For my wife, Felicity, and children

Sean, Kathleen, Bridget, Patrick and the late Mary.

Emergency Law

Judicial Control of Executive Power under the States of Emergency in South Africa

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Abstract

This work examines the legal effects of a declaration of a state of emergency under the Public Safety Act 3 of 1953 and the exercise of legislative and administrative powers pursuant thereto. The general basis of judicial control over executive action and the various devices used to limit or oust the court's jurisdiction are set out and explained. Against this background, the courts' performance of their supervisory role under the special circumstances of emergency rule is critically surveyed and assessed. The legal issues raised by the exercise of emergency powers is examined at the various levels of their deployment: first, the declaration of a state of emergency; second, the making of emergency regulations; third, their execution by means of administrative action, including detention, banning, censorship and the use of force. The major cases concerning emergency issues, both reported and unreported, are analysed in their appropriate contexts, and an overview provided of the effects of emergency regulations and orders on such freedoms as South Africans enjoy under the 'ordinary' law. Finally, an attempt is made to assess how these decisions have affected the prospect of judicial review of executive action, both in the emergency context and in the field of administrative law generally. The conclusion is that, however far the Appellate Division may appear to have gone towards eliminating the role of the law in the emergency regime, grounds remain for the courts to exercise a more vigorous supervisory role should they choose to do so in future.

Table of Contents

Preface

This work deals with an area of law which is, in the nature of things, unpredictable and volatile. Many of the chapters had to be continuously revised as new cases were decided, and the overall structure of the work doubtless reflects this difficulty. I have, however, decided to give priority to comprehensiveness rather than elegance of exposition, and have taken into account cases decided up to a few weeks before the printing of the final draft. The work accordingly reflects the law as stated in the sources available to me up to the end of September 1989. I have tried to consult as many unreported judgements as possible, but realise that many may have escaped my notice. My hope is that these, and those still to be decided, do not materially affect the interpretations advanced in these pages.

Space precludes me from naming the many people to whom I am indebted for assisting in countless ways with the conception and execution of this study. My special thanks, however, go to Professor Ross Harker, who undertook to supervise this thesis during his sabbatical, for his meticulous reading and helpful comments on the draft; to Professor Gavin Stewart, who uncomplainingly sacrificed his own time to design the layout and typography of the thesis, and assist with its electronic setting; to the Legal Resources Centre, in particular the director of its Grahamstown office, Adv Jeremy Pickering, for supplying me with invaluable source material; to Professor Alastair Kerr, ever-generous with advice and guidance; to the many lawyers, journalists and academics with whom I have discussed the problems of emergency rule; and to my parents for their support. Finally, I must mention the inestimable debt I owe to the late Mr Harry O'Connor, former editor of the Eastern Province Herald, whose masterful use of the English language provided the standard to which I have tried, however unsuccessfully, to aspire. My regret is that this work was completed just too late for him to give his verdict on that aspect.

GRAHAMSTOWN

22 October 1989

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Abbreviations

LAWSA = *The Law of South Africa*

NILQ = *Northern Ireland Law Quarterly*

SALJ = *South African Law Journal*

SAJHR = *South African Journal on Human Rights*

THRHR = *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg*

AJ = *Acta Juridica*

Table of Cases

(Emergency cases are indicated in bold face, as are page numbers in which the cases concerned are discussed.)

Table of Statutory Instruments

Acts of Parliament

Provincial Ordinances

Foreign Statutes

Proclamations, Orders and Notices

(The left hand column reflects the mode of citation. This list is arranged in chronological order, and reflects only regulations etc cited in the text. For a full list of emergency instruments, the reader is referred to the title 'public safety' in the official annual index to the Government Gazette.)

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Proc R 224 of 1986 *GG* 10541 11 December 1986
Proc R 235 of 1986 *GG* 10563 29 December 1986
GN 127 of 1986 *GG* 10100 21 February 1986
GN 1517 of 1986 *GG* 10355 11 July 1986
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Proc R 95 of 1987 *GG* 10770 11 June 1987
Proc R 96 of 1987 *GG* 10711 11 June 1987
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Proc R 123 of 1987 *GG* 10880 28 June 1987
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Proc R 99 of 1988 *GG* 11342 10 June 1988
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Miscellaneous

Uniform Rules of the Supreme Court

International Conventions

Commissions of Inquiry

General Introduction

At the time of writing,[1] the whole or large parts of South Africa have been under states of emergency declared in terms of the Public Safety Act [2] at various periods for a total of 54 months,[3] during which the South African government has given free reign to the authoritarian tendencies latent in its style of rule. Under this statute, it has formulated laws of uprecedented severity, and its security agencies have enforced them with ruthless determination. Several thousand people have been detained without trial, some for more than three years, many without ever being prosecuted for offences under the ordinary law or the emergency regulations. Detained persons have been released, some only after going on prolonged hunger strikes, subject to restrictions so severe as to amount to *de facto* incarceration. Freedom of movement of many thousands of people has been curtailed by curfews and roadblocks, and their privacy invaded during large- scale house-to-house searches. Access to certain public areas has been prohibited or restricted. Unauthorised public gatherings have been banned throughout the country, and many of those allowed — including funerals — have been subject to restrictions. Severe curbs have been imposed on schools. Many organisations have been banned (or, to use the language of the regulations, prevented from performing 'any acts whatsoever'), and their memberships decimated by detentions or bannings. Such freedom as was enjoyed by South Africans to discuss and be informed of events of public importance has been further attenuated by far-reaching restrictions on freedom of speech and the media. Many topics which would ordinarily be regarded as the stuff of political discourse have been rendered taboo. The news media have been prohibited from reporting on a wide range of events, including certain of the activities of popular movements of resistance and, perhaps more sinister, the actions taken by the authorities to suppress them. Newspapers which have defied or sought to

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1 September 1989.

