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# Constitution for All Seasons: Providing against Emergencies in a Post-Apartheid Constitution, A

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# A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution

by Stephen Ellmann*

## INTRODUCTION

Even after apartheid, South Africa will remain a complex society. It will have to reckon with the heritage of apartheid, in personal prejudice and institutional inequity. It will have to press forward on urgent tasks of economic development. It will need to meld together people of various racial and ethnic groups, worshipping in different religions and holding an array of political convictions. Given these realities, South Africa cannot escape the possibility of serious domestic conflict despite the achievement of majority rule. The government will need the ability to prevent the disagreements such differences will inevitably spawn from descending into sectional warfare and even revolution.

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

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Emergency powers are a particularly threatening source of tyrannical authority—and also a potentially essential weapon against it. The very power the state may need to preserve a benign social order from destruction is the power that it may abuse to produce a new oppression. The first part of this Article will outline certain factors that may determine how often a post-apartheid government will need emergency powers and other features that may affect the magnitude of the risk that these powers will be misused as well as used. These factors are not matters on which easy predictions are possible, but I will suggest that it is safe to assume both that South Africa will need emergency powers and that it might abuse them.

In light of this prospect, South Africans will need to shape a constitutional response to the problem of emergency rule, a response that should both allow and restrain emergency authority. In the second part of this Article I will examine two broad strategies for accomplishing this end. The first, paradoxically, is to say nothing about emergency rule in the constitution; the second is to make explicit provision for it. Each of these options, I will argue, is capable of being an effective response to the dilemma of emergency rule, and each is subject to serious pitfalls. The purpose of this paper is, of course, to assist those who will choose among these strategies rather than to prescribe a choice. I will suggest, however, that a carefully drafted, explicit constitutional provision is the most promising option for South Africa, and I will outline the sorts of textual provisions that could be employed to circumscribe this ominous power as effectively as possible.

## I. Considerations Bearing on the Treatment of Emergency Powers

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

A. Will a State of Emergency Be the Norm?

Every government needs to wield some emergency powers on some occasions. The proper constitutional treatment of such powers, however, depends on whether the occasions for their exercise are expected to be common or rare. If a country is expected to face such persistent and profound problems that emergency will be the normal state of affairs, then perhaps the constitution should not raise serious obstacles to the exercise of special governmental power. But the more South Africa faces endemic emergencies, and the more its constitution is written to accommodate the regular exercise of emergency power, the less this constitution will be able to secure the rights of individual South Africans against the state. If, on the other hand, South Africa will not frequently need to resort to emergency powers, then the standards for the use of such authority can be made more stringent.

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

First, it is useful to remember that "[a] house divided against itself cannot stand."[1] The nature of the transition to the new South Africa will undoubtedly affect the chances for harmony in the society to come. The more fully the new government can command the support of the entire South African population, and the more readily the various parts of that population subscribe to the venture of building a new nation, the less often the state will need emergency powers.

Conversely, the more divided the new South African society is, the greater the possible need for emergency powers will be. An example from another country may illustrate this point, as well as the risk of abuse that this rationale for emergency powers engenders. After the overthrow of Somoza, Nicaragua established special courts to handle the cases against his supporters. The Inter-American Commission on Human Rights considered these courts a violation of "the right to a

1. 3 COMPLETE WORKS OF ABRAHAM LINCOLN 2 (J. Nicolay & J. Hay eds. 1894).

competent, independent and impartial tribunal,"[2] a right secured by Article 8 of the American Convention on Human Rights.[3] Nicaragua, however, contended that its establishment of these courts "somewhat dampened the rage of the masses and reduced the danger of a confrontation between the thousands of family members of the heroes and martyrs that died in the struggle, who wanted to take the law into their own hands, and the recently constituted authorities."[4] Nicaragua's defense of its policies may or may not have been persuasive, but the general proposition is inescapable: a country experiencing, or approaching, violent civil strife is likely to need emergency powers to deal with this threat.

Second, the nature of the social policies the new government envisions will affect the ease of their implementation. The more profound and abrupt the social transformation that the government plans, the more likely it will be that normal governmental processes will not suffice to bring it about. John Hatchard quotes the argument of a former Zimbabwean Minister of Home Affairs, who said in 1983 that "[s]ocial change does not move in a polite minuet; revolution is not a tea party with silver teapots and waiters. To meet emergent economic threats we need emergency powers to deal with economic sabotage that always threatens societies in the midst of change."[5]

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

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2. Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Republic of Nicaragua*, OAS/ser. L/V/II. 53, doc. 25 (1981), *quoted in* T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 201 (1982).

3. American Convention on Human Rights, *done* Nov. 22, 1969, art. 8(1), 1144 U.N.T.S. 123, 147.

4. *Observations and Comments of the Government of Nicaragua on the Report of the Inter-American Commission on Human Rights on the Status of Human Rights in that Country*, OEA/ser. P, AG/doc. 1369/81 (1981), *quoted in* T. BUERGENTHAL, R. NORRIS & D. SHELTON, *supra* note 2, at 203 (original in Spanish).

5. Hatchard, *The Implementation of Safeguards on the Use of Emergency Powers: A Zimbabwean Perspective*, 9 OXFORD J. LEGAL STUD. 116, 117 (1989) (citing *Parliamentary Debates*, July 14, 1983).

