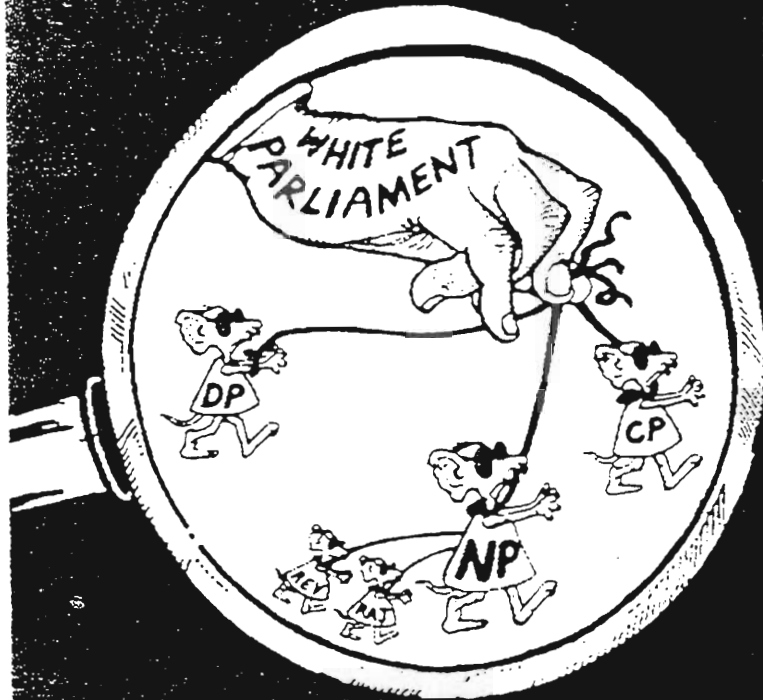


MK attack on SASOL plant (1980)



Police victims were given large funerals that turned into political rallies.
Notice the coffins draped with the ANC flag

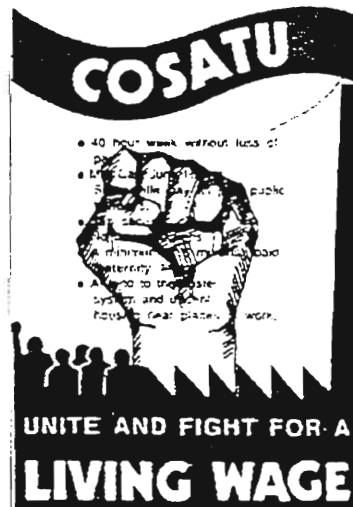
Democracy?