2 Act 3 of 1953.

3 The first state of emergency was declared on 30 March 1960, nine days after police opened fire on demonstrators at Sharpeville, killing 71 and injuring 180. The original proclamation (R 90 of 1960) placed 82 magisterial districts under emergency rule. The next day the state of emergency was extended to a further 31 magisterial districts (by Proc 92 of 1960) and eight more were added on April 11 (Proc 123 of 1960). The state of emergency was withdrawn on 31 August (See Mathews *Law, Order and Liberty* at 224 and 1960 *Annual Survey of Race Relations* at 40-45). Thereafter, 25 years lapsed before the government again resorted to emergency powers with the proclamation of an emergency in July 1985, placing 36 magisterial districts under emergency rule (Proc R 120 of 1985). Roughly four months later the emergency was lifted in six districts (Proc R 199 of 1985), but extended six days later to a further eight districts (Proc R 200 of 1985). The state of emergency was withdrawn on 7 March 1986 (Proc R 39 of 1986). In June 1986 the entire country was placed under emergency rule for the first time (Proc R 108 of 1986) and the country-wide state of emergency has since been renewed annually until the time of writing (Procs R 108 of 1986, R 95 of 1987, R 96 of 1988 and R85 of 1989).

test the limits of these prohibitions have been banned or their staff members detained. In addition to the ordinary police, special security agencies have been created to enforce emergency measures, and others which do not normally play a law-enforcement role, including the Defence Force and its citizen reserve, have been mobilised into the emergency security system. These law-enforcement agencies have pursued their emergency duties with great, at times drastic, vigour. Many people, including innocent bystanders, have died or been injured as members of the security forces have sought to enforce restrictions in the black townships. And, for a period, images of lesser forms of police brutality, such as beatings and sjambokkings of fleeing people, became daily fare for overseas television viewers.

Emergency rule in any country represents in its most acute form the inherent tension between the requirements of state security and the existence of acknowledged individual rights and freedoms. The catalogue of developments just outlined indicates that during the time in which South Africa has languished under formally declared states of emergency, the balance — already distorted by a mass of security legislation forming part of the ordinary law — has been tipped decisively further in favour of the former.

A government's decision to resort to emergency powers to suppress challenges to its authority must inevitably be controversial. Some will view it as an abuse of state power aimed at eradicating legitimate opposition which cannot be challenged by argument. Others will see emergency rule as necessary to eliminate the orchestrated subversion of law and order for political ends. Such controversy naturally becomes the more intense in the kind of fractured, politically polarised and crisis-ridden society over which emergencies have been imposed in South Africa.

The present work is not intended as a contribution to this debate. Its focus is, rather, on the legal issues raised by the exercise of emergency powers during states of emergency proclaimed in terms of the Public Safety Act. But the political background cannot be lost sight of because by its very nature 'emergency law' is value-laden and infused with political issues. Insofar as it is the business of the judiciary to decide where the balance should be struck between authority and freedom when the state and an individual or private group advance contending claims in particular cases, it was inevitable if unfortunate that the courts should have been drawn into the political controversy surrounding emergency rule. An individual who becomes the victim of emergency powers of one or other of the types just outlined can in the final analysis turn only to the courts for relief. Whether it is offerred is inevitably perceived as a matter which affects

society generally, not merely particular litigants. Contending groups have hence inevitably seen the judgments as favouring their cause or against it. We are not here concerned with whether the cases which are examined in the following pages are in fact 'for' or 'against' particular causes, but with the legal question which lies at the root of every case involving a challenge to the exercise of an emergency power: what restraints, if any, are imposed on executive power by the law, as interpreted by the Supreme Court, during a state of emergency?

The answer to this question is beginning to emerge from the growing number of cases, both reported and unreported, in which individuals or associations have attempted to invoke the law in order to protect what they perceive to be their rights and freedoms against emergency action by the state. Like any enabling statute, the *fons et origo* of emergency rule, the Public Safety Act, delimits the powers it confers and specifies the purposes for which they may lawfully be used. But the application of the powers conferred by the Act also raises complex legal questions that can only be resolved by authoritative judicial pronouncement.

This study, insofar as it examines how the courts have treated these issues, may therefore be characterised as an exercise in what Professor Baxter has described as 'particular' rather than 'general' administrative law.[1] It examines the legal principles and policies developed in a specific area of public administration, the substantive content of which is determined by a particular governing statute, and the interpretation of its express and implied provisions by the courts. Just as works devoted to a study of specialised administrative agencies such as the Transport Commission or the Liquor Board may be said to deal with, respectively, 'transportation law' and 'liquor law', the rules governing the special field of administrative activity dealt with in this work may appropriately be described as 'emergency law'.

In one sense, however, this work goes further than a mere description of a particular branch of administrative law. For in their attempts to define the scope of emergency power and the limits of its use, the courts have perforce repeatedly to choose between the competing values of authority and freedom. In many cases individual victims of emergency powers who have turned to the courts for relief have received short shrift. In others, the courts have been prepared to grant relief to individuals or organisations. Whichever way they are decided, however, cases involving emergency powers inevitably raise fundamental questions about the role and behavior of the judiciary under crisis rule, and ultimately its function in the 'apartheid' state. Have

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1 Baxter *Administrative Law* at 2.

judges tended to side with the government at the expense of the rights and liberties of the individual? Or have they frustrated the authorities in their attempts to restore law and order? To the extent to which they have done one or the other, have they been required to do so by the constraints of the law which they are bound by their judicial oath to apply? Or have their decisions been motivated by by inarticulate ideological beliefs and a subjective desire to support an unjust social and political structure, or the forces ranged against it?