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

B. Will the Risk of Abuse of Emergency Powers Be Substantial?

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

That emergency powers are prone to abuse is, unfortunately, all too clear from the world's experience with them. As Clinton Rossiter observes, "[t]he most obvious danger of constitutional dictatorship . . . is the unpleasant possibility that such dictatorship will abandon its qualifying adjective and become permanent and unconstitutional. Too often in a struggling constitutional state have the institutions of emergency power served as efficient weapons for a coup d'état."[6] In a similar vein, the International Commission of Jurists comments that there is a "disturbing tendency" for states of emergency "to become perpetual."[7] Syria, to take just one example, "has been under a continuous series of emergencies since the end of Ottoman rule in 1920."[8]

Emergency powers tempt reformers as well as reactionaries, populists as well as autocrats. In 1978 at least a fifth of all the world's

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6. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 294 (1963).

7. INTERNATIONAL COMM'N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 415 (1983).

8. *Id.*

countries were in states of emergency.[9] The attraction of emergency powers, moreover, is hardly confined to new nations. "The crisis history of the modern democracies demonstrates," Rossiter writes, "that executives will usually ask for more power than they really need . . . ."[10] In the United States, President Truman declared a national emergency in 1950 as the Korean War approached. As Jules Lobel comments, "[t]hat national emergency remained in effect for almost twenty-five years."[11] Midway through that period, and long after the end of the Korean War, President Kennedy used Truman's emergency proclamation "to provide the legal predicate for the embargo against Cuba."[12] Much more recently, according to a newspaper report:

> Lieutenant Colonel Oliver North and the Federal Emergency Management Agency . . . drafted a contingency plan providing for the suspension of the Constitution, the imposition of martial law, and the appointment of military commanders to head state and local governments and to detain dissidents and Central American refugees in the event of a national crisis.[13]

Given the widespread use of emergency provisions, it should not surprise us that South Africa's current four-year state of emergency is by no means unique among the nations of southern Africa. The governor of what was then Southern Rhodesia declared a state of emergency before Ian Smith's unilateral declaration of independence in 1965; Robert Mugabe's government continued the state of emergency when it came to power in Zimbabwe in 1980.[14] That country's declaration of emergency "has been renewed over 40 times since 1965."[15] The

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9. *See id.* at 413.

10. C. ROSSITER, *supra* note 6, at 298-99.

11. Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989).

12. *Id.* Lobel also notes that a declaration of emergency by Franklin D. Roosevelt in 1933, directed at the banking crisis of the Depression, remained in force until the mid-1970s. *Id.* at 1401 n.75.

13. Lobel, *supra* note 11, at 1385 (citing *Reagan Advisers Ran Secret Government*, Miami Herald, July 5, 1987, at 1, col. 1). North denied this charge. *Id.* at 1385 n.2.

14. Hatchard, *supra* note 5, at 117. Africa Watch, a human rights monitoring group, charged last year that Zimbabwe was employing its emergency powers against people whose only offense appeared to be their peaceful opposition to the government. *See* Africa Watch, *News from Africa Watch*, Oct. 25, 1989.

15. Hatchard, *supra* note 5, at 118. Hatchard also reports that "in Zambia a constitutional amendment in 1969 made the previously mandatory six-month renewal

Emergency Powers Act that Zimbabwe now applies was first passed in 1960 to combat African nationalism,[16] and grants the president powers quite similar to those currently conferred on South Africa's state president by the Public Safety Act.[17]

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

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of the state of emergency by the legislature unnecessary. As a result, the state of emergency now remains in force for an indefinite period and is not subject to scrutiny by any other body." *Id.* at 126 (footnote omitted).

16. *Id.* at 118.

17. Section 3(1)(a) of the Public Safety Act 3 of 1953 empowers South Africa's state president to

> make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency.

According to Hatchard, *supra* note 5, at 118-19,

> Section 3(1) of . . . [Zimbabwe's Emergency Powers] Act provides that the President may make regulations as appear to him necessary or expedient for all or any of the following:
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> > (a) the public safety; (b) the maintenance of public order; (c) the maintenance of any essential service; (d) the preservation of the peace; (e) making adequate provisions for dealing with any circumstances which (i) have arisen, or, in his opinion are likely to arise, whether such circumstances relate to the maintenance of any essential or other service or otherwise; and (ii) in his opinion will interfere with the peace, order and good government; (f) making adequate provision for terminating the state of emergency; in Zimbabwe or that part of Zimbabwe as the case may be.

In addition, the structure of the government can help constrain the danger of abuse. Attention to the structure of government was a central focus of those who shaped the United States Constitution. As James Madison, one of the framers, wrote in 1787, "[i]t is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm."[18] The United States Constitution reflects this insight in an array of structural features meant to make it difficult even for unenlightened rulers to oppress their people.

The structure of the government will affect the use of emergency powers both directly and indirectly. The direct effects will be those resulting from whatever procedures may govern the establishment and continuation of states of emergency. The greater the role of the legislature and the judiciary in decisionmaking about emergencies, the better the chances of preventing abuse by the executive power.[19]

There will also be a more indirect impact of governmental structure. Whatever the particular rules governing the use of emergency powers may be, the ability of the ruling party to abuse those powers will depend partly on the extent of that party's unity and preeminence over other voices in the system. The more vigorous the parliamentary opposition parties are, and the less rigidly the majority party controls the votes of its members, the harder it may be for the government to muster the votes necessary to support an abuse of emergency powers. The more assiduously and emphatically courts identify and decry human rights violations, the more likely it is that public and parliamentary opposition to government excesses will also be sharp. However, more effective checks on the governing party's ability to act improperly will also make it more difficult for that party to act properly—or indeed at all. Again, the design of a system that secures enough, but not too much, power for government to govern will be a delicate task for those who write the new South African constitution.

