Chapter 61
States of Emergency

Nicole Fritz

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 that 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration 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 the validity of—

(a) a declaration of a state of emergency;

(b) an 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.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Dignity	Entirely
11	Life	Entirely

12	Freedom and Security of the person	With respect to subsections (1)*(d)* and *(e)* and 2*(c)*
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: — subsection (1)*(d)* and *(e)*; — the rights in subparagraphs (i) and (ii) of subsection (1)*(g)*; and — subsection (1)*(i)* in respect of children of 15 years and younger

35	Arrested, detained and accused persons	With respect to: — subsections (1)*(a)*, *(b)* and *(c)* and (2)*(d)*; — the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)* — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national government gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonable possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph *(e)*, or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) 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.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.[1]

61.1 Introduction*

South Africa's past made the inclusion in the Final Constitution of provisions allowing for states of emergency fairly controversial.[2] Under apartheid, states of emergency had been speciously invoked in order to perpetrate massive state-sponsored violence against the civilian population.[3] That South Africa's new, hard-won Bill of Rights should contain provisions allowing for the suspension of those selfsame rights must have struck some as fairly sinister. However, recent global events cast the inclusion of these provisions in a somewhat different light. International terrorist attacks — of the type orchestrated in New York, London, Delhi and Bali — and fears about the intensification of these attacks suggest that there may be circumstances in which some type of emergency legal order is warranted. Like many throughout the world concerned for the protection of human rights and civil liberties, South African human rights lawyers and practitioners are now more likely to believe that resort to emergency powers may in certain circumstances be legitimate.

Bruce Ackerman articulates a not uncommon view when he observes:

> The attack of September 11 is the prototype for many events that will litter the twenty-first century. We should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time round?[4]

Certainly South Africa's emergency provisions, although untested, have occasioned considerable international interest, as legislators and theorists from other jurisdictions look about, searching for models of how legal regimes should respond in times of great peril. Paradoxically, within South Africa itself, relatively little consideration has been given to how these provisions might be utilized.

This chapter begins with a general discussion — attempting to position South Africa's state of emergency provisions within classical and contemporary debates on the need for legal regimes that regulate emergency periods — before narrowing its focus. § 67.3 examines two distinct themes emanating from South Africa's

* I would like to thank Julie Ebenstein and Omar Farah for the research assistance they provided on this chapter.

1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

2 Gerhard Erasmus 'Limitation and Suspension' in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995) 650.

3 For a discussion of states of emergency under apartheid, see John Dugard *Human Rights and the South African Legal Order* (1978); Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

4 Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029.

state of emergency provisions (FC s 37): the heightened, supervisory role allocated the courts and the extent to which international law has influenced the drafting of FC s 37. § 67.4 examines the specific provisions of FC s 37.

61.2 Positioning section 37

(a) Legal regimes that regulate states of emergency

In praising the Roman Senate's appointment of a dictator during periods of emergency, Machiavelli provides a justification that continues to be relied upon today for making provision within legal regimes for extraordinary measures to be taken during times of state peril:

> And truly, among the other Roman institutions, [the dictatorship] is one that merits to be considered and counted among those which were the cause of the greatness of so great an Empire: For without a similar institution, the Cities would have avoided such extraordinary hazards only with difficulty; for the customary orders of the Republic move too slowly (no council or Magistrate being able by himself to do anything, but in many cases having to act together) that the assembling together of opinions takes so much time; and remedies are most dangerous when they have to apply to some situation which cannot await time. And therefore Republics ought to have a similar method among their institutions. And the Venetian Republic (which among modern Republics is excellent) has reserved authority to a small group (few) of citizens so that in urgent necessities they can decide on all matters without wider consultation.[5]

In contemporary terms, the justification is this: observation of the rights and protections provided by modern constitutions in situations of emergency can prevent the government from responding efficiently and energetically to enemies or to events that would destroy those rights and, perhaps, even the constitutional order itself.[6] As Ferejohn and Pasquino note, following Machiavelli, this justification is fundamentally conservative in nature, aiming to address the threat to the system in such a way that the constitutional state is returned to its normal functioning. Rights are to 'be restored, legal processes resumed and ordinary life taken up again.'[7] The conservative nature of the extraordinary measures permitted is generally apparent from the fact that the provisions permit no permanent changes to be made to the constitutional system by the authority empowered to enact the extraordinary measures. Again, this safeguard can be traced to the rule of the Roman Senate. As Machiavelli explained:

> A dictator was made for a (limited) time and not in perpetuity, and only to remove the cause for which he was created; and his authority extended only in being able to decide by himself the ways of meeting that urgent peril, (and) to do things without consultation, and to punish

5 Niccolo Machiavelli *Discourses on Livy* (Jon Roland ed., Henry Neville trans 1675) (1517) Book 1, Chapter 34, available at http://www.constitution.org/mac/disclivy_.htm.

6 John Ferejohn & Pasquale Pasquino 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, 210-11.

7 Ibid.

> anyone without appeal; but he could do nothing to diminish (the power) of the State, such as would have been the taking away of authority from the senate or the people, to destroy the ancient institutions of the City and the making of new ones.[8]

The placement of the states of emergency provisions in the Bill of Rights of the Final Constitution suggests that the drafters of these provisions were all too appreciative of the ultimately conservative purpose of these provisions: that they, like Machiavelli, appreciated that 'no Republic will be perfect, unless it has provided for everything with laws, and provided a remedy for every incident, and fixed the methods of governing it' and that 'those Republics which in urgent perils do not have resort to either a Dictatorship or a similar authority, will always be ruined in grave incidents.'[9] There is thus no anomaly in the inclusion of provisions that allow for derogation from fundamental rights in a chapter that begins: 'This Bill of Rights is a cornerstone of democracy in South Africa'.[10] In fact, this placement serves fundamentally to underscore that rights are to be suspended only in order to preserve the larger constitutional edifice that safeguards such rights.

Were these powers to be used to undercut or to modify substantially the legal order of the constitution itself — were they to be used to effect permanent changes to the normal legal order — it would not only be a violation of the norms regulating the emergency powers, it would also 'no longer properly [be] an exercise of an emergency power at all but ... an exercise of constituent power. It [would be] an abrogation or transformation of the constitution and ... [would] not [be] functioning to preserve it.'[11] In addition, Jon Elster notes, in response to Ferejohn and Pasquino, that 'if the events calling for a state of emergency have structural rather than conjunctural roots, the exercise of emergency powers should aim, among other things, to prevent similar events from occurring in the future.'[12] Elster, however, fails to allow for the very real possibility that effective resolution might involve amendment to the underlying constitutional structure.