These questions have been extensively dealt with in respect of the courts' functioning in the area of 'ordinary' security legislation.[1] This study does not deal with the courts' treatment of this legislation, except insofar as it is relevant to the interpretation of emergency provisions. It sole purpose is to examine their role in the circumstances of emergency rule, which has confronted the South African judiciary with a supreme challenge to demonstrate its commitment to the rule of law and individual justice. The pages that follow will provide an assessment of the extent to which it has been able to do so, or at least been prepared to try.

It may be useful, at the outset, to summarise the approach adopted in the pages that follow. In Chapter 1, some general observations are ventured on the nature of emergency rule, the justifications cited therefore, and its dangers. We then turn in Chapter 2 to a general exposition of the relationship between the judiciary and the executive in 'normal times', and the legal basis upon which the former can exercise control over the latter. Note is then taken in Chapter 3 of the extent to which parliament and the executive have attempted to limit judicial control of emergency powers, and the courts' responses to these 'ousting' devices is discussed. Thereafter, the courts' responses to issues raised at the various stages of the deployment of emergency powers are treated sequentially: first, those relating to the declaration of states of emergency (Chapter 4); second, those arising from the exercise by the State President of his law- making powers under section 3 of the Public Safety Act (Chapter 5); third, those created by the exercise of administrative powers pursuant to the State President's regulations (Chapter 6). The nature of emergency penal provisions is examined in Chapter 7. Finally, tentative conclusions are advanced about the role of the courts under the emergency regime (Chapter 8).

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1 See in particular, Corder *Judges at Work*, Forsyth *In Danger for their Talents* and Dugard *Human Rights*.

1: On Emergency Rule in General

1.1 Incidence

Emergency rule takes many forms, and is of ancient origin. Perhaps the best- documented early example of a form of emergency government was the institution of the Roman Dictator, who was appointed temporarily by the Consuls on the recommendation of the Senate after it had decided that a situation so grave had developed that it was impossible to secure the safety of the Republic by ordinary methods.[1] Many states have subsequently taken a leaf out of the Romans' book. As the International Commission of Jurists reported in 1983:

> 'States of emergency are encountered with surprising frequency throughout the world....[T]he problem is of global importance. One study, published in 1978, stated that at the time at least 30 of the 150 states which comprise the community of nations were under a state of emergency. It is probably no exaggeration to say that at any given time in recent history a considerable part of humanity has been living under a state of emergency.'[2]

Most legal systems provide for emergency rule in situations where the state is gravely imperilled by internal or external threat. The right of governments to override civil liberties in defence of the state or the public safety is recognised in modern international human rights conventions. So, for example, Article 4(1) of the United Nations Covenant on Civil and Political Rights, 1966, provides:[3]

> 'In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.'

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1 See Rossiter *Constitutional Dictatorship* at 15-28; Friedrich *Constitutional Government and Democracy* at 235; Friedrich and Sutherland 'The Defence of the Constitutional Order in Bowie and Friedrich (eds) *Studies in Federalism* at 676-711.

2 International Commission of Jurists *States of Emergency: Their Impact on Human Rights.*

3 See also Article 15(1) of the European Convention on Human Rights, 1950, and Article 27(1) of the American Convention on Human Rights, 1969. The most recent work dealing with these conventions is Theodor Meron *Human Rights in Internal Strife: Their International Protection.*

In some countries, emergency powers are implied from more general provisions in the constitution;[1] in others, of which South Africa is an example, the legislature confers power on the executive authority to take special measures for averting actual or perceived threats during a specified period.

Just as the constitutional preconditions for the exercise of emergency powers differ from country to country, so too do the terms used to describe them. Some constitutions use the term 'state of siege' (Argentina, Belgium, France), others 'state of war' (Italy, Netherlands), 'state of public danger' (Italy), or 'state of civil emergency' (Netherlands), yet others 'state of emergency' (Ireland, South Africa, Zimbabwe). Constitutions of Eastern bloc countries typically refer to a 'state of martial law'.[2]

1.2 Justifications

The nature of emergency rule will vary according to the type of state concerned and the nature of the threat against which it is directed. A distinction can be drawn, for example, between emergency powers used in time of international war and those used during civil war, revolt or rebellion. Similarly, some emergency powers are tailored for use during crises occasioned by natural disaster. Whatever their form or cause, however, it is possible to isolate certain characteristics distinctive of emergency rule in the sense in which that term is used in this work.

The first is the theoretical basis on which it rests. The justification for the adoption of emergency powers is based on the same reasoning as that underlying the defences of self-defence and necessity in the criminal law and in the law of delict. Just as an individual has the right to perform an act which is otherwise unlawful in order to protect a legally-recognised interest,[3] so too is a state permitted to take extraordinary measures in order to protect its existence, constitutional order, or the public for whose safety it is responsible. This parallel is graphically expressed in words attributed to Abraham Lincoln:

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1 The 'defence power', the 'war power', general powers to make laws for peace, order and good government: see generally W S Tarnopolsky 'Emergency Powers and Civil Liberties' (1972) 15 *Can Pub Admin* 194 at 197.

2 See generally Bonner *Emergency Powers in Peacetime* at 4, from which the information contained in this paragraph is derived.

3 See eg De Wet and Swanepoel *Strafreg* at 72-80; Smith and Hogan *Criminal Law* at 191-98; Burchell and Hunt *Criminal Law* v 1 at 322 *et seq*.

> 'Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defence. So every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law but it is a fact.'[1]

These sentiments are embodied in the Roman maxim, *salus reipublicae, suprema lex* — the safety of the state is the highest law. The idea underlying this ancient maxim may be spelled out as follows. The public has entrusted the ruling authorities with the responsibility of safeguarding their interests within a particular constitutional structure. Should forces seek to undermine that structure by unconstitutional means, the government is under an obligation to act against them with all the force at its disposal. Where this entails overriding the rights of the individual, the innocent are taken to have impliedly consented in the interest of the common weal;[2] the guilty have, of course, forfeited their right to the protection of the ordinary law because they have chosen to disregard it for their own ends.