This paper will not attempt to make detailed predictions, but will assume, I hope not too optimistically, that a post-apartheid South Africa will not need to resort to emergency powers as a matter of course. It will also assume, I think realistically, that South Africa—like most, if

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18. THE FEDERALIST No. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

19. I assume the greatest danger of abuse in emergencies lies in the expansion of executive authority. A well-designed system of "checks and balances," however, ideally would limit the authority of each branch of government.

not all, nations—will face a serious risk that any emergency powers it grants will be abused. With these perspectives, we can now consider what emergency provisions, if any, a future South African constitution should include.

## II. Constitutional Stategies for Regulating Emergency Powers

I have called this section "constitutional strategies" rather than "constitutional provisions" because one of the two principal strategies is to make no explicit provision for emergency powers at all. The other strategy, of course, is to address the issue of emergency provisions explicitly, in greater or lesser detail. Each of these methods can contribute to the effective supervision of emergency powers, but neither is guaranteed to be successful. The choice between them must turn on an analysis not only of their intrinsic properties but also of the political environment in which either of these strategies is to be deployed.

The strategy of textual silence can help to foster a constitutional climate in which emergency powers are effectively, though tacitly, disfavored. Unfortunately, it is difficult to be confident that textual silence would have this effect in South Africa. Explicit constitutional treatment of emergency powers can also help to cabin emergency powers, if the constitutional text is written to circumscribe rather than to encourage the use of such authority. This paper will present in some detail the sorts of explicit textual safeguards that could provide the needed limits. The central danger of the strategy of textual explicitness, however, is that those who adopt the new constitution may choose not to adopt such safeguards. In that light, I will argue that textual explicitness can be the most effective response to emergency powers in South Africa—but that its value will be jeopardized unless there is a firm political commitment to the enactment of a rigorous text.

### A. Textual Silence

Silence may not seem like much of a solution to the dilemma posed by the necessity and danger of emergency powers. In South Africa today, the constitution's general lack of entrenched human rights limits on governmental power is demonstrably no solution at all to the need for restraining governmental abuse. We are, however, considering the treatment of emergency powers in the context of a future constitution that—unlike the current South African constitution—does establish a range of protected human rights. In this setting, textual silence on the question of emergency powers may speak quite articulately.

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

Let me begin this examination of the United States Constitution by acknowledging that this document is not entirely silent on the issue of emergency powers. Nevertheless, the list of provisions that explicitly authorize emergency deviation from normally guaranteed rights is very short. One section authorizes the suspension of the writ of habeas corpus, "when in Cases of Rebellion or Invasion the public Safety may require it."[20] The third amendment prohibits the quartering of soldiers in any house without the owner's consent during peacetime, but allows it in time of war.[21] Finally, the fifth amendment waives the requirement of a presentment or indictment for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[22]

To be sure, those who wrote the United States Constitution realized that there might be emergencies to face. Congress can declare war,[23] and the president is the commander-in-chief of the armed forces.[24] The militia may be called out to enforce the laws, subdue rebellion, or repel invasion.[25] On application from a state, the United States is bound to

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20. U.S. CONST. art. I, § 9, cl. 2.

21. U.S. CONST. amend. III.

22. U.S. CONST. amend. V. Certain special provisions growing out of the Civil War may also be seen as explicit deviations. *See* U.S. CONST. amend. XIV, §§ 3 & 4.

23. U.S. CONST. art. I, § 8, cl. 11.

24. U.S. CONST. art. II, § 2.

25. U.S. CONST. art. I, § 8, cl. 15. This provision is noted in Lobel, *supra* note 11, at 1387.

protect that state from domestic violence.[26] In addition, the president wields the "executive Power"[27] and "shall take Care that the Laws be faithfully executed."[28] Much might be and has been inferred from these and related grants of power. However, no provisions other than those cited in the previous paragraph specifically permit emergency abrogation of Americans' normally available rights, and no provisions expressly authorize the imposition of martial law or the declaration of a state of emergency. In contrast, the language of the United States Bill of Rights securing individual liberties is, in general, notably unqualified.

Despite the relative silence of the United States Constitution, government officials can and do exercise emergency powers. Just before this conference began, for example, state and local officials responded to the effects of hurricane Hugo with such steps as a six p.m. to seven a.m. curfew and an order blocking citizens from returning to their homes until rescue work was over.[29]

Emergency powers have also been used in more controversial ways. Local governments coping with urban riots in the 1960s "not infrequent[ly]" imposed curfews or other emergency measures in response.[30] The mayor of Milwaukee, Wisconsin confined all city residents except "doctors, nurses and others performing essential services" to their homes for twenty-six hours, with two brief pauses to permit food shopping.[31] Riot curfews were "generally upheld" by the courts.[32] The mayor of Philadelphia proclaimed a state of emergency pursuant to a local ordinance after the assassination of Martin Luther King, Jr., and banned almost all types of outdoor gatherings of twelve or more persons. The United States Supreme Court found that an appeal challenging arrests under this state of emergency did not present a substantial federal question.[33] In 1955, a labor dispute in Indiana became so violent

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26. U.S. CONST. art. IV, § 4.

27. U.S. CONST. art. II, § 1.

28. U.S. CONST. art. II, § 3.

29. *See* Hevesi, *Storm, Losing Force, Does Wide Damage*, N.Y. Times, Sept. 23, 1989, at 29, col. 5 (continuing a story begun on page 1, column 6, under the title *Hurricane Lashes Carolinas, Leaving Wide Devastation*); Applebome, *For Storm Victims, a Day of Slow Agony After a Day of Fear*, N.Y. Times, Sept. 23, 1989, at 29, cols. 2-4.