The placement of FC s 37 in the Bill of Rights indicates that it follows the orthodox justification offered for emergency regimes — that it is intended to allow for threats to the nation to be addressed in such a way that the constitutional state is returned to its normal functioning. There are, nonetheless, a variety of ways in which emergencies might be addressed and the legal regime returned to normal. To better appreciate the specific model adopted in the Final Constitution, it is worth examining the typology of emergency powers set out by Ferejohn and Pasquino.

As they explain, emergencies may be dealt with through resort to specifically enumerated constitutional powers, or through ordinary legislation.[13] The mere

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8 Machiavelli (supra) at Book 1, Chapter 34.

9 Ibid.

10 FC s 7(1).

11 Ferejohn & Pasquino (supra) at 211.

12 Jon Elster 'Comments on the Paper by Ferejohn and Pasquino' (2004) 2 *International Journal of Constitutional Law* 240.

13 Ferejohn & Pasquino (supra) at 215.

existence of specifically enumerated constitutional provisions pertaining to emergencies does not necessarily mean that states will not resort to ordinary legislative measures — thus analogues of Britain's Defence Against Terrorism Act and the USA's Patriot Act might be enacted in other jurisdictions through ordinary legislative procedures, notwithstanding the existence of specific emergency provisions. South Africa, too, may, when faced with grave emergency, choose not to avail itself of its constitutional provisions but address the peril through ordinary legislation. There is, however, a disincentive for doing so in that such legislation would be checked for consistency against the ordinary provisions of the Bill of Rights, and not adjudicated in terms of the suspensive conditions expressly contemplated by FC s 37.

Ferejohn and Pasquino further distinguish between monist and dualist systems. Monist systems insist that the normative order remains invariant at all times. They draw no distinction between regular government and exceptional government because the principle 'let the good of the people be the supreme law' operates not as the basis for derogation from regular government but as the very principle of ordinary government.[14] Dualist systems, conversely, maintain the possibility of two separate constitutional normative orders: each operates under different sets of circumstances.[15] Within dualist systems, a regulator allows, in exceptional circumstances, for the normal order or regular government to be replaced by a normative order in which the temporary suspension of the rights characteristic of the normal order is permitted.[16] The emergency provisions enumerated in FC s 37 indicate that our constitutional order may be classified within this typology as a dualist system.

Ferejohn and Pasquino further distinguish those systems that support the principle that necessity knows no law, or that in war, the laws are silent, from those systems which expressly regulate the emergency government.[17] In respect of the latter, a further distinction is made between those systems, classified as neo-Roman, that provide for regulation *ex ante* by constitutional ad hoc

14 Ibid at 224.

15 For a critique of Ferejohn and Pasquino's identification of dualist systems, see David Dyzenhaus 'Terrorism, Globalisation and The Rule of Law: *Schmitt v Dicey*: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005. Dyzenhaus maintains that one has to resist the categorization of dualism and insist on a legal order that is unitary. Otherwise, Dyzenhaus contends, Ferejohn and Pasquino are forced to concede Carl Schmitt's thesis that a state of emergency is a lawless void, a black hole, in which the state acts unconstrained by law. Dyzenhaus argues that Ferejohn and Pasquino ultimately contradict themselves in claiming 'that responses to emergencies require a dualist legal order, one divided between ordinary law that responds to the normal, and emergency law which responds to the exception', but also favouring 'the idea that the emergency legal system should be a legal order — a rule of law order, to the extent possible'. Ibid at 210. I am less troubled by this ostensible contradiction. I read Ferejohn and Pasquino, in their description of a dualist order that contains a constitutionally inscribed regulator, to mean not that the law or the rule of law is inapplicable during periods of emergency but that certain concessions to the emergency are made. However, I shall return to Dyzenhaus' argument in a later section when examining the role of the courts.

16 Ferejohn & Pasquino (supra) at 221.

17 Ibid at 229.

provisions, and 'those who believe that laws, special laws, or executive measures are better able to confront the crisis.'[18] It may be noted that, for Ferejohn and Pasquino, judicial oversight does not appear to be a characteristic of a truly emergency constitutional regime. . Constitutional emergency regimes for them tend to embrace a larger number of *ex ante* controls.

South Africa's constitutional system of emergency powers appears to fall somewhere between the latter two classifications. It is regulated *ex ante* by the temporal restrictions found in FC s 37(2) *(b)*. Again, temporal restrictions, as *ex ante* controls, have been a feature of constitutional emergency orders since Roman Senate times, when the appointment of a dictator was limited to a period of six months.[19] In South Africa, time limitations are more stringent: the first declaration of a state of emergency operates for only 21 days and extensions thereof are limited to three month periods.

Ferejohn and Pasquino submit that those who are supportive of special laws and extraordinary measures 'seem less worried about the exercise of emergency powers and its possible abuse by the regular branches of government. They seem to be more satisfied with *ex post* control by the judiciary on the measures taken to face the emergency.'[20] South Africa's constitutional arrangement reserves a prominent role for the courts during emergencies: in this hybrid arrangement the existence of *ex ante* controls is supplemented by stringent *ex post* controls.[21]

Yet, despite the many checks, an important control of Roman Senate times finds no place within South Africa's emergency order or for that matter any modern constitutional order. Under the Roman model, regulation was automatic in separating the agency declaring the emergency from the one invested with the emergency powers (heteroinvestiture): 'in the republican model, the executor is called by others (a senate) to the special position of dictator, which is dormant within the constitution, and is automatically dismissed when the emergency ends.'[22] As the agency declaring and the agency exercising emergency powers are separate there is limited incentive for the declaring agency to act opportunistically.

(b) Challenges brought about by new types of threat

As Ferejohn and Pasquino concede, '[m]odern circumstances of emergency are very much different from those faced by Rome and this seems especially true after the

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18 Ferejohn & Pasquino (supra) at 229.

19 Ibid at 212.

20 Ibid at 229.

21 See FC section 37(3).

22 Ferejohn & Pasquino (supra) at 235. See also Elster (supra) at 240. Clinton Rossiter lists eleven criteria that must be met for a dictatorship to remain constitutional. The second of these is that 'the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictatorship.' *Constitutional Dictatorship* (New Edition, 1979) 298.

events of September 11.'[23] International terrorism does not share the features that generally defined emergencies of the past, which were limited

spatially and temporally. These very obvious differences call into question the utility and the efficacy of modern constitutional emergency regimes.