The democratic government has two fundamental obligations: on the one hand, to protect the integrity of the state and the constitutional order on which it is based; on the other, to uphold the rights and freedoms of the individual. Under crisis conditions these obligations may conflict; efforts to protect the state may entail the violation of individual rights and freedoms.[3] The greater the threat to the state, the more justified are violations of individual rights, including those of members of the general public.

The legal rationale for the adoption of special emergency powers is ultimately based on the premiss that if the state is overthrown by unconstitutional forces it will be unable to discharge the duty of protecting individual rights and advancing the welfare of the community. Galgut J expressed this point when he said in *Brink and others v Commissioner of Police*:[4]

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1 Cited in O'Boyle, 'Emergency Situations and the Protection of Human Rights: A Model Derogation Provision for a Northern Ireland Bill of Rights' (1977) 28 *NILQ 160 at 161*.

2 *Latin for Lawyers* suggests that the phrase *salus reipublicae suprema lex* '...is based on the implied assent of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the common good' (at 241).

3 O'Boyle *ibid.*

4 1960 (3) SA 65 (T) at 68A.

> 'One cannot overlook the fact that if the State is overthrown, the safeguard of the Courts and law and order will be removed.'

There is also a more pragmatic justification for emergency rule. This rests on the need for speed and flexibility of action not normally available to a state trammelled by the niceties of democratic rights and constitutional constraints. As Innes CJ observed during World War I:[1]

> '[T]here is an inherent right in every State, as in every individual, to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the Courts depend and upon which the constitution is based is itself challenged. Under such circumstances the State may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger.'

1.3 Characteristics

The characteristics common to various forms of emergency rule flow logically from the reasons cited for their adoption. The most obvious is a dramatic concentration of power in the hands of the executive. The normal distribution of power between various branches of government is distorted, the executive assuming legislative powers normally reserved for parliament and judicial powers normally reserved for the courts. Conversely, the normal powers of the other branches of government are curtailed: parliament losing much of its power of surveillance over executive action; the courts their power to pronounce upon the legality of administrative acts.

Along with this concentration of the various governmental functions in the hands of administrative authorities goes an expansion of executive power: officials are able to curtail or eliminate vested rights and liberties to an extent not permissible under ordinary law. Emergency decrees typically authorise special powers to arrest, search and seize, censor, regulate movement with curfews and other devices, detain without trial, requisition property, utilise the defence forces for routine policing, and generally to apply such force as may be required by the exigencies of the situation. In addition, the executive is usually indemnified against legal action for wrongs committed or damage caused in the *bona fide* exercise of these powers. All this en-

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1 In *Krohn v The Minister of Defence* 1915 AD 191 at 210, citing with approval *Queen v Bekker, Queen v Naude* (1900) 17 SC at 335.

tails a widening of the scope of discretionary action. The power conferred on executive officials to modify and limit rights is no longer governed by clear standards or norms, supervised and imposed where necessary by the courts.[1]

The corollary of this concentration and expansion of executive power is an erosion or suspension of normal constitutional restraints on its exercise. Thus constitutional rights may be suspended entirely, and special immunities granted to the executive acting under emergency powers. The citizen's ordinary right of recourse to the courts may be curtailed. Civil rights, in particular freedom of assembly, movement, speech and association, are severely limited because they are considered to be luxuries which the society cannot afford while the emergency prevails.

1.4 Challenges

For all that, however, a state of emergency is not a licence for official lawlessness. It entails merely a temporary suspension of various safeguards provided by the ordinary law, not their elimination. In this respect, a state of emergency falls short of martial law, in which civil government is suspended and unrestricted power conferred on the military authorities. Moreover, since a state of emergency temporarily suspends the law, it is a device peculiar to the constitutional state founded on law. A dictatorship has no need for provisions which enable the government to declare formal states of emergency; it rules by permanent executive decree. The declaration of a state of emergency in a democratic state presupposes that it is a temporary expedient aimed at some extraordinary threat to the very existence of the state itself or which threatens the life and safety of a significant section of the populace, and which is necessary for restoring normality and a return to the ordinary law, with its panoply of safeguards for the individual and constraints on executive power.

A state of emergency thus represents a challenge to all branches of the constitutional state: to the executive and its security agencies, whose function it is to take the steps necessary to meet the threat; to parliament, which must scrutinise, debate and ultimately authorise the executive actions taken in its name; to the courts, whose function it is to ensure that the executive

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1 See Mathews *Freedom* at 25. Prof Mathews cites as an example from standing legislation the power granted by s 46(3) of the Internal Security Act 74 of 1982 to the Minister of Law and Order to ban public meetings. The majority of emergency enabling regulations considered in this work illustrate this characteristic even more starkly.

authorities do not exceed the mandate conferred on them by law; to the 'fourth estate', the media of mass communication, whose task it is to inform the public on how emergency powers are being exercised; to the general public, upon whose approval ultimately rests the legitimacy of emergency rule. The roles of each of these institutions must be defined and safeguarded if emergency rule is not to undermine the very system it is designed to protect. Such a danger goes hand in hand with emergency powers because, for several reasons, such powers are sometimes easier to assume than to abandon.

1.5 Dangers

The exercise of emergency powers, entailing as they inevitably do severe restrictions on civil and political liberties, may exacerbate the threat against which they are directed. This is especially true when those powers are used against political opposition to the government of the day, which tends to be driven underground and to more desperate measures, and which may gather greater popular support in the process. In these circumstances, the use of emergency powers may alienate large sections of the populace and undermine the public image of the security forces.[1] This tendency is especially marked in a deeply polarised political system, where the use of emergency powers is invariably viewed as partisan by opponents of the ruling authorities.