30. Comment, *The Riot Curfew*, 57 CALIF. L. REV. 450, 461 (1969).

31. *Id.* at 464.

32. Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1164 n.7 (1984).

33. Stotland v. Pennsylvania, 398 U.S. 916 (1970) (dismissing appeal for want of a substantial federal question).

that martial law was imposed.[34] Perhaps most notoriously, during World War II military authorities excluded from the Pacific Coast area all people of Japanese descent, including American citizens, and confined many in internment camps. The constitutionality of this extraordinary action was upheld by the United States Supreme Court.[35]

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

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

This constitutional silence makes the existence of emergency powers and the occasions for their exercise matters of inference and debate.[36]

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34. Comment, *The Riot Curfew*, *supra* note 30, at 454.

35. Korematsu v. United States, 323 U.S. 214 (1944). *See generally* 50 U.S.C.A. §§ 1989a(a), 1989b to 1989b-8 (Supp. 1989) (apologizing for the World War II treatment of people of Japanese ancestry and authorizing payments in restitution to the victims).

36. Three possible positions in this debate could impose much more radical limits on emergency powers than have in fact evolved in the United States. First, it could be argued that the framers of the Constitution intended to make emergency action illegal, not in order to prevent government officials from ever taking such steps, but in order to impress on them the seriousness of their decisions. A responsible government official, on this view, must decide when his or her duty requires a violation of the law, and when a violation is called for the official must—in Thomas Jefferson's words—"throw himself on the justice of his country and the rectitude of his motives." Letter from T. Jefferson to J. Colvin (Sept. 20, 1810), in 11 THE WORKS OF THOMAS JEFFERSON 146, 149 (P. Ford ed. 1905), *discussed in* Lobel, *supra* note 11, at 1392-97. Second, it might be claimed that the normal powers conferred on the government are sufficient to meet even its emergency needs, and therefore that no additional powers are needed. *See* Lobel, *supra* note 11, at 1387 n.13. Third, it might be contended that if the normal powers should ever prove insufficient, the only remedy would be to amend the Constitution. In effect, each of these arguments would mean that the Constitution's failure to authorize emergency powers is, in context, not silence but prohibition.

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

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

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

In fact, both Congress and the courts in the United States have on occasion sought to limit the boundaries of executive emergency powers—although the record of both legislative and judicial intervention in this sphere is a mixed one. Congress enacted several pieces of legislation in the 1970s, including the War Powers Resolution of 1973,[37] in an attempt to cut back on the previous decades' expansion of executive emergency powers.[38] These efforts have been attacked as a dismal failure,[39] but Congress may be able to block particular executive

37. This resolution is codified at 50 U.S.C. §§ 1541-1548 (1982).

38. *See* Lobel, *supra* note 11, at 1412-18.

39. *Id.* at 1414.

ventures even if it does not divest the executive of general discretion. Individual members of Congress also can help catalyze public concern even when they cannot prevail in the legislative process.

The courts have also contributed to the limitation of emergency power. To say this is not to deny that the courts have sometimes shied away from controversies that threatened to bring the judiciary into collision with the political branches of the government.[40] Indeed, emergencies, by their nature, are likely to generate forces so intense that courts (and even legislators) may find it politic to avoid the issues. It is therefore no surprise that some judgments have endorsed extremely broad deference to executive emergency decisions.[41]

Despite such constraints, the United States Supreme Court has recently declared that "[w]e can readily grant that a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive."[42] It has also held that even when military powers must be used, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[43] Although the same decision properly recognizes "a permitted range of honest judgment as to the measures to be taken,"[44] this discretion is not unlimited. The U.S. Supreme Court has repeatedly curtailed emergency bypassing of the courts.[45] During

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40. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (giving effect to a congressional statute divesting the Court of jurisdiction to hear a constitutional challenge to post-Civil War Reconstruction legislation). More recently, "There were numerous efforts to obtain some answers to the constitutional questions during [and posed by] the Vietnam War. Most courts held the issue to present a nonjusticiable political question." G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 427 (1986).

41. *See* Sterling v. Constantin, 287 U.S. 378, 399 (1932) (describing the executive as vested with "conclusive" discretion to decide whether military force is required to enforce the law); Moyer v. Peabody, 212 U.S. 78, 85 (1909) (Holmes, J.) ("When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."); Luther v. Borden, 48 U.S. (7 How.) 1, 42-45 (1849) (United States Constitution and laws confer on president the exclusive authority to determine, on request from a state, whether to call out the militia to suppress insurrection).

42. Scheuer v. Rhodes, 416 U.S. 232, 250 (1974).

43. *Sterling*, 287 U.S. at 401.

44. *Id.* at 399-400.

45. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Sterling*, 287 U.S. at 401-04; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). *But cf.* Dames & Moore v.

the Korean War, the Court went so far as to invalidate President Truman's seizure of most of the nation's steel plants, despite the president's contention that the seizure was necessary to forestall a strike that would directly jeopardize the war effort.[46]

More broadly, the courts may contribute to a climate of restraint not so much through their relatively infrequent decisions on grand issues of executive emergency power as through their day-to-day work on the articulation of the balance of individual rights against the needs of the state.[47] This task has long been one of the staples of courts' work. The United States Constitution guarantees a right of free speech, for example, and no word in the text permits this right to be taken away.[48] It has fallen primarily to the courts to decide when speech poses such a danger to the nation that it can constitutionally be suppressed. The courts' record in answering this question has not always been an admirable one. Over the years, however, the courts have wrestled with the question, first evolving the "clear and present danger" test and, more recently, the stringent "incitement" test to help specify those circumstances under which governmental necessity can justify controlling political speech.[49] In making these decisions, and a host of others, the courts have given force to the claim that constitutional rights and national security are compatible. The more this claim becomes part of the bedrock of political belief, the less room there is for abuse of executive power—and the silence of the text provides the space for this principle to gather force.