This raises the spectre of needing a permanent emergency regime. The Roman practice of either being in a state or emergency or not may be too rigid. We may need to develop an emergency regime that operates alongside the normal regime. That is, it may be necessary to create legal boundaries around emergencies to substitute for geographic and temporal ones that no longer exist.[24]

Certainly, South Africa is not immune from these threats and, like governments elsewhere, may want to have resort to more flexible models, where governing instruments can be tailored to the actual exigencies of the situation — concerns which may increasingly incline governments to lean towards the use of legislative models. These types of laws might delegate a great deal of authority to the executive and may only be enacted for temporary periods. As with the USA's Patriot Act or India's Prevention of Terrorism Act, there may be a sense that the legislation is in some ways exceptional: 'But however unusual it may be, emergency legislation remains ordinary within the framework or the constitutional system: it is an act of the legislature working within its normal competence.'[25]

Ferejohn and Pasquino rightly express concern at this growing inclination. They contend that legislative emergency models are much more likely to bring about permanent changes to the normal legal order: 'the special danger of the legislative model is that the authority by which the president takes action is an ordinary statute, and statutes have, intrinsically, the potential to change the legal system in some permanent way.'[26]

Bruce Ackerman shares this concern over the normalization of emergency regimes in an era of international terrorism.[27] He calls for the design of a model that allows for short-term emergency measures while protecting against permanent changes.[28] His model, however, is rooted in a reassurance rationale rather than the traditional existentialist justification — i.e. that the emergency threatens the very existence of the state. As Ackerman explains:

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23 Ferejohn & Pasquino (supra) at 228.

24 See Ferejohn & Pasquino (supra) at 228.

25 Ibid at 215. South Africa has also made provision for international terrorist threat through ordinary legislation: The Protection of Constitutional Democracy Against Terrorist and Related Activities Act 40 of 2004.

26 Ferejohn & Pasquino (supra) at 219.

27 See Ackerman (supra) at 1047.

28 For criticisms of Ackerman's reassurance model, see Lawrence Tribe & Patrick Guldridge 'The Anti-Emergency Powers Constitution' (2004) 113 *Yale Law Journal* 1801; David Cole 'The Priority of Morality: The Emergency Constitution's Blind Spots' (2004) 113 *Yale Law Journal* 1753.

> September 11 and its successors will not pose such a grave existential threat, but major acts of terrorism can induce short-term panic. It should be the purpose of a newly fashioned emergency regime to reassure the public that the situation is under control, and that the state is taking effective short-term actions to prevent a second strike.[29]

At the core of Ackerman's constitutional emergency model is the principle of supermajoritarian escalation.[30] While it may be necessary for the executive to act

unilaterally in the early days of the emergency, the power to act unilaterally should avail only for the period necessary for the legislature to convene. Thereafter, the state of emergency

> should expire unless it gains majority approval. But this is only the beginning. Majority support should serve to sustain the emergency for a short time — two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter.[31]

By requiring new and ever greater majority support for the state of emergency within the legislature, the process of supermajoritarian escalation marks the emergency regime as provisional and temporary, requiring 'self-conscious approval for limited continuation'.[32] The process also automatically places the emergency regime on the path to extinction. In the later stages of the emergency it will become virtually impossible to attain the heightened levels of support that the escalation requires. As Ackerman notes, 'modern pluralist societies are simply too fragmented to sustain this kind of politics — unless, of course, the terrorists succeed in striking repeatedly with devastating effect.'[33]

FC s 37(2) *(b)* already contains a supermajoritarian escalator. It requires that any extension of a declaration of a state of emergency, bar the first (which need only be supported by a majority vote within the legislature), must be supported by 'a supporting vote of at least 60 per cent of the members of the Assembly.' This is a fairly simple escalation, with no further escalation but for the 60 per cent majority vote required for any subsequent extension. Given South Africa's political realities — a ruling party, the ANC, that controls an overwhelming majority within Parliament — this particular supermajoritarian escalation may not hold out sufficient protection against the normalization of emergency regimes. Ackerman notes: 'Only a more elaborate multistage mechanism can reliably steer the system toward the eventual dissolution of emergency conditions.'[34]

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29 Ackerman (supra) at 1031.

30 Ibid at 1047.

31 Ackerman (supra) at 1047.

32 Ibid at 1048.

33 Ibid.

34 Ibid at 1055.

As Dyzenhaus observes, Ackerman's model envisages a limited role for the judiciary:

> Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as 'miraculous saviors of our threatened heritage of freedom.' Hence, it is better to rely on a system of political incentives and disincentives, a 'political economy' that will prevent abuse of emergency powers.[35] (footnotes omitted)

For Dyzenhaus, the allocation of so limited a role to the judiciary is mistaken, both as a practical matter and normatively. Practically, the very political economy

Ackerman constructs to constrain emergency powers 'still has to be located in law in order to be enforceable, which means that Ackerman cannot help but rely on judges'.[36] Dyzenhaus asks: 'why should we accept his claim that we can rely on judges when the executive asserts the necessity of suspending the exceptional constitution, the constitution for the state of emergency, when one of his premises is that we cannot so rely?'[37]

Normatively, Dyzenhaus insists that the judiciary will always have some role to play in maintaining the rule of law and not just rule by law. Where the executive is given prerogative power or the equivalent to suspend the normal legal order, by the constitution or by statute, it is the duty of judges to try to understand that delegation as constrained by the rule of law:

> To the extent that the delegation cannot be so understood, judges must treat it as, to use terminology developed by Ronald Dworkin, an 'embeded mistake', that is, a fact which they have to recognize, but whose force they should try to limit to the extent possible. They are entitled to do this because they should adopt as a regulative assumption of their role the view that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law.[38]

But Dyzenhaus never explains why such faith in the courts is well placed. Indeed if, as he points out, the executive asserts the necessity of suspending the exceptional constitution, and fails to adhere to the procedures stipulated, why would it be any more likely to comply with anti-executive orders handed down by courts, assuming courts were inclined to render such decisions in times of emergency? Dyzenhaus contends that 'judges also have an important role in calling public attention to a situation in which such cooperation wanes or ceases'. But if we return to Ackerman's supermajoritarian escalator, it is not at all clear why the legislature, if its procedures are violated, would not play that role equally well.

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35 Dyzenhaus (supra) at 2016.