Emergency measures may become enduring features of the political and legal systems, permanently displacing ordinary legal safeguards and rule by consent. Short-term successes of emergency measures may tempt governments to misperceive them as long-term solutions. Such a tendency was evident in South Africa after the declaration of its first formal state of emergency in the 1960s. Professor Dugard's description [2] of the government's attempts to deal with radical opposition after the Sharpeville shooting illustrates this point:

> 'Initially the solution took the form of the enactment of temporary measures, such as the 90-day detention law, which required annual renewal by Parliament; but, as foreign investors became more convinced of the ability of the security forces to counter political change and white opposition became more timid, the Government became bolder and enacted severe emergency-type measures that have become a permanent part of the South African legal system.'

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1 See Boyle, Hadden and Hillyard *Law and State* (1975) at 6-27 & 37-56.
2 Dugard *Human Rights* at 112.

These enhanced powers notwithstanding, the government has declared and in the 1980s five times renewed states of emergency aimed at suppressing popular forces of resistance. During most of the time this work was in preparation, it appeared that emergency rule was set to become the norm — a prognosis strengthened by the amendment to the Public Safety Act authorising the Minister of Law and Order to declare regional states of emergency, or 'unrest areas'.[1] One commentator predicted in 1986 that this measure would 'bring the Public Safety Act off the shelf where it has gathered dust for so long and place it alongside the Internal Security Act as a prime instrument for repression and control'.[2] Even if the government decides to lift the national state of emergency — which just before the time of going to press it was hinting at doing — the amendment makes possible the invocation of emergency powers on a selective basis, without the fanfair of a formal declaration of national emergency. Such 'mini' states of emergency are the ideal foil for the Gaullist option of reform coupled with selective repression.

Emergency rule may thus create a climate of authoritarianism in which measures once regarded as extraordinary are at best perceived by the public as the norm, or at worst not even deemed worthy of note. Officials may habitually resort to emergency measures without considering less drastic expedients, and this tendency may be transmitted to succeeding generations of administrators.[3] Reflex use of emergency powers may also desensitise the general public to human rights violations, and remove them from the agenda of reporting and discussion in the popular news media. This process of desensitisation is, of course, usually encouraged by state-sponsored propaganda and censorship of newspapers and other news media which are prepared to provide coverage of events that might place the security system in an unfavourable light.[4] Emergency rule inevitably tends to encourage abuse of power. Wide powers conferred on the executive may be used for partisan or sectarian ends. Ruling authorities may be tempted to act against legitimate opposition, or against media of communication simply for conveying information of which they do not approve. The climate of public ignorance thus created may enable governments to justify further excesses. As Friedrick and Sutherland put it:[5]

> 'If constitutional executives or legislatures were able, on the pretext of emergency, to exercise unlimited discretion in the assumption of powers normally denied them, self-interest would often tempt them to discover imaginary crises, or to exagerate the extent and severity of real ones.'

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1 See s 4 of the Public Safety Act and 4.5 below.
2 Mathews *Freedom* at 195.
3 See Bonner *Emergency Powers* at 16.
4 For details on censorship measures, see 6.9 below.
5 Friedrick and Sutherland *Constitutional Government and Democracy* at 688.

A situation which frees individual security officials from the normal constraints of law will increase the chance of excesses. As wider discretionary powers devolve upon officials lower down the state hierarchy, safeguards and controls within the administration are weakened or abandoned. Such abuses as torture, the use of power for personal ends and simple gratuitous resort to mayhem may occur.[1] Where innocent persons become become victims, the sense of alienation already referred to will be aggravated.

Emergency rule also has a corrosive effect on the law itself. Emergency regulations, by their very nature, are normally hasty measures concocted by officials with their eyes on efficacy rather than justice. Regulations are not subjected to the same rigorous scrutiny and searching criticism as a bill in theory should receive in its passage through parliament. This encourages a 'shot-gun' approach which produces vague and pervasive rules that hit individuals and conduct which the draftsmen may not have had in mind.[2] In addition, emergency laws may be applied inconsistently, thus reinforcing the view among opponents of the government that they are no more than partisan instruments for the suppression of legitimate opposition.[3] Most important, however, is that emergency law, being based ultimately on coercion, saps the moral content of the law. The net result is to undermine public respect for the law. Even where emergency rules are used against those engaged in violence or subversion, the legitimacy of their application may remain in doubt.

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1 The latter possibility is amply illustrated by the shocking disclosures in *S v De Villiers and others* Eastern Cape Division 26 May 1988 Case No 475/87, unreported, in which two members of the police reaction unit were sentenced to death for the shooting, in cold blood, of a young black man who they had earlier injured during what Zietsman J described as a 'drunken' foray into a black township.

2 One example of this was the sudden withdrawal, days before deadline, of Reg 11 of the Media Emergency Regulations, 1988 (Proc R 99 of 1988), which required the registration of 'news agency businesses'. The suspension was plainly the result of embarrassment at the fact that 'news agency business' was so widely defined as to include, not only the major 'established' newspapers, at which the regulation was not aimed, but also every public relations department and officer in the country.

3 For example, the media were allowed to report freely on the results of boycotts by black consumers of shops in the Conservative-party controlled towns of Boksberg and Carltonville, even though the 'media regulations' then in force expressly proscribed the publication of news on any boycott 'insofar as such news...discloses particulars of the extent to which such boycott is successful' (Reg 3(1)(d) of Proc R99 of 1988).