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

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Regan, 453 U.S. 654 (1981) (upholding the constitutionality of Presidential "suspension" of pending civil claims against Iran as part of the international settlement of the hostage crisis).

46. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the Steel Seizure Case). *See also* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852).

47. Vincent Blasi has emphasized the courts' role in fostering a liberal popular culture during normal times that could help to withstand the intolerant pressures of "pathological" periods. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). Courts may also be able to stem the effects of such pathologies with seemingly modest, even technical, decisions that buy time for the apparent demands of the moment to be more calmly reassessed.

48. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

49. Two stages of this evolution are reflected in Abrams v. United States, 250 U.S. 616, 627-31 (1919) (Holmes, J., dissenting), and Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

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

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

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

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

Second, a number of important international agreements that protect human rights incorporate explicit provisions for states of emergency.[50] To omit a textual treatment of emergency powers when such prominent models exist, and when so many other matters will no doubt be receiving explicit textual discussion, would be odd and even perilous. In South Africa textual silence might not become part of a slow accretion

50. *See infra* note 52.

of constitutional tradition limiting emergency powers but instead could come to be seen as a tacit acceptance of largely unlimited extraordinary authority.

To be sure, the framers of the United States Constitution also wrote with the memory of revolution fresh in their minds. Those in power in the early years saw threats that tempted them to limit citizens' liberties.[51] These early events could have become the seeds of a radically different understanding of the balance of governmental power and individual rights in the words of our constitution. I do not suggest, therefore, that the fact that emergency powers cannot be ignored in the deliberations over a new South African constitution compels their explicit treatment in that document. I do suggest, however, that the strategy of textual silence in South Africa may well be a gamble against the odds.

### B. Textual Explicitness

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

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

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51. Lawrence M. Friedman notes that "[t]he Sedition Law of 1798, passed by a nervous, partisan federal government, showed that historical fears [of government overreaching through broad definition of crimes against the state] were not groundless." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 257 (1973).

an even weaker safeguard of South Africans' rights than textual silence might be.

### 1. The Elements of an Effective Textual Limitation on Emergency Powers

In identifying the constitutional language that might regulate emergency authority, we can draw on a range of models, for if textual explicitness is a risky strategy, it is nonetheless a strategy in wide use. A number of international human rights instruments,[52] as well as many nations' constitutions,[53] make explicit provision for emergency powers.[54] Some commentators also support this strategy.[55] One early endorsement came from Machiavelli:

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52. *See* American Convention on Human Rights, *supra* note 3, art. 27, at 152; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 4, 999 U.N.T.S. 171, 6 I.L.M. 368, 369-70; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, 232 & 234. *See also* Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR (Resolutions, Part I) at 71, art. 29(2), U.N. Doc. A/810 (1948). Hatchard points out that the African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 [hereinafter Banjul Charter], does not have a derogation provision. Hatchard, *supra* note 5, at 116 n.1. Haysom notes, however, that this Charter "does make provision for derogation or limitation of specific rights by reference to considerations of national security or other factors." Haysom, *States of Emergency in a Post-Apartheid South Africa*, *supra* at 143.

53. For a survey of such provisions, see United Nations Economic and Social Council Comm'n on Human Rights, *Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN.4/826, at 257-71 (1962).

54. An alternative technique for limiting rights is to include restrictions in the very provisions declaring the rights. The Bophuthatswana Declaration of Fundamental Rights makes extensive use of this technique. *See, e.g.*, Declaration of Fundamental Rights, arts. 13-16, *reprinted in* SOUTH AFRICAN LAW COMMISSION, WORKING PAPER 25, PROJECT 58, GROUP AND HUMAN RIGHTS 241-42 (1989) [hereinafter SOUTH AFRICAN LAW COMMISSION]. The Bill of Fundamental Rights and Objectives proclaimed for Namibia in Proclamation R. 101 of 1985 also uses this technique, in articles 5-10, *reprinted in id.* at 224-26. The European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 52, arts. 6, 8, 9, 10 & 11, at 228, 230 & 232, does so as well, as does the Banjul Charter, *supra* note 52, arts. 8, 11, 12(2) & 14, at 60-61. In this paper I will not focus on this method of restricting rights, other than to say that it can generate problems similar to those presented by separate provisions for derogation from rights.

55. *See* INTERNATIONAL COMM'N OF JURISTS, *supra* note 7, at 432. Rossiter believes that "all uses of emergency powers and all readjustments in the organization of the

> Now in a well-ordered republic it should never be necessary to resort to extra-constitutional measures; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes. Thus no republic will ever be perfect if she has not by law provided for everything, having a remedy for every emergency, and fixed rules for applying it.[56]

The South African Law Commission takes such a course. It recommends the following in Article 30 of its Bill of Rights:

> The rights granted in this Bill may by legislation be limited to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others or for the prevention of disorder and crime, but only in such measure and in such a manner as is acceptable in a democratic society.[57]

The Law Commission's proposal may very well be meant to provide genuine restrictions on the state's power to abridge the rights guaranteed elsewhere in the Bill of Rights. It is far from clear, however, that it would have this effect in practice. Article 30 permits the restriction of rights for a very wide range of reasons. Indeed, it would seem that any legitimate purpose of legislation might also be a legitimate basis for interfering with constitutional rights, for all such purposes would surely be embraced in "the public interest" to which this article refers. Moreover, although courts *could* actively enforce the requirement that the limiting of rights not exceed the measure and manner "acceptable in a democratic society," this standard is neither clear nor necessarily strict. It seems quite possible that the actual result of this provision

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government should be effected in pursuit of constitutional or legal requirements," C. ROSSITER, *supra* note 6, at 300, but he does not encourage "too much provision for constitutional dictatorship." *Id.* at 301.