36 Dyzenhaus (supra) at 2017.

37 Ibid.

38 Ibid at 2035 citing Ronald Dworkin *Taking Rights Seriously* 81, 121-22 (1977)

The scepticism of some academics, like Ackerman, regarding the judiciary's ability or inclination to properly supervise declarations of emergency and adopted responses, and the absence of convincing responses to such scepticism from other academics, like Dyzenhaus, must imbue South Africa's emergency provisions with some poignancy, if not concern. In the subsequent section, greater consideration is given to the role of the courts under South Africa's emergency provisions. But it is worth noting that the role of the courts in supervising the emergency is at all times underlined in the Final Constitution. The language and the structure of FC s 37 must be read as a rejection of South Africa's emergency past — a past during which the role of courts was minimized. And yet, despite the attempt at reassuring South Africans that the past will not repeat itself, the protections promised by judicial supervision under FC s 37 may not be well realized during future states of emergency.

61.3 Themes emanating from section 37

FC s 37 is fairly detailed in its provisions. These details will be discussed later in § 61.4. Two primary themes, however, emerge from this section, and both deserve sustained attention: the heightened role afforded the courts in supervising states of emergency; and the extent to which the provisions track those found in international law.

(a) Role envisaged for the courts

An essential feature of the state of emergency provisions are the powers carved out for the courts in supervising any emergency measures taken. Not only are the courts specifically empowered to decide the validity of any declaration of a state of emergency, any extension of such a declaration or any legislation enacted or action taken in consequence of a declaration,[39] but the Final Constitution explicitly prohibits any legislation or action that would place unlawful conduct on the part of the state or any person beyond the purview of the courts.[40] No indemnities for unlawful conduct can receive constitutional sanction. Moreover, there can be no derogation from the role afforded the courts under FC s 37.[41]

Furthermore, in respect of any detentions carried out in consequence of a declaration of a state of emergency, courts are to review these detentions as soon as reasonably possible but in any event no later than ten days after the date of detention.[42] A court must release the detainee unless further detention is necessary to restore peace and order.[43] Detainees not released are thereafter permitted to apply for further review of their detention once a period of ten days has expired

39 See FC s 37(3)

40 See FC s 37(5) *(a)*.

41 See FC s 37(5) *(b)*.

42 See FC s 37(6) *(e)*.

43 Ibid.

since their previous review, and are entitled to release unless further detention is necessary, again, under the same standard.[44] On further review, the state is to provide written reasons to the court to justify the continued detention of the detainee and must provide a copy of those reasons to the detainee at least two days prior to the review.[45] Finally, in respect of detainees, once the court releases a person, that person is not to be detained again on the same grounds unless the state establishes before a court that there exists good cause for re-detaining that person.[46]

These provisions mark an obvious departure from the emergency provisions under the apartheid legal order and, in this sense, are some of the clearest indicators that the Final Constitution is, in Ruti Teitel's terminology, a 'transitional

constitution': being 'both backward- and forward-looking, as it disclaims past illiberal, and reclaims future liberal, norms.'[47] These provisions reflect are a clear rejection of parliamentary supremacy, the doctrine under which South Africa's notorious emergency provisions were enacted.[48] They are also an unambiguous refutation of the tenor of the previous emergency provisions, which sought time and again to oust judicial review, making protection by the courts, 'for all practical purposes, non-existent'.[49]

Implicit, if not explicit, in the constitutional arrangement for states of emergency, is the belief that the courts will temper the worst excesses of any legislation enacted or action taken pursuant to a declaration of a state of emergency — that in supervising emergency powers the courts will act to safeguard individual rights. And yet, as the academic debates reflected in the previous section suggest (together with actual court conduct in many jurisdictions, including South Africa), such faith may not be entirely well placed. Arguably, South Africa's past experience of states of emergency may account for the absence of greater appreciation for concerns such as Ackerman's and the concomitant design of a more elaborate *ex ante* type control procedure.[50]

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44 See FC s 37(6) *(f)*.

45 See FC s 37(6) *(h)*.

46 See FC s 37(7).

47 Ruti Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009, 2015, 2078 ('In ordinary times constitutionalism is conceived as entirely forward-looking in nature, designed to endure for generations. Constitutionalism in transitional times is particularly retrospective in nature, justificatory and constructive of the political transformation.')

48 See Etienne Mureinik 'Book Review: Emerging from Emergency: Human Rights in South Africa: *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* By Stephen Ellman' (1994) 92 *Michigan Law Review* 1977, 1985.

49 'States of Emergency' Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 801.

Samuel Issacharoff and Richard Pildes conclude, in their study of US constitutional practice in times of emergency, that American courts have neither wholly endorsed executive unilateralism nor a civil libertarian stance:

> Instead, the courts have developed a process-based, institutionally oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts. Through this process-based approach, American courts have sought to shift the responsibility for these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.[51]

This approach appears to have been conditioned by an appreciation, articulated by former US Chief Justice William Rehnquist, that '[j]udicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays is ill-suited to determine an issue such as "military necessity"'.[52] The courts have felt more emboldened to issue orders against the executive when there is not found to be institutional endorsement by both political branches for departures from ordinary legal structures and rules.[53] Issacharoff and Pildes point out that although critics of the limited or deferential role that US courts have assumed in times of emergency have tended to 'frame the problem as a character failing — courts need to have more "courage" — this long-standing judicial practice, across many generations, suggests there are deeper structural and institutional reasons that consistently lead judges to define their role in specific, limited ways.'[54]

As I have already indicated, the emergency provisions of the Final Constitution are as yet untested.[55] Nonetheless, there is some reason to believe that South African courts may, at least in respect of the determination that a state of emergency exists, afford substantial deference to the executive. The Constitutional Court case that comes closest to touching on such security concerns is *Kaunda & Others v President*

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50 Nonetheless it would be wrong to suggest that South Africa's emergency arrangement makes no provision for *ex ante* type controls: the powers given the legislature to extend states of emergency are of this type.

51 Samuel Issacharoff & Richard Pildes 'Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime' (2004) 2 *International Journal of Constitutional Law* 296, 297. Issacharoff and Pildes merely describe this approach. Cass Sunstein prescribes a 'minimalist' stance that he argues judges should adopt in deciding all constitutional matters. He insists that judicial minimalism is to be promoted during normal times but is even more essential under emergencies: 'Courts will not have the requisite information to second-guess the executive on the balance between security and liberty but they can still require clear congressional authorization for any executive action that intrudes on constitutionally protected interests.' Cass Sunstein 'Minimalism at War' (2004) 47 *Supreme Court Review* 48, 53-54.