**OUR LEADERS ARE JAILED!
80% OF US CANNOT VOTE!**

PRINTED AND ISSUED BY THE MDM

Poster protesting against tricameral parliament

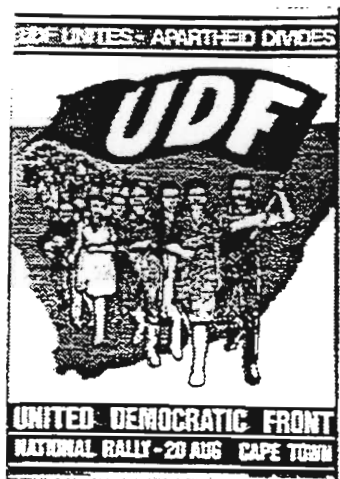


A COSATU poster mobilising worker support

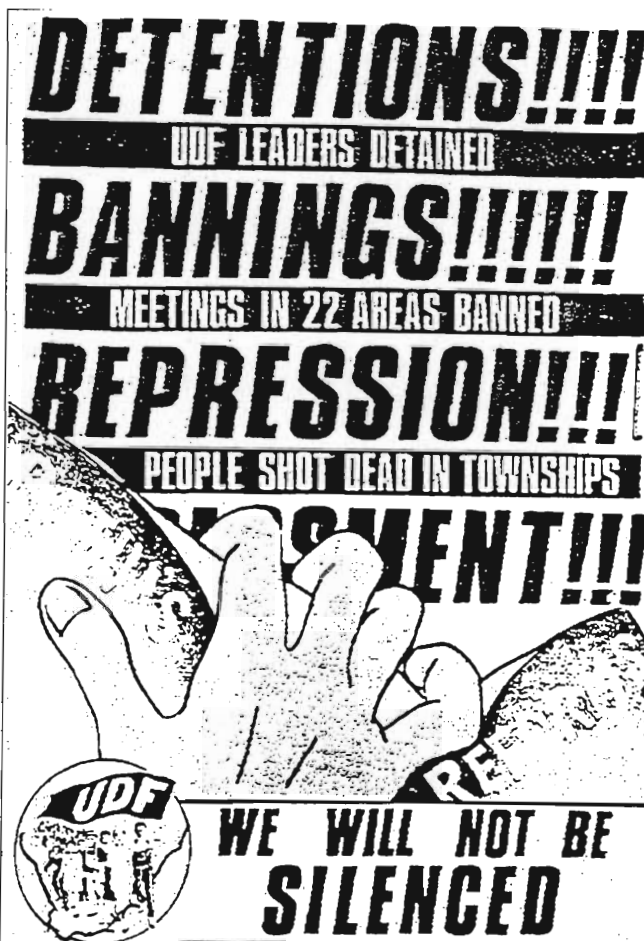
WORKERS OF THE WORLD UNITE



COSATU leaders, Elijah Barayi, Chris Dlamini, Jay Naidoo, Sidney Mufamadi and Cyril Ramaphosa at a meeting in November 1985



