STATES OF EMERGENCY

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ABSTRACT

NOODTOESTAND

Noodtoestand word deesdae as so alledaags en gemeenplasig beskou dat daar nie werklik sprake van diepgaande gesprekvoering en besinning oor die bestaan, inhoud en voortsetting daarvan is nie. Hierdie artikel beoog om 'n oorsig oor die afgelope vier jaar van noodtoestand in Suid-Afrika te gee. Aanvanklik in 1985 is daar slegs 'n gedeeltelike noodtoestand afgekondig wat later opgehef is. 'n Algemene noodtoestand is in Junie 1986 afgekondig; sedertdien is dit jaarliks in in 1987 en 1988 herafgekondig. Die beperkings op individuele vryheid, persvryheid en die normale regsgang is met elke verdere noodtoestand uitgebrei. Die gevolg hiervan is dat daar slegs by hoë uitsondering 'n beroep op die howe gedoen kan word om ondersoek na die geldigheid van noodtoestandmaatreëls en verbandhoudende owerheidsoptredes in te stel.

1. INTRODUCTION

The state of emergency is becoming an accepted fact of everyday life - discussion by legal academics and whites in general as to the merits and the continuation of the emergency measures as well as the acts of the executive in terms thereof nowadays only takes place by exception. The partial state of emergency (declared in 1985) was lifted early in 1986. A general state of emergency (applicable to the whole of South Africa) was however declared in June 1986. Due to the provisions of the Public Safety Act 3 of 1953 the validity of a state of emergency only extends for a year. Consequently the continuation of the emergency had to be proclaimed de novo in June 1987 and June 1988. Individual liberty, the freedom of the press and due process of law have been increasingly

curtailed (and to a large degree excluded) in the course of the successive emergencies.

In this review article a brief outline of the four states of emergency in South Africa from 1985 and the resulting limitations imposed on freedom will be given. In this regard reference will be made to content of the emergency regulations, related executive acts and the interpretation of the courts in the light of the South African Law Commission's proposed Bill of Rights.

2. INDIVIDUAL LIBERTY, FREEDOM OF THE PRESS AND DUE PROCESS

Individual liberty, freedom of the press and due process of law are basic human rights that form part and parcel of the South African legal heritage. The past few decades have seen an ever increasing encroachment on these freedoms. This curtailment has reached an apex with the promulgation and annual renewal of the state of emergency (its main characteristic being the continued erosion of these (and other) fundamental freedoms). In terms of the recommendations of the South African Law Commission (1989:476-485) these rights (amongst others) should be enacted in a Bill of Rights. The supreme court will be responsible for the upholding of this Bill and the protection of fundamental freedoms.

The state of emergency embodies a serious inroad on (and to a large extent the abrogation of) the following provisions of the envisaged Bill of Rights:

1. Article 4: Right to physical integrity.
2. Article 8: Freedom of expression and of information.
3. Article 12: Freedom of movement.
4. Article 16: Freedom of association.
5. Article 18: Freedom of political association.
6. Article 19: Freedom to gather and demonstrate peacefully and the right to petition.
7. Article 23: Right to personal freedom. This includes the prohibition on arbitrary arrest and detention. Arrest and detention may only take place in accordance with generally accepted (normal) procedures

as prescribed by law. Lawful arrest and detention may only follow on a reasonable presumption of a crime having been committed or to prevent a crime being committed.

8. Article 24: Various rights of detainees, inter alia the standards of detention, civilised treatment, furnishing of reasons for arrest and detention, the right to remain silent, to be brought before a court within 48 hours after arrest, to have the purported crime adjudicated upon by an impartial court, to legal representation, to receive visitors as well as the prohibition against torture, assault and inhuman and degrading treatment.
9. Article 25(b): Presumption of innocence.
10. Article 27: The right to institute a civil action against the executive and to the review of administrative acts.

The South African Law Commission acknowledges that the above-mentioned rights and freedoms (as well as other contained in its proposed Bill of Rights) may be curtailed having regard to considerations of state security, public order, public interest, the boni mores, public health, the administration of justice, conflict with the rights of others and the prevention of chaos and crime. Such curtailment is, however, permissible only to that extent and in such a manner as is generally acceptable in a democratic society (article 30).

Article 31 specifically provides for the unassailable power of the supreme court to adjudicate upon alleged encroachments on the rights and freedoms contained in the Bill of Rights as well as to invalidate legislation and executive acts incompatible therewith.

The Commission (1989:440) is of the opinion that the rights and freedoms contained in the Bill of Rights may be curtailed by legislation and related executive acts pertaining to state security. This, however, is subject to two explicit conditions:

1. The extraordinary machinery inherent in state security may only be utilised if and when the continued existence of the state as such is in question (1989:439), and
2. security legislation itself must be limited: "Order and rule are needed to maintain freedom, but vigorous restraints are needed to

contain rulers within the bounds of a constitutional order which protects human rights" (Carl J Friedrich as quoted in the 1989-report (440)).