52 William Rehnquist *All the Laws But One: Civil Liberties in Wartime* (1998) 205.

53 Issacharoff & Pildes (supra) at 315.

54 Ibid at 332.

55 The only appraisal occurred in the *Second Certification Judgement.* See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1996 (1) BCLR 1253 (CC) at para 45.

of the Republic of South Africa & Others.[56] At issue in *Kaunda,* were the arrests of 69 South African citizens in Zimbabwe on the suspicion of being mercenaries en route to stage a coup in Equatorial Guinea. The majority held that courts should be careful about intervening in areas where the executive possesses unique skills and experience — in this case the conduct of diplomacy and foreign relations. They therefore declined to issue any directive to the executive, notwithstanding the grave danger in which the applicants were placed.[57]

(b) International law and South Africa's emergency powers

There are two express references in FC s 37 to international law. First, FC s 37(4) *(b)* (i) requires that legislation enacted pursuant to a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the legislation is 'consistent with the Republic's obligations under international law applicable to states of emergency'. Second, FC s 37(8) provides that non-South

Africans detained in South Africa in consequence of an international armed conflict may avail themselves of 'the standards binding on the Republic under international humanitarian law in respect of the detention of such persons'.

International law has also influenced the drafting of other provisions contained in FC s 37 — the formulation that a state of emergency may be declared only when 'the life of the nation is threatened' is drawn directly from the provisions dealing with states of emergency and derogation of rights in the authoritative international instruments. Similarly, the identification in FC s 37 of those rights that are non-derogable directly corresponds to such identification under international law. The stipulation that the right to equality is non-derogable 'with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language' is lifted from Article 4(1) of the International Covenant on Civil and Political Rights (the ICCPR).[58]

International law provisions relating to state obligations during times of emergency are primarily concerned with two themes: the circumstances that must obtain before a derogation of rights can be justified; and the rights that may be derogated from as opposed to those that must be preserved no matter the exigency which the state faces. These two concerns are reflected, for example, in art 4 of the ICCPR: 'On the one hand, it allows for a State Party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand,

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56 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC). The applicants maintained that the South African government be required to take steps to have them extradited to South Africa so that any trial they might have to face could be conducted here and that it be required to seek assurances relating to their conditions of detention and to trial procedures should they face trial in Zimbabwe or Equatorial Guinea.

57 O'Regan J's dissent offered a far less deferential approach.

58 International Covenant on Civil and Political Rights (1966) 999 UNTS 171, 6 *ILM* 368 (Ratified by South Africa on 10 December 1998). Article 4(1) provides: '[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State 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.'

Article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.'[59]

These concerns are also reflected in the derogation provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[60] and the American Convention on Human Rights (American Convention).[61] Interestingly, the African Charter on Human and Peoples' Rights[62] makes no such provision for derogation: the drafters believed that the exclusion of a derogation provision from the Charter would discourage governments from

resorting too easily to extraordinary measures that would violate human rights.[63] More recent international initiatives like the Paris Minimum Standards of Human Rights Norms in a State of Emergency[64] and the Siracusa Principles[65] indicate a growing international consensus that states should be subject to more detailed restraints during times of emergency than the fairly generalized provisions of the core instruments — such as the ICCPR and European Convention — suggest.

And yet even the 'relaxed' threshold protections of the core instruments have not met with compliance. Despite the requirement that the life of the nation itself must be jeopardized by the emergency before the derogation of rights is justified, states have employed emergency powers in substantially less threatening circumstances. Rarely have international courts held states to the language of international legal instruments. The *Greek Case,* decided by the ECHR*,* is the exception: 'the Greek military declared a state of emergency to justify a coup and the repression of a general strike, [and] the European Institutions rejected [the] state's claim of the existence of an emergency'.[66] *Lawless*,[67] the most oft-cited case on emergency powers, is notable for the establishment of a strict test for the use of emergency

59 Human Rights Committee General Comment No 29 'States of Emergency' (art 4 of the Covenant) (2001) CCPR/C/21/Rev.1/Add.11 at para 2.

60 Convention for the Protection of Human Rights and Fundamental Freedoms (1950, entered into force 3 September 1953) 213 UNTS 221 (Not ratified by South Africa). Article 15 reads in relevant part: '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.'

61 American Convention on Human Rights (1969, entered into force 18 July 1978) OAS Official Records OEA/ser K/XVI/1.1, 1144 U.N.T.S. 123, *ILM* 673 (1970). Article 27(1) provides: 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations. . .'

62 African Charter on Human and Peoples' Rights (1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 21 *ILM* 58 (1982)(Ratified by South Africa on 9 June 1996).

63 Stephen Livingstone 'International Law Relating to States of Emergency and Derogations from International Human Rights Treaties' Human Rights Centre, Queens University Belfast, 1, available at: www.interights.org/doc/Livingstone_derogation_final.doc (accessed on 9 January 2007).

64 Adopted by the International Law Association (ILA) Conference in 1984.

65 The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (1984), reprinted in (1985) 7 *Human Rights Quarterly* 3, 7-8.

powers — that the threat must be actual or imminent; that its effects must involve the whole nation and that the organized life of the community must be threatened. And yet the European Court deferred quite readily to the determination of the government of Ireland that an emergency threatening the life of the nation existed as a result of the activities of paramilitary groups using violence which substantially and negatively effected relations with its neighbours.[68]

Lawless therefore takes two somewhat contradictory legal positions: doctrinally, it is uncompromising in the showing it requires to justify states of emergency; at the same time, the case also establishes a deferential standard of review once the state of emergency has been called. This Manichean approach reflects the balance international law must strike on the issue of states of emergency: it cannot afford to overreach on this issue because it implicates national security concerns so sensitive for states. Too invasive and onerous an intervention would undermine the relevancy and the effectiveness of international law. However, the international legal regime cannot ignore the fact that many of the struggles to establish human rights and the rule of law are fought against governments that hide their authoritarianism behind a pretence of national emergency which demands, so they contend, the derogation of rights for the greater good.