UDF poster



The UDF keeps protest alive: poster, 1985



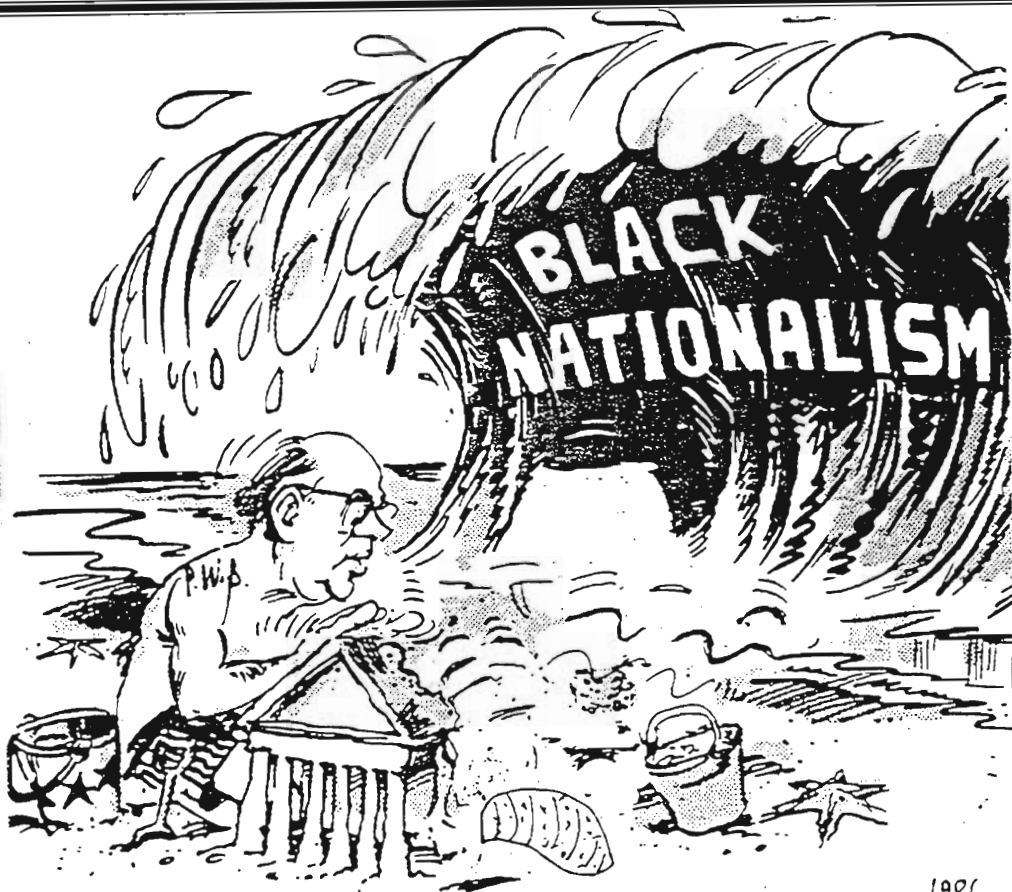
Alan Boesak delivering a public address

Addressing the large gathering, Boesak had this to say:

“Let me remind you of three little words... The first word is “all”. We want all our rights, not just a few token handouts which the government sees fit to give – we want all our rights. And we want all of South Africa’s people to have their rights. Not just a selected few, not just “Coloureds” or “Indians”, after they have been made honorary Whites. We want the rights of all South Africans, including those whose citizenship has already been stripped away by this government.

The second word is the word “here”. We want all our rights here in a united, undivided South Africa. We do not want them in impoverished homelands, we do not want them in our separate little group areas. We want them in this land which one day we shall once again call our own.

The third word is the word “now”. We want all our rights, we want them here, and we want them now. We have been waiting for so long, we have been struggling for so long. We have pleaded, cried, petitioned too long now. We have been jailed, exiled, killed for too long. Now is the time.”