A balance must be struck between human rights and state security. The Commission (1989:440) is of the view that the criterion of that which is acceptable in a democratic society should be used as the only yardstick to pronounce on the validity of security measures and administrative acts. This proposal is welcomed especially as the present situation pertaining to emergency measures strongly tends to exclude the above-mentioned basic human rights. However, in our view, the criterion of acceptability in a democratic society is too vague and may consequently be misinterpreted in favour of state absolutism. We would rather recommend the substitution thereof by a provision similar to that of the German Constitution (Grundgesetz). Article 1 (the Generalklausul) and 19 of the Grundgesetz prohibit the abrogation (temporary or permanent) of the essence (Wesensgehalt - article 19(2)) of any of the rights contained in the Constitution.

The above-mentioned basic human rights (individual rights and procedural rights) is embodied in South African law. There has, however, been a tendency to exclude the rules of natural justice and to modify procedural rules (eg the shifting of the onus) in favour of the state). The following two categories are instances of such encroachment:

1. Rules forming part of the ordinary law of the land that severely curtail basic human rights:

    a. Limitations on individual liberty and due process of law eg security legislation Internal Security Act 74 of 1982 that provides inter alia for indefinite detention (s 29)) and the Prevention of Illegal Squatting Act 52 of 1951 (see Olivier, Pienaar and Van der Walt, 1988:1-15).
    b. Press control measures eg the Newspaper and Imprint Registration Act 63 of 1971 and the Publications Act 42 of 1974 (see Du Plessis, 1986:288-375; Lane, 1986:1-264).

2. Extraordinary measures are the emergency regulations and martial law (see Venter, 1988:1-22) that on the one hand do not form part of the law of the land and on the other hand abrogates the rules thereof (even the existing security legislation).

These two categories are also contrary to the provisions of the proposed Bill of Rights, inter alia on account of the fact that the fundamental freedoms described above have in many instances been abrogated and that the review powers of the supreme court have been explicitly excluded.

3 STATES OF EMERGENCY 1985-1988

The states of emergency from 1985 to 1987 will be discussed in so far as they systematically encroached on individual liberty, due process and the freedom of the press. An overview of the contents of the 1988 emergency regulations will be given. Reference will also be made to the interpretation of the regulations by the courts and the effect thereof on the above-mentioned basic rights.

3.1 1985

A partial state of emergency was declared on 21 July 1985 (PR120 & PR121 of 1985-07-21 - Du Plessis & Olivier, 1987a:129; Lane, 1986:290-294). The emergency regulations applied only in specified magisterial districts. The security forces were empowered to arrest and detain people; the provisions of the **Criminal Procedure Act** 51 of 1977 and the normal due process rules were excluded. These measures abrogated the law of the land in respect of inter alia arrest and detention and were much more severe than the **Internal Security Act** 74 of 1982.

Two restrictions on the freedom of the press were introduced: the prohibition on

1. publication of information regarding detainees;
2. the filming, recording, publishing and broadcasting of material concerning public disturbances and the dissemination of photographs, drawings and sound recordings.

3.2 1986

A general state of emergency was declared on 12 June 1986 (PR109 of 1986-06-12). Initially the emergency regulations were similar to the 1985-regulations. In December 1986 severe media restrictions (PR224 of 1986-12-11) were introduced as a result of the authorities' concern about the role of the press in promoting unrest as well as in aggravating and prolonging the emergency. The proposals of the Media Council to act as watchdog were rejected by the Government. In January 1987 further restrictions on the press were promulgated (GN R101 of 1987-01-08).

The publication of comment on the aims, policy and strategy of banned organisations as well as of reports and advertisements promoting the public image of such organisations was prohibited.

3.3 1987

The most important changes to the emergency regulations (PR95, 96, 97, 98 of 1987-06-11) can be summarised as follows:

1. An improvement in the formulation of various regulations in order to close some of the loopholes identified by the courts.

2. The introduction of measures pertaining to schools and teachers' training colleges under the control of the Departement of Education and Training (PR98 of 1987-06-11).

3. Provision was made for promulgation of rules by the Minister of Justice for the treatment of detainees. GN1300 of 1987-06-11 was repealed on account of vociferous opposition by **inter alia** the South African Medical Society and substituted by PR106 of 1987-06-26. PR106 ostensibly made the normal **Prison Regulations** (GN R2080 of 1965-12-31) and the **Prisons Act** 8 of 1959 applicable to persons detained in terms of the emergency regulations; however a number of provisions in favour of trial-awaiting prisoners were explicitly excluded eg visits by relatives and the right to receive newspapers and food.