The deferential standard that the European Court applied in *Lawless* was reaffirmed as recently as 2001. In fact, in the most recent derogation case considered, *Marshall v United Kingdom*:[69]

> the Court rejected as inadmissible on the grounds of being manifestly ill-founded a challenge to the derogation the United Kingdom maintains to this day in Northern Ireland. This was despite the fact that the major terrorist organisations in Northern Ireland had been on ceasefire for two years before the events which occurred in this case.[70]

The international legal system appears to have settled on a rational basis standard of judicial review where states of emergency are concerned. As a result, the European Court of Human Rights has held that 'a State has a wide margin of appreciation ... to determine whether the life of the nation was threatened by a public emergency and, if so, how far it might go in attempting to overcome it.'[71] In a system where enforcement and sanction methods are limited and in many cases

66 Livingstone (supra) at 4 (citing the European Court of Human Rights *Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* 1.)

67 *Lawless v Ireland (No. 3)* (1961) 1 EHRR 15.

68 See Oren Gross 'Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 464-65.

69 *Marshall v United Kingdom* Application No 41571/98 (10 July 2001).

70 Livingstone (supra) at 4.

71 *Republic of Ireland v United Kingdom* 2 EHRR 25 (Series A) (1978) at III (C). On the substantial deference standard created by the margin of appreciation in the context of emergency derogation, see Gross (supra) at 495.

non-existent, this is the most tactically sound approach for international courts to take. It affords them the best chance to maintain their relevance without being ignored by states unwilling to subordinate the decision of a national government to an order of an international court. That said, this deference holds out the potential for permitting abuse.

It is because of the deference afforded states in their determination of states of emergency that commentators argue that the provisions identifying those rights from which no derogation is permitted offer more effective protection:

> Neither national nor international judicial institutions have been willing to challenge on a regular basis a state's assertions of the need for a state of emergency or the need for the measures taken to respond to it, measures which lead to substantial curtailment of non-derogable human rights. What they have been prepared to do is firmly uphold the status of non-derogable rights. Thus both the European and American Courts of Human Rights have firmly rejected arguments from states that killings by state forces or the use of force against suspects are in any way justifiable because of a situation of war or the threat of terrorism.[72]

In July 2001, the UN Human Rights Committee (HRC), in its authoritative General Comment 29 on Article 4 of the ICCPR, indicated that a number of rights should be upheld during a state of emergency, in part to give effect to the obligations of non-discrimination, customary law obligations or obligations under international humanitarian law:

- prohibition on taking hostages;
- prohibition on forced displacement of persons;
- the rights of minorities;

- the rights of all detained people to be treated in a way which respects their dignity;
- fundamental aspects of the right to fair trial, such as the presumption of innocence; and
- arbitrary deprivation of liberty.

Finally, it should be noted that South Africa is bound to comply with certain international obligations once a state of emergency is declared. The ICCPR, for instance, requires that a state derogating from its obligations under the Convention notify the UN Secretary-General of such derogation. General Comment 29 emphasized the need for immediate notification and for the notification to include full information on the measures taken (including the text of any relevant laws) plus a full explanation of the reasons why these measures were taken.

61.4 Analysis of FC s 37

(a) When may an emergency be declared?

FC s 37(1) authorizes the declaration of a state of emergency where two conditions are met, namely: that the 'life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency'; and where the

72 Livingstone (supra) at 4. See also Gross (supra) at 498.

declaration is 'necessary to restore peace and order'. There are thus two assessments to be made: *(a)* whether the disturbance qualifies as a threat to the life of the nation; and *(b)* whether the declaration is necessary — and not just desirable or advisable — for the restoration of peace and order.

There is little domestic jurisprudence that might guide an assessment of what constitutes a threat to the life of the nation. However, international human rights jurisprudence is instructive. The European Court of Human Rights has held that a state of emergency can be justified only by 'an exceptional situation of crisis which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed'.[73] In a later decision, the Court set down several criteria that had to be met before the derogation section of the European Convention[74] could be relied upon. These criteria are:

> *(a)* the threat must be actual or imminent; *(b)* its effects must involve the whole nation; *(c)* the continuance of the organised life of the nation must be threatened; *(d)* the crisis or danger must be exceptional, in that normal measures or restrictions permitted by the

> Convention for the maintenance of public safety, health and order, are plainly inadequate.[75]

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73 *Lawless* (supra) at para 28. See also Currie & de Waal (supra) at 803.

74 Article 15 (Measures derogating from human rights are permissible 'in time of war or other public emergency threatening the life of the nation.')

75 *Greek Case* (supra) at 72. See also Currie & de Waal (supra) at 803. International and nongovernmental organizations have attempted to define in greater detail what circumstances will qualify as public emergencies. For example, a report submitted in 1982 to the UN Subcommission on Prevention of Discrimination and Protection of Minorities refers to 'states of emergency' as a generic juridical term reflecting the use of emergency powers in exceptional circumstances. Exceptional circumstances exist when there are:

> Temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation, that is to say, the political and social system that it comprises as a State, and which may be defined as follows: 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. Nicole Questiaux 'Study of the Implications for Human Rights Developments Concerning Situations Known as States of Siege or Emergency' UN ESCOR, 35th Sess. 60, at 16 UN Doc E/CN4/Sub2/1982/15 (1982). The International Law Association's *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1984), prescribes:
>
> *(a)* The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.
>
> *(b)* The expression 'public emergency' means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.
>
> The Siracusa Principles provide:
>
> A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence of basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

The last criterion invokes the same concerns made explicit in the second condition set by the Final Constitution for the declaration of a state of emergency — that the declaration, and the extraordinary powers thereby availed, be necessary for the restoration of peace and order. Where ordinary measures would suffice — where the normal powers and processes of the criminal justice system could adequately address the threat — no declaration may be made. The obvious corollary of this second condition, as noted by Currie and de Waal, is that 'once peace and order are restored the justification for a state of emergency falls away and it should end.'[76]

It is interesting to note that, unlike Canada's Emergencies Act, which distinguishes between four types of emergency (natural disasters, threats to public order, international emergencies and states of war) and subjects each to different regimes,[77] neither the Final Constitution nor legislation[78] distinguishes between the types of occurrences that may constitute a state of emergency. Thus the same acts may be taken in response to an emergency brought about by general disorder

as in response to an emergency brought about by invasion. Yet, whatever the genesis of the threat, only where the extraordinary powers that avail the government under a state of emergency are necessary to restore peace and order may a declaration be made. It is this threshold of necessity in the second condition which acts as safeguard against any default resort to emergency powers in circumstances of threat not requiring such measures.