56. 1 N. MACHIAVELLI, DISCOURSES, in N. MACHIAVELLI, THE PRINCE AND THE DISCOURSES 203 (1950).

57. SOUTH AFRICAN LAW COMMISSION, *supra* note 54, at 479. The "restriction of rights and freedoms" section (section 14) of the Bill of Rights drafted by the Natal/KwaZulu Indaba would permit even wider interferences with constitutional rights. *See id.* at 252.

would be to do precisely what textual silence can avoid doing—to make the invasion of rights for any number of reasons seem normal.

If this undercutting of constitutional guarantees is to be avoided, the exception provision must be drafted much more restrictively. I believe that those who draft the constitution's emergency clauses will need to look at three sorts of restrictions on the power to derogate from rights: rules specifying the procedures to be followed by the executive and legislative branches in wielding emergency authority; substantive limits on the extent of the emergency powers available to the government; and provisions for judicial review to enforce some or all of the foregoing requirements. I suggest consideration of the following elements, but there are surely others that will also be worth including.[58]

a. Procedures for Executive and Legislative Emergency Action

(i) *A "sunset" provision specifying that any existing proclamation of a state of emergency, and any existing legislation providing for emergency powers to abridge normal rights, lose all effect with the adoption of the new constitution.* The result of this sunset rule would be that the leaders of the new South Africa would have to apply their own minds freshly to the question of what emergency powers they would need.

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

(iii) *A requirement that any declaration of a state of emergency lapse unless it is specifically approved by the legislature within a stated short period (such as*

58. Nicholas Haysom offers a valuable, and somewhat different, set of safeguards in Haysom, *States of Emergency in a Post-Apartheid South Africa*, *supra* at 150-59.

*fourteen days) after its proclamation; a similar requirement for legislative approval of any emergency regulations adopted by the executive.* Conditioning the use of emergency powers on legislative approval will press the legislature to give direct consideration to their use. In contrast, a provision which allowed the executive to proceed so long as the legislature did not actively *disapprove* would shift the burden of inertia so as to favor executive power.[59]

The importance of legislative involvement in the decision to use emergency powers also counsels in favor of a requirement that the legislature be called into session without delay if an emergency is declared while it is in recess, and perhaps for a requirement that the legislature remain continuously in session for the duration of any emergency.[60] Dissolving the legislature during an emergency should be prohibited unless a new legislature is to be democratically elected without delay.[61] Similarly, altering the structure of the judicial branch through emergency power should not be permitted.[62]

(iv) *A requirement that legislative approval of the use of emergency powers be by super-majority vote.* Invasion of rights is a serious matter. If the government cannot muster a super-majority (such as a two-thirds vote), perhaps that indicates that the necessity for such interference with constitutional rights is not clear enough to the population at large to justify going forward.[63]

(v) *A requirement that any declaration of a state of emergency or emergency regulations lapse after a limited period of time (perhaps six months), subject to renewal by the executive and re-approval by the legislature.*[64]

(vi) *A further "sunset" provision for new emergency legislation, such that this legislation would have to be reconsidered and re-enacted on a periodic basis.* Both (v) and (vi) are meant, like certain of the other procedural

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59. John Hatchard urges requirements of legislative approval. Hatchard, *supra* note 5, at 125-28.

60. *See* C. ROSSITER, *supra* note 6, at 302.

61. The International Commission of Jurists comments that "[t]here is no convincing evidence that the existence of an elected legislature is incompatible with a legitimate state of emergency." INTERNATIONAL COMM'N OF JURISTS, *supra* note 7, at 438. If suspension of the legislature *is* warranted, the same source urges restoration "with the briefest possible delay under conditions which ensure that it is freely chosen and representative of the entire nation." *Id.*

62. *Id.* at 459.

63. The International Commission of Jurists notes that "enhanced majority" vote is required in some nations. *Id.* at 433.

64. *See* Hatchard, *supra* note 5, at 129.

requirements, to try to generate periodic executive and legislative reassessment of the case for emergency action.

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

b. Substantive Limits on the Extent of Emergency Powers

(i) *Permitting invasion of rights only "in time of war or other public emergency threatening the life of the nation."*[65] The effect of this limitation should be both to restrict the occasions for the invasion of constitutional rights and to emphasize to rulers and citizens alike that such invasions are the exception and not the rule. Admittedly, even this limitation may be subjected to loose interpretation, and some deference to those authorities charged with identifying and responding to such dangers is entirely appropriate.

Such a provision does seem to capture, however, the important distinction between situations that threaten the nation's existence and other occasions, such as natural disasters, that constitute emergencies of a lesser order. The effect of making this distinction should not be to preclude all abridgement of citizens' rights in these lesser emergencies. Rather, the effect of this restriction would be to empower the courts to assess the legitimacy of these other abridgements within the general body of doctrine that governs the rights themselves. "Normal" restrictions would be assessed in light of normal doctrine; only emergencies affecting the life of the nation would justify more substantial invasions of rights.[66]

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65. This language is quoted from the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 52, art. 15(1), at 232.