4. On 28 August 1987 the Minister of the Interior announced the proclamation of amending the media regulations (PR123 of 1987-08-28) in order to curtail the so-called alternative press. PR123 was nevertheless made applicable to the normal (established) as well as the alternative press. The Minister was empowered to warn and subsequently suspend periodic publications for a period of three months. The normal rules of **audi alteram partem** and the giving of notice to interested parties were specifically excluded.

5. PR123 was amended by PR7 of 1988-01-15 to further strengthen the hand of the Minister. The grounds on which the Minister could rely for the warning or banning order no longer needed to be specifically mentioned, and only the publisher needed to be informed of the Minister's envisaged action. The inherent competency of the Supreme Court to review the Minister's action was effectually excluded by the introduction of PR7.

During the validity of the 1987-emergency regulations two divergent lines in the attitude of the various divisions of the Supreme Court (as in 1986 - see Du Plessis & Olivier 1987b:201-204, 207) can be identified. The courts differed sharply on inter alia

1. whether the interpretation of the empowering provisions (eg for arrest and detention) should be **in favorem libertatis** or in favour of the Executive (**Release Mandela Campaign v State President** 1988 1 SA 201 (N); **United Democratic Front v State President** 1987 3 SA 296 (N); **Minister of Law and Order Omar** 1987 3 SA 859 (A));
2. whether the **onus** to prove the validity of the initial arrest and subsequent detention was on the detainee or the state (**Peters v Minister of Law and Order** 1987 4 SA 482 (NK); **Swart v Minister of Law and Order** 1987 4 SA 452 (K)).

3.4 1988

The third general emergency was declared on 10 June 1988 (PR96 of 1988-06-10). The emergency is regulated by a number of proclamations.

3.4.1 Security emergency regulations (PR97 of 1988-06-10)

A member of the security force may order persons to proceed to a place indicated by him or to desist from conduct if he deems it necessary for the maintenance of order (reg 2).

Regulation 3 provides for arrest without a warrant and initial detention for a period of 30 days by a member of a security force. The Minister of Law and Order may extend the detention for a period not exceeding the duration of the state of emergency. Neither the arresting official nor the Minister is compelled to consider the use of alternative measures prescribed by the law of the land. The Minister need not give reasons to nor hear any person when exercising his discretion to prolong the detention. Detainees may be interrogated by members of the security forces. No person (other than the Minister or officials) shall have access to a detainee without the Minister's consent nor be entitled to any official or any other information concerning him. Detainees may be released subject to conditions imposed by the Minister.

Threats of harm, hurt or loss are deemed to be criminal acts (reg 4). The power of entry, search and seizure without a warrant is given to the security forces (reg 5). Names and addresses must be furnished by request (reg 6).

The ambit of the emergency regulations have been extended by the introduction in 1988 of regulations 7, 8 and 9. Regulation 7 imposes restrictions on the activities or acts of organisations. The Minister is granted far-reaching powers to prohibit and control the activities of organisations identified by him. (Subsequently 17 organisations have been severely curtailed - GN1112 & 1113 of 1988-06-10.)

Regulation 8 contains similar provisions as to the activities and acts of natural persons. An amendment (PR170 of 1988-09-22) provides for the publication by the Minister in the Government Gazette of an order prohibiting a specified person to perform acts without the written permission of the Commissioner. Non-compliance with this order constitutes an offence. The effect of this amendment (previously a written notice had to be served personally) is that persons may be arrested and detained (for an unspecified period awaiting his removal to the area to which he has been restricted) immediately after publication

of the Minister's order without them having been informed about the prohibition or having the opportunity to desist from the specified conduct.

Regulation 9 empowers the Minister to issue an order prohibiting persons in general or persons belonging to a category of persons to carry on an activity or performing an act specified in the order.

Wide-ranging powers to issue orders are granted to the Commissioner of Police (reg 10 & 11) inter alia to prohibit gatherings and to impose conditions on the holding of a gathering (eg funerals).

All liability (civil and criminal) for activities committed by the security forces (which would otherwise have resulted in court proceedings) is specifically excluded by regulation 15.

3.4.2 Prison emergency regulations (PR98 of 1988-06-10)

The prison regulations are similar to those contained in GN1300 of 1987-06-27 (discussed above).

3.4.3 Media emergency regulations (PR99 of 1988-06-10)

Regulation 2 prohibits the presence of journalists and other people gathering news without the Commissioner's permission at the scene of any unrest, restricted gathering (eg a funeral) or security action. The publication of material on unrest situations, restricted gatherings, security actions, strikes or boycotts, informal structures (eg street committees) , speeches, statements or remarks of listed persons and detainees and of office-bearers of unlawful organisations, the circumstances and treatment of detainees as well as of the release of detainees is (reg 3(1)). Comments on and advertisements concerning unlawful organisations are once again prohibited (reg 3(2)). The Commissioner may in addition to the above-mentioned restrictions forbid publication of material detrimental to the safety of the public (reg 3(3)). The publication of material (as defined in regulation 3(1)) constitutes a criminal act (reg 3(6)). Regulation 4(1) prohibits the taking of

photographs, the production of television programmes and the making of sound recordings as well as the publication thereof.