This reading was confirmed by the Constitutional Court in the *Second Certification Judgment*: the Court observed that a declaration of a 'state of national defence', as permitted under FC s 203, would not in itself make for a declaration of a state of emergency.[79] It might provide grounds for the declaration, but even in that event all the provisions of FC s 37 would remain applicable. To be constitutional, any declaration of a state of emergency following on a declaration of a state of national defence would need to be necessary for the restoration of peace and order. The circumstances giving rise to the state of national defence would also need to be such that they threaten the life of the nation.

(b) Regulating declarations of a state of emergency

A state of emergency may be declared 'only in terms of an Act of Parliament'. The authorizing legislation is the State of Emergency Act.[80] The SoE Act provides that any declaration of a state of emergency must be by proclamation in the Government

76 Currie and de Waal (supra) at 802.

77 See Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1061-62. While emergencies responding to threats to public order require renewal every 30 days, an emergency response to war requires a revote every 120 days.

78 See State of Emergency Act 64 of 1997.

79 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 45. See also Currie & de Waal (supra) at 803.

80 Act 64 of 1997 ('SoE Act').

Gazette. The President may declare a state of emergency within the Republic or in any area within the Republic and must briefly state the reasons for the declaration.[81]

FC s 37 sets out a number of safeguards protecting against the possible abuse of state of emergency powers. Some of these protections are time-related: thus a state of emergency, and any ensuing legislation or action, is effective only prospectively.[82] Any declaration and ensuing legislation or action is valid only for 21 days from the date of the declaration unless the National Assembly resolves to extend the declaration, and it may do so for no more than three months at a time.

The role afforded the National Assembly in extending a state of emergency identifies additional institutional safeguards, and the prominent powers given other branches of government in supervising the state of emergency. No limit is set on the number of times the National Assembly may extend the declaration. However, while the first extension needs only the support of a majority of the members of the Assembly, any subsequent extension must be supported by at least 60 per cent of the members of the Assembly. Any resolution, to extend or to refuse to extend a state of emergency, can only be made following a public debate in the Assembly. The provisions relating to the National Assembly's extensions

are those to which Ackerman refers when he speaks of South Africa's 'supermajoritarian escalator'. As has already been noted, the provisions require only a fairly simple escalation and, given South African political realities, a more elaborate multistage mechanism might have been preferred to ensure that any extensions are genuinely necessary, command overwhelming public support, and are not a pretext for mere discrimination. Nonetheless, the requirement that resolutions must follow public debate in the Assembly ensures that opposition, if not sufficient to terminate the state of emergency, is at least heard and disseminated.

In addition to the role played by the National Assembly in supervising the operation of a state of emergency, the supervisory functions of the courts during this time are explicitly reinforced. They may decide on the validity of the initial declaration, on any extension, and on any ensuing legislation or action. As Currie and de Waal explain, the conditions stipulated in FC s 37(1) are thereby made justiciable — meaning courts may determine whether there did exist a threat to the life of the nation and whether a declaration was necessary to restore peace and order.[83] These authors further suggest that 'the requirement of "necessity" suggests a proportionality test'. They rely, as the basis for this argument, on the Siracusa Principles. The Principles provide that the 'severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat of life to the nation and are proportionate to its nature and extent'.[84]

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81 SoE Act ss 1(1) and (2).

82 See FC s 37(2) *(a)*.

83 Currie & de Waal (supra) at 804.

84 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN4/1985/4 Annex (1985). See also Currie & de Waal (supra) at 804.

Currie and de Waal are not alone in maintaining that the requirement of necessity incorporates a proportionality test. In fact, Oren Gross insists that the principle of proportionality is one of the basic substantive principles underlying the derogation regime:

> Proportionality is essential to the legitimacy and justification of a claim to derogation from otherwise protected human rights. Even where an act of derogation may be justified under the conventions, the state does not enjoy unfettered discretion with respect to the derogation measures that it wishes to pursue. Such measures can only be taken to 'the extent strictly required by the exigencies of the situation'.[85]

I would argue, admittedly against the weight of authority, that the terms 'necessity' and 'strictly required' (both used in FC s 37) demand only that the state have no alternative means at its disposal, no less restrictive or less harmful measures to deploy, but not that the action taken be proportional to the result achieved. FC s 37 does not, contrary to what Currie and De Waal suggest, require the weighing of harms.

Recall that the South African emergency provisions are intended to allow for the preservation of the 'life of the nation'. This phrase embraces the 'organised

life of the nation' and thus the continued existence and functioning of the constitutional infrastructure. Within the constitutional emergency arrangement, this objective of preserving the 'life of the nation', and thus the 'organised life of the nation', reigns supreme. While it may be difficult to imagine circumstances in which this objective might weigh less than the harm caused in securing the objective, we might consider the following hypothetical.

Suppose three-quarters of South Africa's citizenry rises up in violent protest against current levels of crime and demands the suspension of the Bill of Rights: they believe the Bill unjustly enables and enriches criminals. Suppose that the state believes that in order to quell the insurrection that it must embark on a process of massive detention (assuming there were such facilities to detain so large a number) and that it declares a state of emergency on the grounds that the life of the nation is threatened by general insurrection and that the declaration is necessary to restore peace and order. In such a situation, we might argue that the declaration is necessary and the measures strictly required and yet still be forced to concede that they are not proportional to the measures taken and the harm caused: the detention of the majority of South Africa's citizenry cannot be proportional to safeguarding the continued functioning of the current constitutional infrastructure.

States of emergency will come to an end in one of two ways. Either the President, through a proclamation, will declare that the state of emergency is withdrawn, or the National Assembly will resolve not to extend the declaration or will allow the declaration of the state of emergency to lapse.[86]

(c) Action taken during an emergency

85 Gross (supra) at 449. See also Ronald St J Macdonald 'Derogations Under Article 15 of the European Convention on Human Rights' (1997) 36 *Columbia Journal of Transnational Law* 225, 242-45; Jaime Oraa 'Human Rights in States of Emergency' (1992) 31 *International Law* 140, 140–70.

86 See FC s 37(2) *(b)*; SoE Act s 4.

FC s 37 first protects against abuse by regulating the actual declaration of a state of emergency. But it then goes further and regulates the measures that may be taken once a state of emergency has been declared. The key characteristic of the emergency regime is that it allows for derogation from fundamental rights in a way that the normal constitutional order would not permit. However, any legislation authorizing derogation from the Bill of Rights must be strictly required by the emergency, must be consistent with South Africa's international law obligations applicable to states of emergency, and is to be published in the Government Gazette as soon as reasonably possible after enactment.