66. I would also urge that courts be empowered to review the question of whether the circumstances facing the country constitute a threat to the life of the nation. An alternative would be to make the executive proclamation of a state of emergency, confirmed by the legislature, conclusive—but this course is open to abuse. For further discussion of judicial review, see *infra* notes 82-86 and accompanying text.

(ii) *Permitting invasion of rights only "to the extent strictly required by the exigencies of the situation."* This limitation is part of both the European Convention on Human Rights[67] and the International Covenant on Civil and Political Rights.[68] The standard is meant to be a genuine limitation, but would appropriately be applied with substantial deference to the judgment of the executive branch, as confirmed by the legislature, that particular steps were needed.[69]

A related principle would call on governments not only to show "the need for the measures in question, but also . . . [to demonstrate] the efforts made to ensure that the measures employed will not be abused."[70] A review of emergency measures after the end of the state of emergency might also be required to insure that injustices are found and corrected as far as possible.[71]

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

International human rights treaties that do permit some derogations are useful sources of suggestions for the list of rights that must never be violated. The International Covenant on Civil and Political Rights makes the following rights nonderogable: the right to life; the right to be free of torture or cruel, inhuman, or degrading treatment; the right not to be enslaved; the right not to be imprisoned for failure to fulfill a contractual obligation; the right not to be punished under retroactive

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67. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 52, art. 15(1), at 232.

68. International Covenant on Civil and Political Rights, *supra* note 52, art. 4(1), at 369-70.

69. Additional constraints on the scope of emergency powers might also be helpful. Hatchard recommends that the government be required to specify the type of emergency it faces, and that it be limited to those emergency powers appropriate to that emergency. He would also have the government limit any declaration of emergency to the part of the country actually affected. Hatchard, *supra* note 5, at 126-27. The International Commission of Jurists similarly recommends that "[v]arious types of emergencies should be distinguished." INTERNATIONAL COMM'N OF JURISTS, *supra* note 7, at 433.

70. INTERNATIONAL COMM'N OF JURISTS, *supra* note 7, at 438.

71. *Id.*

criminal laws; the right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion.[72] The International Covenant also forbids any derogation from rights that "involve[s] discrimination solely on the ground of race, colour, sex, language, religion or social origin."[73]

The American Convention on Human Rights is broadly similar to the International Covenant, but it also protects the following rights not made inviolable by the Covenant: certain rights of the family; the right to a name; the right of children to protection; the right to a nationality; and the right to participate in government.[74] The American Convention also secures "the judicial guarantees essential for the protection of such rights."[75]

The International Commission of Jurists offers extensive recommendations for making various due process rights nonderogable.[76] Due process protection is not made inviolable in the International Covenant or the American Convention.[77] South African experience, however, underlines the importance of securing this complex of rights.

In particular, even if detention without trial is to be permitted, it is essential to guarantee certain protections of detainees. The International Commission of Jurists identifies a number of important protections of detainees, such as the right to see counsel and family members.[78] It urges, in addition, that

> [t]he ordinary civilian judiciary should retain jurisdiction to review individual cases of detention in order to ensure that the stated grounds are within the purposes of the emergency legislation authorising detention orders, that proper procedures have been followed and to ensure that the conditions of detention comply with the law.[79]

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72. International Covenant on Civil and Political Rights, *supra* note 52, art. 4(2), at 370.

73. *Id.* art. 4(1), at 369-70. It might well be argued that derogations should be prohibited if they involve discrimination that is even *partly* motivated by such considerations.

74. American Convention on Human Rights, *supra* note 3, art. 27(2), at 683.

75. *Id.*

76. *See* INTERNATIONAL COMM'N OF JURISTS, *supra* note 7, at 424-29.

77. *See id.* at 426.

78. *Id.* at 429.

79. *Id.* at 435.

It maintains as well that "[t]he ordinary courts should retain jurisdiction over charges of abuse of power by security forces."[80]

Finally, to the extent that a new South African constitution confers enforceable social and economic rights, it will be necessary to consider whether, and to what extent, derogation from these rights should be permitted during an emergency. The International Covenant on Economic, Cultural and Social Rights "does not contain a provision permitting derogation in times of emergency,"[81] but I doubt that in an emergency in which many human freedoms are subject to abridgement there would not be valid cause for interference with at least some economic or social rights.

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

### c. Guaranteeing Judicial Review of the Justification for Invading Constitutional Rights

I would suggest that the courts be empowered and required to review whether an emergency exists and whether it justifies the particular steps the government has taken to deal with it.[82] It is undoubtedly difficult for courts to weigh the gravity of a threat to the nation or to determine whether particular steps need to be taken in a situation so

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80. *Id.* at 436.

81. *Id.* at 469 n.63.

82. This recommendation would entail the rejection of such doctrines as the "political question" doctrine in the United States, to the extent that they might otherwise operate to divest the courts of authority to review these issues. It would also prohibit the enforcement of statutory "ouster clauses" which would have the same effect. South Africans are all too familiar with the statutory ouster clause of that nation's current emergency legislation. Section 5B of the Public Safety Act 3 of 1953. *See State President v United Democratic Front* 1988 (4) SA 830 (A).

serious that the government has labeled it an emergency. Precisely for this reason, deference to the judgments of the other branches on these questions will be appropriate.