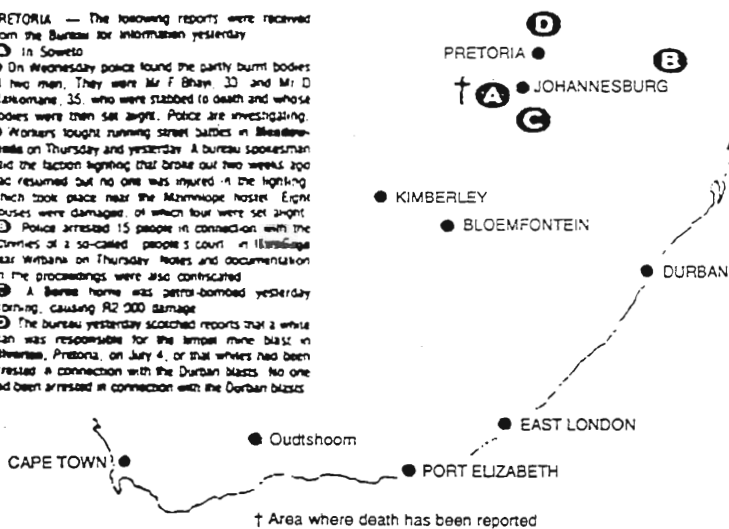
1986

Rising tide of Black resistance

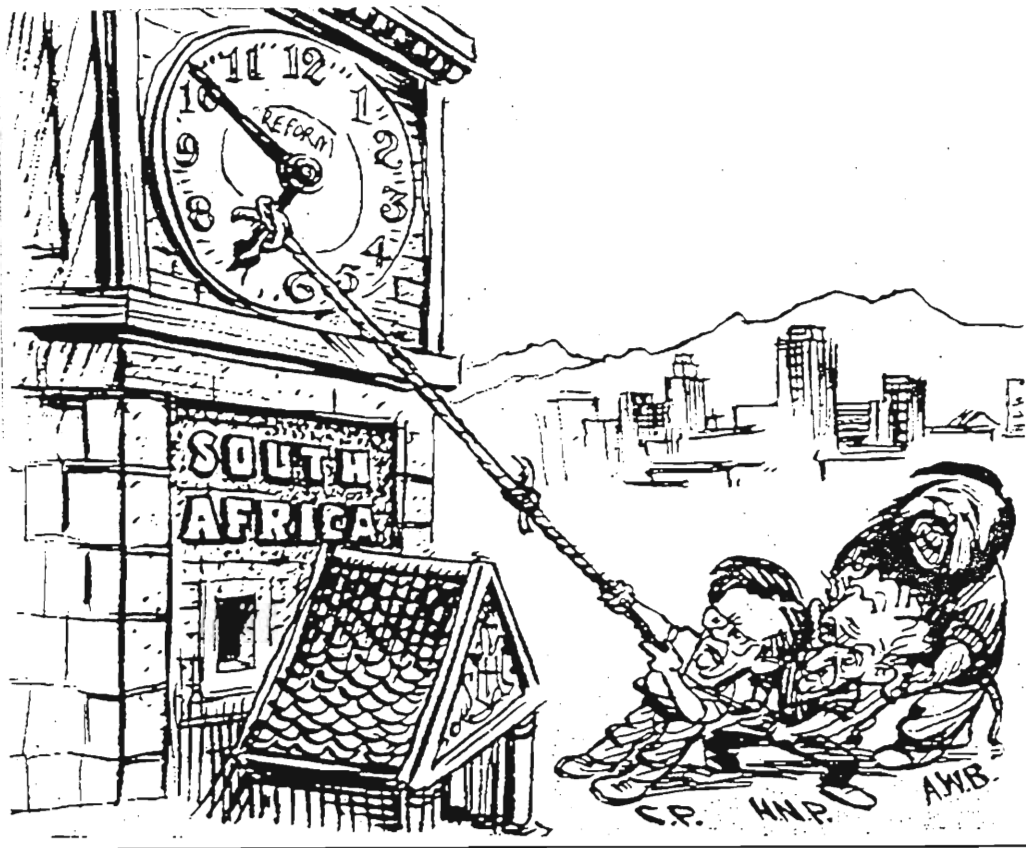
UNREST: OFFICIAL REPORT

PRETORIA — The following reports were received from the Bureau for information yesterday

- In Soweto
- On Wednesday police found the partly burnt bodies of two men. They were Mr F. Bhan, 33 and Mr D. Makomane, 35, who were stabbed to death and whose bodies were then set alight. Police are investigating.
- Workers fought running street battles in Middelwade on Thursday and yesterday. A bureau spokesman said the faction fighting that broke out two weeks ago had resumed but no one was injured in the fighting which took place near the Mzimhlope hostel. Eight houses were damaged, of which four were set alight.
- Police arrested 15 people in connection with the activities of a so-called people's court in Middelwade near Witbank on Thursday. Notes and documentation on the proceedings were also confiscated.
- A Bantu home was petrol-bombed yesterday morning, causing R2 000 damage.
- The bureau yesterday scotched reports that a white man was responsible for the lamp post blast in Sheppards, Pretoria, on July 4, or that whites had been arrested in connection with the Durban blasts. No one had been arrested in connection with the Durban blasts.



Unrest report from *The Cape Times*, 12 July 1986. These reports, which appeared daily, showed the politically-related violence that was taking place throughout the country. On this day there were several incidents in the north of the country, but of course, violence occurred in many other areas as well.



Right-wing resistance to reform



Soweto, 29 October 1989. Part of the crowd of 80 000 who attended a rally to welcome home the seven released ANC leaders