Subversive statements may not be made, produced or published (reg 5). These include inter alia statements in which members of the public are incited or encouraged, or which is calculated to have the effect of inciting or encouraging members of the public to take part in unrest, to resist a member of the cabinet and officials performing their functions in terms of the emergency regulations or other security legislation, to take part in a boycott action or an act on civil disobedience or to oppose compulsory military service (reg 1).

The Minister may decide that certain periodicals may not be produced, imported or published (reg 6). Regulation 7 contains measures similar to the 1987 media regulation amendments (3.3 above).

The compulsion to register as news agencies (reg 11) was strongly opposed by the established press (Maggs, 1988:10). This was repealed by PR125 of 1988-07-28.

3.4.4 Educational institutions emergency regulations (PR100 of 1988-06-10)

The Director-General of Education and Training may issue orders in connection with presence of pupils, the content of courses and syllabi, the wearing, possession and displaying of clothing, stickers etc., the distribution of notices etc., and the movement or activities of pupils.

3.4.5 Judgements of the Appellate Division

A number of appeals against judgements of provincial and local divisions of the Supreme Court concerning the validity of the emergency regulations and related administrative acts were decided upon by the Appellate Division.

In Minister of Law and Order v Dempsey 1988 3 SA 19 (A) the court was of the opinion that the arresting official's subjective view as to the necessity of the arrest and detention may not be questioned.

The Appellate Division's judgement in **Ngqumba v Staatspresident, Damons NO v Staatspresident, Jooste v Staatspresident** 1988 4 SA 224 (A) effectively abrogated a number of individual and procedural rights of detainees:

1. The release of detainees may only be ordered by the Minister.
2. Neither the arresting official nor the Minister is compelled to consider whether a particular situation "can properly be dealt with under the ordinary law of the land" (254A-D, 256A-J). This implies that there is no obligation to consider the use of alternative measures such as those contained in the **Criminal Procedure Act** 51 of 1977 and the **Internal Security Act** 72 of 1982.
3. The provisions regarding arrest and other procedural matters as set out in the **Criminal Procedure Act** 51 of 1977 are only applicable to the extent that the emergency regulations explicitly refers to it.

In its interpretation of the media emergency regulations in **Staatspresident v United Democratic Front** 1988 4 SA 830 (A) the court renounced its inherent jurisdiction to proclaim on the validity of proclamations and regulations - even in cases of such subordinate legislation being vague and uncertain. The court was also of the opinion that the State President is empowered to issue proclamations and regulations contrary to existing legislation.

4 CONCLUSION

A comparison of the basic human rights pertaining to individual freedom, due process of law and the freedom of the press (as set out in the recommendations of the South African Law Commission) and the provisions of the various 1988 emergency regulations shows clearly that the majority of these rights have been abrogated and the remainder severely curtailed. Officials responsible for the arrest and detention in emergency situations as well as the Minister of Law and Order virtually have absolute powers; in terms of recent judgements of the Appellate Division their exercise of discretionary powers in this regard may only be investigated in cases where **mala fides** have been proved by the detainee concerned. The same applies as far as the control of the media by the security forces and the Minister of Home Affairs is concerned. Due process of law has also in

fact to a very large extent been excluded by the wording of the emergency regulations - the normal rules governing the arrest, detention, the bringing before a competent court within a specified period after arrest, the laying of charges and the presumption of innocence have in the case of actions in terms of the emergency regulations been suspended. Thus there is no statutory duty at all to charge a detainee (the emergency regulations provide for indefinite detention - i.e. for the duration of the emergency) and the inherent power of the court to pronounce on the validity of the arrest and detention is specifically excluded.

Due to the emergency having effectively been in operation for almost four years and the tendency of the courts to interpret the regulations in favour of the Executive and to limit their inherent powers of review, discussion by legal academics and the White population at large on the merits, contents and continuation of the emergency have become almost non-existent.

It is to be hoped that the discussion and the enactment of the proposed Bill of Rights will result in a serious reconsideration of the emergency measures. If the recommendations were to be enacted the courts would be compelled to express an opinion on the validity of the various measures and of administrative acts applying the yardstick of acceptability in a democratic society (South African Law Commission, 1989:440). This should hopefully result in judgments in favorem libertatis and the courts once again re-establishing their pivotal role as custos libertatis.

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