In short, a state of emergency strains the tension that always exists between competing values in the constitutional state: the rights of individuals and the interests of the collectivity; freedom and authority; personal liberty and public order; executive power and the rule of law. More particularly, it puts to the test the ability of the constitutional democracy to defend itself against attack without permanently undermining the principles upon which it rests. If a state of emergency is not itself to become the vehicle for destroying the constitutional polity it was purportedly designed to protect, means must be found for ensuring that the balance is not irreversably tipped in favour of authoritarianism. It must, in other words, be struck at a point where the authorities are given sufficient latitude to cope with the emergency, but not so much as to destroy forever the prospect of a return to normality once the threat which occasioned the assumption of emergency powers is averted.[1] As the authoritative arbiter of the limits of the power conferred on the executive by the Public Safety Act, the judiciary bears a heavy responsibility for deciding where that balance is struck.

In principle, the formal declaration of a state of emergency does not alter their role as monitor of the legality of executive action and protector of the rights and freedoms of the citizen. Unlike martial law powers,[2] those assumed by the executive after a formal declaration of a state of emergency remain subject to the ordinary process of judicial review, [3] in terms of which a court may set aside administrative acts if their authors fail to conform with the requirements of the law.

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1 The dilemma referred to here is well stated in the words of Michael Boyle: '[T]he problem of emergency government is how a state can provide for the temporary abeyance of constitutional restraints without doing permanent damage to the norms and values underpinning constitutional government. More specifically, the problem concerns the way in which a government can deal effectively with an emergency situation, and, at the same time, endevour to prevent the dangers of emergency government from occurring. From a legal standpoint this involves the creation of various checks and safeguards to take the place of the usual constitutional restraints that govern the exercise of executive power but which have been temporarily relaxed to enable the state to defend itself.' (M P O'Boyle 'Emergency Situations and the Protection of Human Rights: a Model Derogation Provision for a Northern Ireland Bill of Rights' 160 at 164-5.

2 On which see Wiechers *Staatsreg* 247-49 and the most recent case on the subject, *End Conscription Campaign v Minister of Defence* 1989 (2) SA 180 (C).

3 A contemporary writer described the first attempt in South Africa to regulate martial law powers by legislation (by Proclamation 201 of 1939) as a 'modern tendency' in the development of martial law powers (see Conradie 'Krygswet' (1941) 5 *THRHR* 183 at 192). The aforementioned proclamation may have been a response to the plea by Innes CJ in *Krohn v Minister of Defence and others* 1915 AD 191 for statutory regulation of what he described as 'the system of martial law' (see at 202). The proclamation was subsequently made an Act of Parliament by two War Measures Acts (Acts 13 and 32 of 1940), upon the second of which the Public Safety Act is closely modelled.

The burden of this study is to investigate the extent to which the principles of review apply to administrative acts performed under a statutory state of emergency. In order to provide a framework within which to set the survey, however, it is necessary first to set out the principles upon which judicial control of executive action is founded.

2: Parliament, Executive and Judiciary

2.1 The Doctrine of Parliamentary Sovereignty

The South African constitution, in spite of the recent introduction of certain consociational elements,[1] remains firmly based on the doctrine of parliamentary supremacy.[2] This means that parliament may legislate on any matter it pleases, and that no court may strike down its enactments, however unjust, unreasonable or absurd the court might think them to be. There is no justiciable bill of rights against which the constitutionality of an admitted statute can be tested.[3] The will of parliament is supreme, and the courts have no option but to enforce that will insofar as it is embodied in statutory form. The doctrine of parliamentary sovereignty empowers parliament to encroach as far as it desires on the rights and liberties enjoyed by legal subjects under the common law, and to delegate to officers or agencies of the executive general and specific powers to encroach still further on those rights by administrative action.[4]

The sovereignty of parliament clearly fetters the judiciary's capacity to influence state policy. But it also has important implications for the executive. For all executive agencies owe their existence to, and derive all but a small residue of their powers from legislation. Where such legislation confers discretion, the manner in which choice is exercised and the power discharged must be in accordance with the will of parliament as expressed in the enabling instrument.

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1 By the Republic of South Africa Constitution Act 110 of 1983.

2 See eg *S v Takaendisa* 1972 (4) SA 72 (RAD) at 77-8 and *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 747-8. For an historical exposition of the doctrine see Dugard *Human Rights* at 14-36.

3 The movement to include a bill of rights in the South African constitution is, however, gaining strength: see the South African Law Commission's Project 5, Working Paper 25, 'Group and Human Rights'.

4 See eg Kruger 'Die Regbank, die Noodtoestand en Fundamentele Regte' (1988) 3 *SA Public Law* at 181.

2.2 The principle of legality

Intimately associated with the notion of parliamentary sovereignty, therefore, is the idea of legality,[1] which rests on the axiom that

> 'a person or body which owes its existence [*sc*: to] and derives its powers from a statute...can do no valid act unless thereto authorised by the statute....Any limitations upon the exercise of power which are prescribed by the statute must be observed.'[2]

The administration, in short, can only do what it has statutory authority to do and, when challenged in a court of law, must be able to justify its acts by pointing to a statute.[3] Where it cannot do so, it has acted beyond its powers (*ultra vires*) and so unlawfully.[4]

2.3 Judicial Review

Only the Supreme Court can authoritatively decide when the executive has exceeded its statutory powers, and grant the relief of the victim of unlawful executive action with an appropriate remedy.[5] The process by which a court inquires into the legality of administrative action is known as judicial review, which, insofar as it can entail frustrating the will of the executive and its political supporters, is probably the most controversial of the judicial functions. The courts, ever-anxious to avoid the charge that they are encroaching on the realm of the executive, have been careful to stress that judicial review is a *legal* process, the object of which is to ensure that the intention of the legislature as expressed in the relevant empowering statute

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1 Baxter *Administrative Law*(at 30) views the principle of legality as 'the obverse of the *ultra vires* doctrine'.