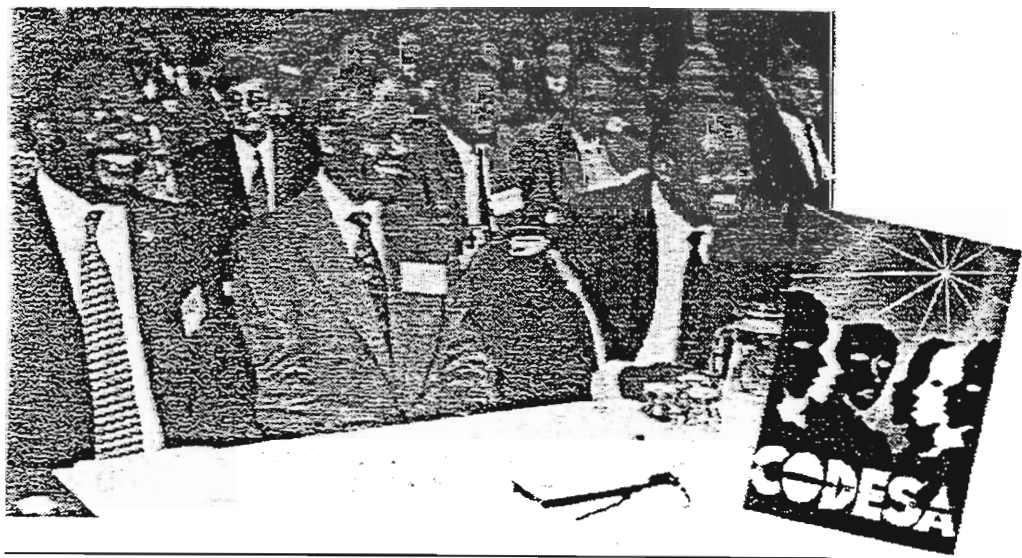
Freed Rivonia trialist Govan Mbeki gets a helping hand from Winnie Mandela after his release



The dismantling of apartheid



Nelson Mandela greets supporters upon his release from Victor Verster prison, 11 February 1990



Nelson Mandela with his ANC delegation at the opening of the Convention for a Democratic South Africa in 1991. The CODESA emblem, showing the sun shining on the Republic's black and white people, symbolised the ideal of a "New South Africa".

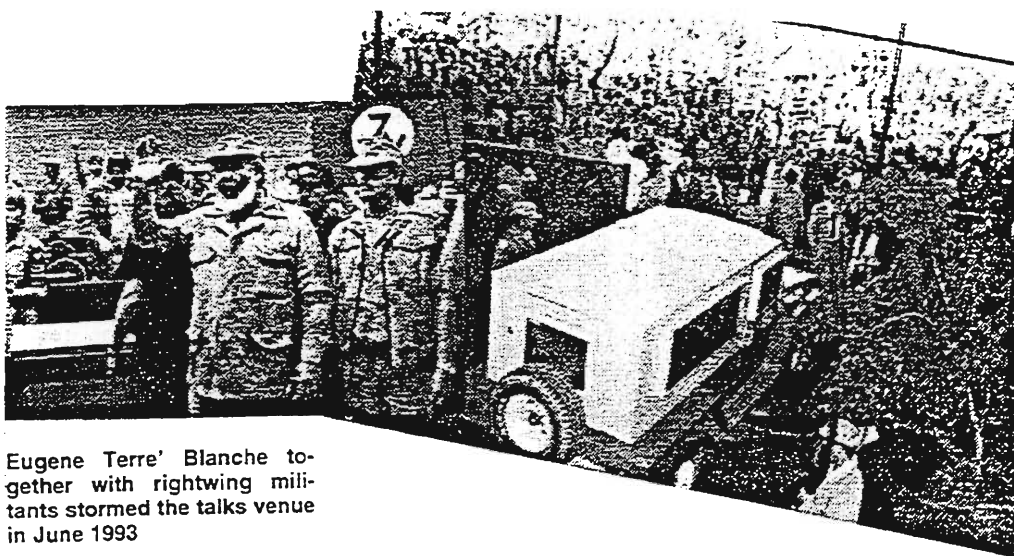


Marchers flee after Ciskei soldiers opened fire on them at the Bisho Stadium in September 1992