FC s 37(5) prohibits an Act of Parliament authorizing the declaration of emergency or any legislation enacted or other action taken pursuant to the declaration from indemnifying the state or any person for unlawful acts. As Currie and de Waal observe:

> These requirements are all justiciable. It is also specifically provided that no derogation from s 37 itself is permissible. This means that the jurisdiction of the courts cannot be ousted during emergencies.[87]

(d) Non-derogable rights

FC s 37 contains a list of non-derogable rights and provides the extent to which these rights are non-derogable. Only the rights of human dignity and life are non-derogable in their entirety. As concerns the right to equality, which is non-derogable 'with respect to unfair discrimination, solely on the grounds of race, colour, ethnic or social origin, sex, religion or language', there are omissions which must register as peculiar. Why, for instance, is unfair discrimination on the basis of race or religion strictly prohibited during a state of emergency and yet unfair discrimination on the basis of gender or sexual orientation is not? Currie and de Waal argue that 'the fact that some rights are derogable does not make them "weaker" rights and does not make the non-derogable rights "core rights" or "superior rights"'[88] Still the omission of some of the listed grounds in FC s 9(3), prohibiting unfair discrimination, from those listed in the Table of Non-Derogable Rights suggests that within the Final Constitution not all unfair discrimination is viewed as equally offensive. It would appear that this more restrictive list of grounds than that which appears in FC s 9(3) is occasioned by the identical wording of art 4 of the ICCPR. Still, while the section might be laudable in seeking to keep faith with South Africa's international law obligations, it might yet be asked why the drafters did not consider that unfair discrimination on the basis of sexual orientation was as unlikely to advance the restoration of peace and order as unfair discrimination on the basis of colour.

It should be noted that the analogous provision under the Interim Constitution[89] (IC s 34) was more expansive in its listing of non-derogable rights. Gerhard Erasmus argued against such expansive incorporation, insisting that '[t]o make the list of non-derogable rights as wide as possible in the belief that a pro-rights approach is thereby displayed is mistaken.'[90] This is so, because as with FC s 37, a number of

87 Currie & de Waal (supra) at 805 (footnotes omitted).

88 Currie & De Waal (supra) at 806.

89 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

categories of threat might trigger a state of emergency and derogation of rights. However, Erasmus argues that:

> 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 s 34 in order to suspend certain rights because of extreme need despite the fact that they are listed in s 34 as non-derogable.[91]

The less expansive list contained in FC s 37 may be, in part, a response to concerns such as those of Erasmus. Still, the Table of Non-Derogable Rights is more extensive in its protections than many international instruments that 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 and servitude; and the right to be free from a retroactive application of penal laws'.[92] It is at least

arguable that the directive contained in FC s 37(4) *(a)* that '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 the derogation is strictly required by the emergency' is sufficiently protective and preservative of rights that it diminishes the need to make as many explicitly non-derogable.

A related concern is that by placing certain rights outside the ambit of those which may be suspended, an incentive may be given to those enacting and interpreting emergency legislation to give non-derogable rights their bare minimum content. This seems to be particularly true in respect of the right to dignity. In fact, it may even be argued that a narrow reading of the right to human dignity, as it appears in the Table of Non-Derogable Rights, is textually mandated. The Table also lists certain sections relating to the rights of arrested, detained and accused persons as non-derogable. But, while FC s 35(2) *(d)* is specifically enumerated as non-derogable, that is not true of FC s 35(2) *(e)*. FC s 35(2)*(e)* provides that 'every prisoner has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.' This omission suggests that the latter provision may be suspended — a conclusion which seems difficult to square with the listing of the right to human dignity, in its entirety, as a non-derogable right.

(e) Rights of detainees

FC ss 37(6) *(a)* to *(h)* and 37(7) and (8) regulate detention without trial under a state of emergency. The detail of these regulations, and the protection they afford, is a reflection not only of the fact that detention without trial is generally the hallmark of emergency regimes throughout the world, but that detention without trial was among the most egregious features of apartheid emergency powers. The detention of political opponents of the apartheid state often served to facilitate further

90 Gerhard Erasmus 'Limitation and Suspension' in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 659.

91 Ibid.

92 Ibid at 660.

violations — torture, cruel, unusual and degrading treatment and, in some cases, disappearance.

Under a constitutionally mandated state of emergency, violations of the sort perpetrated in the past would be much more difficult to achieve: a friend or family member of the detainee must be informed of the detention as soon as is reasonably possible; and a notice in the Government Gazette identifying the detainee, place of detention and the emergency measure under which detention is made must be published within five days of the detention. Access to legal and medical practitioners is guaranteed. Most importantly, the courts' supervision of such detention is entrenched: detention is to be reviewed as soon as reasonably possible, but no later than 10 days after the date of detention. And unless it can be established that the detention is necessary to restore peace and order, the detainee must be released. If not released, the detainee may, after ten days have elapsed, apply for further review: and the same standard for continued detention applies. The detainee has the right to appear personally in court, to be represented by a legal practitioner and to argue against the detention. She must also have

access, at least two days prior to the review date, to the state's written reasons for continued detention. These written reasons must also be supplied to the court.[93]

To prevent the type of abuse perpetrated under South Africa's notorious 90 Day Detention Law of 1963, whereby on expiry of such period, detainees were released and simply re-detained,[94] FC s 37(7) provides that, 'if a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.'

Finally, FC s 37(8) regulates the treatment of non-South African detainees, detained 'in consequence of on international armed conflict', and guarantees to such persons rights correlative to South Africa's obligations under international humanitarian law. These obligations are primarily to be found in the Hague and the Geneva Conventions.[95] This provision may appear not to warrant much attention — simply underscoring as it does South Africa's international law commitments. However, some of the domestic protections afforded under FC s 37 are more extensive than those guaranteed under international law. This being the case, it is not clear why the exigencies of international armed conflict, whatever the circumstances, justify heightened protection for citizens over permanent or temporary residents, or even visitors.[96]

93 These protections are all contained in FC s 37(6).

94 See Ruth First *117 Days: An Account of Confinement and Interrogation Under the South African Ninety-Day Detention Law* (New Edition, 1989)(For a personal account of this type of abuse.)

95 See, for comparison, the protections provided in art 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3 (Ratified by South Africa on 21 November 1995.)

96 For a discussion of the differences between citizens and non-citizens as beneficiaries of fundamental rights, see Stu Woolman 'Application' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; Jonathan Klaaren 'Freedom of Movement & Residence' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 66; Jonathan Klaaren 'Citizenship' in Stuart Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 60.