2 Rose Innes *Judicial Review* at 89 *in fine*.

3 Rose Innes *op cit* at 91. See also Wiechers *Administrative Law* at 174: 'When it is said that a government organ may not act *ultra vires*, this means that it must keep within the bounds of its authority and must use its powers in the prescribed manner.'

4 As was stated in a celebrated passage in *Estate Geekie v Union Government* 1948 (2) SA 494 (N) at 502: 'In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question always appears to resolve itself into whether the tribunal has acted *ultra vires* or not.'

5 Which can take the form of a declaration of nullity, an interdict or an award for damages. On administrative law remedies generally, see Baxter *Administrative Law* Chap 17.

has been observed.[1] Ostensibly, the reviewing court is simply comparing the administrative act at issue with the terms of the relevant enabling statute with a view to establishing whether the former falls substantively and procedurally 'within the framework' (Afrikaans: 'Binne die raamwerk') of the latter. In most cases, however, the reality is far more complex, entailing a balancing of the particular interests advanced for protection by the protagonists and an assessment of the suitability of judicial control of the type of administrative action concerned.[2]

2.4 Grounds of Review

The scope of judicial review is determined in the first place by the terms of the empowering legislation under which the administrative authority acted or purported to act. Empowering or enabling legislation is, however, interpreted by the courts using common law modes of construction and against the background of certain common law presumptions regarding legislative intent. These presumptions will apply unless the legislature takes the trouble to exclude them.[3] In principle, therefore, all administrative acts, whatever the status of the repository of the power and however wide his discretion, are subject to the following rules, except insofar as they are expressly or impliedly excluded by statute.

2.4.1 *The perpetrator of the action (the repository) must be legally empowered to perform the act.* Powers are not conferred on the administration generally, and any power which is conferred must be exercised by the named repository.[4] Where a discretion is conferred on an ad-

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1 As Baxter puts it (Baxter *Administrative Law* at 303): ' '[T]he self-justification of the *ultra vires* doctrine is that its application consists of nothing other than *an application of the law itself*, and the law of Parliament to boot.' Among the devices used for reinforcing this 'self-justification' is the distinction between review and appeal, the 'legality' (reviewable), the 'merits' (unreviewable) of administrative action, and between errors of law (reviewable) and errors of fact (not reviewable). These underscore the idea that the courts are concerned, not with the wisdom or desirability of administrative action, but with its legality. As has often been noted, however, the distinction between matters of law and matters of policy is not always easy to preserve in practice.

2 Wade and Phillips *Constitutional and Administrative Law* at 580-81.

3 Occasionally, however, the courts have reversed the order, assuming the presumptions *not* to apply unless the legislature expressly or impliedly *includes* them (for the best-known example see *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) at 270F.

4 Baxter *Administrative Law* at 426; Wiechers *Administrative Law* at 183-4.

ministrative organ it may not, in the absence of statutory authorisation, re-delegate that discretion to, or subject itself to the dictation of, another, or fetter its discretion by the adoption of rigid policies.[1] Such delegation constitutes an unlawful abdication of power by the organ to which the discretion is entrusted, and visits the act of the sub-*delegatus* with nullity. Where the repository is permitted to delegate his discretion, the instrument by which the discretion is conferred must contain reasonably clear guidelines for the direction of the sub- *delegatus.*[2] It is self-evident that the repository may not delegate wider powers than he himself has.

2.4.2 *The administrative act must be performed in accordance with the procedures prescribed by the empowering legislation and, to the extent that these are not expressly or impliedly excluded by statute, with the principles of natural justice.*[3] The object of the common law principles of natural justice, expressed in the maxim *audi alteram partem*, is to ensure that administrative action is fair and rational.[4]

2.4.3 *The act must be performed in the circumstances stipulated by the empowering legislation.* The legislature is presumed not to intend conferring powers to be used whenever the repository pleases. Enabling legislation normally sets out conditions which must exist before the power can be exercised. These circumstances, which form 'the basis and justification for the exercise of statutory powers',[5] are commonly known as 'jurisdictional facts.[6] In some statutes the jurisdictional facts are stated in terms amenable to empirical verification. In others they are matters of judgment. But even in the latter case, there must be some substratum of fact from which a court can determine whether the official's opinion that the legal precondition for the exercise of the power exists was rationally formed.[7]

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1 Wiechers *Administrative Law* at 186-7.

2 *Arenstein v Durban Corporation* 1952 (1) SA 279 (A) at 297-8; *The Master v I L Back & Co Ltd* 1981 (4) SA 763 (C) at 776-7.

3 On the content and application of the common law rules of natural justice see Wiechers *Administrative Law* at 210-228 and Baxter *Administrative Law* Ch 14. Also Corder 'The Content of the Audi Alteram Partem Rule in South African Administrative Law' (1980) 43 *THRHR* 156.

4 The duty to give a hearing is not merely a 'process value', but a method of ensuring that an official has properly applied his mind to the facts of the matter — ie properly exercised his discretion.

5 Wiechers *Administrative Law* at 188.

6 See Rose Innes *Judicial Review* at 99.

7 As support for this view see the valuable discussion of 'law, fact and discretion' by Etienne Mureinik 'Administrative Law in South Africa' (1986) 103 *SALJ* 615 at 626- 45.