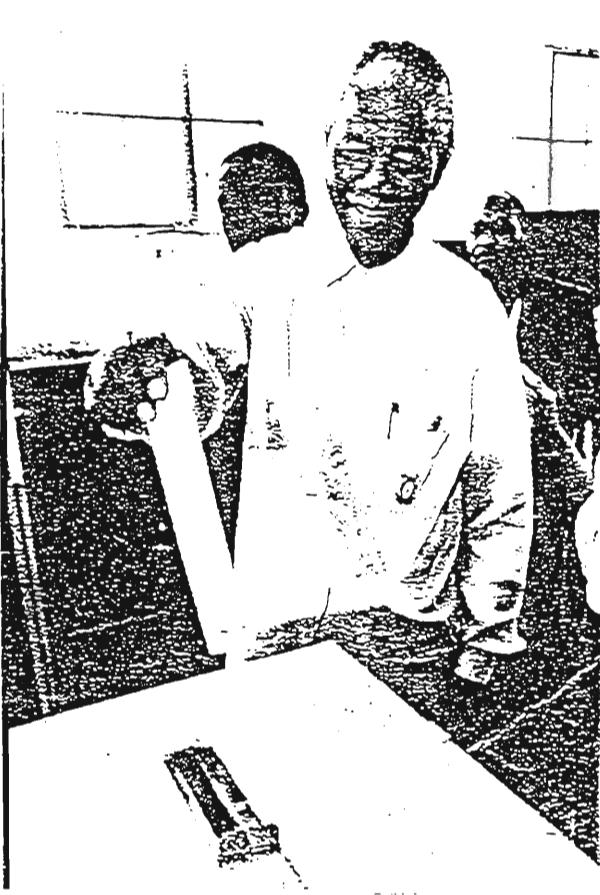


Consequently, the ANC represented by Cyril Ramaphosa and the NP represented by Roelf Meyer, held secret talks which led to the concluding of a "Record of Understanding" on 26 September 1992, an agreement which was in reality a compromise.

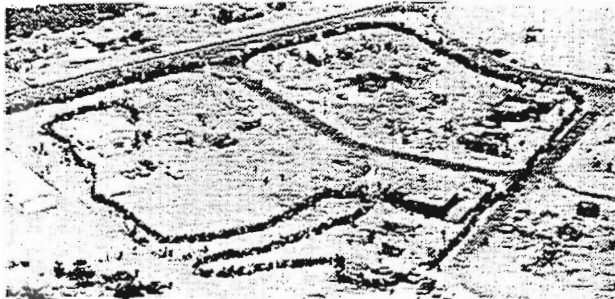
The ANC's Cyril Ramaphosa ... determined to extract tangible concessions from government



Eugene Terre' Blanche together with rightwing militants stormed the talks venue in June 1993



Nelson Mandela casting his ballot in KwaZulu Natal



A day of peace dawned as millions of South Africans queued patiently to make their mark in the country's first all-inclusive election

I have waited
all my life for
this day. No long
queue is going
to stop me



N'wamitwa, Gazzankulu. They have been here since dawn, and now, late afternoon, their moment to vote has arrived



The leaders of the Government of National Unity gathered outside Tuynhuys in Cape Town: President Nelson Mandela (centre) with his two deputies, Thabo Mbeki (left) and F.W. de Klerk



What's the use of having Human Rights ...

... if the government can suspend these rights ...

Well, there are times when any government may have to call a state of emergency.

by calling a state of emergency?

Convince me!

Well, the country could be invaded ...
there could be an attempted coup ...
a major flood ...

And if you look at what it says here ...
it sets limits on the government's powers in a state of emergency.

It says there are many rights that cannot be suspended ...
even in a state of emergency.

So you see
The Bill of Rights sets the rules for a state of emergency

to further protect our rights
OK! You've got a point!
But let's just hope not to take them away!

... that it's one part of the Bill of Rights that never has to be used!
Hear hear!

A REMINDER...

“LET US STRIVE TO BRING ABOUT AN UNDIVIDED SOUTH AFRICA, WITH ONE NATION SHARING A COMMON CITIZENSHIP, PATRIOTISM AND LOYALTY, PURSUING AMIDST OUR DIVERSITY, FREEDOM, EQUALITY AND SECURITY FOR ALL, IRRESPECTIVE OF RACE, COLOUR, SEX OR CREED; A COUNTRY FREE FROM APARTHEID OR ANY OTHER FORM OF DISCRIMINATION OR DOMINATION.”

- THE DECLARATION OF INTENT,
SIGNED IN MAY 1992.

UNITED WE STAND ...