This deference, however, should not be complete. There are cases where elements of such review have been accomplished, not only in the United States[83] but also, notably, in South Africa. Quite recently, in *End Conscription Campaign and Another v Minister of Defence and Another*,[84] Justice Selikowitz determined that war did not "actually prevail" in the Western Cape and therefore martial law could not lawfully be imposed. Perhaps courts will overturn executive and legislative assessments of the existence of an emergency only when the government's predicate for acting is strikingly unjustified, but even the possibility of their intervention can be a valuable safeguard.[85]

Where the issue is not the existence of an emergency but the steps taken to address it, the courts' role can and should be more vigorous. Lower courts have sometimes performed this role with striking vigor even under current South African law, in reviewing and disapproving aspects of the emergency regulations issued by the present government.[86] In assessing the steps the government takes in an emergency in a future South Africa, the courts will be performing a function which a post-apartheid constitution is likely to call on them to perform in many contexts—the weighing of claims of constitutional or legal right against the needs of the state. Moreover, the courts will, at least in part, be applying specific constitutional provisions—such as the procedural and substantive limits discussed earlier in this paper—which are meant to

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83. *See supra* notes 42-46 and accompanying text.

84. 1989 (2) SA 180 (C).

85. Another safeguard which might rarely be enforced but still be of value is suggested by the International Covenant on Civil and Political Rights, which expressly declares that its provisions do not imply "any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein." International Covenant on Civil and Political Rights, *supra* note 52, art. 5(1), at 370. For a discussion of this provision, see Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 86-89 (L. Henkin ed. 1981). It may be rare that a court will be willing or able to discern that the government of its country is engaged in such an effort. Yet it does seem reasonable to include in domestic law a safeguard to which many nations have subscribed as a matter of international obligation.

86. *See, e.g., Metal and Allied Workers Union and Another v State President and Others* 1986 (4) SA 358 (D).

apply in this very context. We can fairly expect, therefore, that they will be capable of playing a valuable role in adjudicating such issues in emergencies as well.

### 2. The Political Task of Winning Support for Close Regulation of Emergency Power

In the course of the discussion of the desirable elements of a constitutional provision for derogation from rights, we travelled quite a distance from the brief, yet expansive, authorization that the South African Law Commission suggested. The emergency powers we would recognize in imposing such safeguards would be somewhat harder to use, and decidedly narrower in scope, than those potentially available under the Law Commission formulation. At the same time, the detailed hemming-in of emergency authority might well transmit the same sort of subliminal message on behalf of human rights that textual silence may convey in the United States. In fact, the derogations that would still be permitted might turn out to be narrower than those that American courts would read the American Constitution to allow. In short, an explicit provision along these lines could better protect human rights than would textual silence and yet still grant the government substantial emergency power.

Textual explicitness will provide little assurance of these happy results, however, unless the text adopted is a rigorous one. What South Africa's constitution says should reflect what South Africa's leaders and people want, and so the strength of the new constitution's emergency provisions will depend in the first instance on the extent to which the people of a future South Africa share an abhorrence of the excesses of emergency rule. For two reasons, however, even an initial commitment to the principle of restricting emergency powers may not ensure that the final text contains effective limits.

The first reason is that once the work of writing an exceptions clause is begun, the momentum of the process may widen whatever exceptions are at first envisaged. It is impossible, after all, to catalogue all of the circumstances in which special powers may be needed.[87] Because these situations cannot be stated with precision, the only alternative to omitting some is to adopt broad and inclusive language. For similar reasons, it may seem undesirable to hedge the adoption of

87. *See* C. ROSSITER, *supra* note 6, at 302.

emergency measures with demanding requirements for legislative or judicial approval, for the possibility that circumstances will arise in which action must be taken despite the absence of such approval cannot be absolutely denied. In short, a "logic of emergency" presses against the adoption of the limits that will be needed.

The second difficulty is that the elaborate provisions required for the most vigorous control of emergency powers may prove too extensive for inclusion in a constitution. As Chief Justice Marshall wrote long ago, a constitution should not "partake of the prolixity of a legal code."[88] The more the constitution conveys only the broad outlines of the powers it grants, however, the greater the risk that the text will fail to spell out essential limitations.[89]

At the least, these considerations suggest that the process of adopting an explicit text may itself be fraught with risk. If South Africa is to have an emergency powers provision whose language firmly confines the state's use of such authority, those committed to this goal will need to press their case strongly and clearly. This may be a demanding task, for both South Africa's legal heritage and its potential political divisions can be used to support arguments for relatively unfettered emergency powers. Nonetheless, this task may be a rewarding one, for, as Albie Sachs points out, the very process of forging a national consensus on such a provision could itself be an important step in fostering a climate of respect for human rights. The resulting climate may in the end be more important than any specific choices of constitutional words or silences. Moreover, this task may also be an unavoidable one, for the alternative to a strict emergency provision is all too likely not to be a restrictive textual silence but instead a loose and permissive textual authorization. If such an effort is undertaken, now and in the years to come, I would suggest that the chances of at least partial success are good enough to make the strategy of textual explicitness South Africa's best safeguard against the abuse of emergency power.

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88. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

89. Even if the text is incomplete, to be sure, the tenor of what *is* said can influence the interpretation of what is not explicit. In addition, an explicit, but incomplete, provision might be made more demanding through language declaring that additional, unstated limitations are implicit in the constitution's general approach to emergency powers. *Cf.* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

## Conclusion

Whether to seek rigorous textual safeguards or to opt for inference from a silent text is a decision South Africans will make. Indeed, the choice of a strategy for restraining emergency power is only one of many delicate political and legal issues that South Africans will be answering as they move towards a post-apartheid constitution. South Africans are developing those answers already, as they press the political and legal struggle for human rights and as they discuss and debate the contours of a new constitution. I hope the comments here will help in this complex and valuable project.