2.4.4 *In arriving at its decision, an administrative body must take into account only matters relevant and material to the exercise of its discretion.* A court will not dictate to an official what weight he ought to give to relevant factors or considerations, or correct an inference with which it disagrees. But where the administrative organ's decision is based on considerations not related to the statutory grounds on which it is authorised to act, its ensuing act is *ultra vires*.[1] The official who fails to take into account material factors, or whose decision is influenced by alien considerations, is said to have 'failed to apply his mind' to the proper exercise of his discretion.[2]

2.4.5 *The administrative act must advance the objective(s) of the empowering legislation, and not serve some extraneous or ulterior purpose,* however laudable that might be. An act performed for some purpose other than that for which it was granted is *ultra vires* because it unlawfully extends the scope of the power conferred.[3] It is not therefore a requirement of this ground of review that the respository should have acted *mala fide*.[4]

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1 Rose Innes *Judicial Review* at 132-35. A good example is *Free Press of Namibia v Cabinet, Interim Government of South West Africa 1987 (1) SA 614 (SWA).*

2 This term is frequently applied in a wider sense to the disregard of *any* of the requirements for validity. It seems preferable, however, to restrict it to defects in the repository's judgments of fact.

3 Wiechers *Administrative Law* at 230.

4 See *Orangezicht Estates, Limited v Cape Town Town Council* (1906) 23 SC 296 at 307-9. Also Steyn *Uitleg* at 227.

2.4.6 *The act must be performed in good faith and for honest purposes.* In practice, this ground of review is frequently confused with improper purpose, as outlined in the previous paragraph. Professor Wiechers argues that bad faith, insofar as it relates to the subjective state of mind of the repository, does not constitute an independent ground of review, except insofar as the official who acts *mala fide* can be found to have disregarded some other requirement of validity, such as proper purpose.[1] Professor Baxter, on the other hand, shows that the courts have in fact on occasion treated *mala fides* in the form of dishonesty, fraud or corruption as sufficient reason in itself for setting aside administrative acts.[2] Insofar as most cases involving patent dishonesty will also be tainted with some formal defect, such as improper purpose, the difference between these views is probably somewhat academic. But the preservation of *mala fides* as an independent ground of invalidity will probably be useful in those few cases in which an act that appears to have been performed in bad faith nevertheless falls within the scope of the enabling legislation.[3]

2.4.7 *The administrative act must be reasonably clear and comprehensible in form.* Much administrative action, be it 'purely administrative' or legislative in nature, takes the form of directives enjoining people to do or refrain from doing certain things. Those acts which are 'so

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1 Wiechers *Administrative Law* at 254-57.

2 Baxter *Administrative Law* at 515-20, citing *Clayton NO v Suburban Railway Co* 1893 (10) SC 16, *Pillay v Licensing Officer, Umkomaas 1930 NLR 111, Adams Stores v Charlestown Town Board 1951 (2) SA 508 (N).*

3 The expression *mala fides* is frequently used rather loosely, sometimes being limited to actions tainted with moral turpitude, sometimes being extended to cover all forms of wrongful use of power, however honestly motivated (Raath 'Die Mala Fides van Administriewe Organe: Twee Belangwekkende Beslissings in Bophuthatswana' (1983) 8 *TRW* 84). In some earlier judgments in which absence of proof of *mala fides* was held to bar judicial review, the term might have been used in the wider sense. More recently, however, some courts have interpreted those judgments as authority for the proposition that absence of *bona fides* in the narrower sense is the *only* ground of judicial review, an approach which Professor Dean has observed is tantamount to 'setting honesty rather than rationality as the standard by which the proper exercise of discretionary powers was to be determined by the courts'(Dean 'Reason and Prejudice: The Courts and Licensing Bodies in the Transvaal' in Kahn (ed) *Fiat Justitia* at 211). This confusion has persisted to the present day, especially in the face of indemnity provisions which exlude state liability for the *bona fide* exercise of certain statutory powers (on which see 3.7 below). There seems to be no good reason, however, why the official who has acted stupidly or irrationally should be allowed to rely on the fact that he was not acting dishonestly, a state of mind which in any event is often difficult if not impossible to prove. Thus the view expressed in *Thompson trading as Maharaj & Sons v Chief Constable, Durban* 1965 (2) SA 296 (D) that 'so long as the respondent was acting in the *bona fide* belief that he was doing his duty under the by-laws he must have been acting in pursuance of the by-laws, *whether his acts are legal or not*' (at 302, emphasis added) is in clear conflict with the principle of legality on which judicial review is grounded.

uncertain that people will not know how to comply with them or whether they are subject to them or not'[1] are void.[2]

2.4.8 *The effects of administrative actions must not be unreasonable in the sense that they are 'partial or unequal in their operation as between different classes', 'manifestly unjust', or involve such 'oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of ordinary men'.*[3]

Baxter points out, with respect correctly, that 'unreasonableness' can relate to the effects of the administrative act, to the manner in which the repository reached his decision, and to his purposes.[4] In this sense any form of abuse of discretion, whether it relates to the procedural or substantive aspects of an administrative act, can be termed 'unreasonable'. Thus the courts have deemed unreasonable, in addition to administrative acts which have partaken of the qualities mentioned by Lord Russell *supra*, those which are so defective in any respect as to amount to

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1 *R v Shapiro* 1935 NPD 155 at 159.

2 There is room for debate on whether the rule against vagueness or obscurity is part of the *ultra vires* doctrine, or whether it is a ground of review *sui generis* (see *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A)). The general view appears to be that incomprehensible administrative acts cannot stand because 'the enabling statute does not empower the person concerned to make vague regulations' (*R v Pretoria Timbers (Pty) Ltd* 1950 (3) SA 163 (A) at 182), or, alternatively, that a tacit limitation (versweë aanwysing) against the performance of such acts can be read into all empowering statutes (see the dissenting judgment of Van Heerden J in the *United Democratic Front* case *supra*, discussed at 5.5 below).

3 The forms of unreasonableness cited in this passage are enumerated by Lord Russell of Killowen in *Kruse v Johnson* [1898] 2 QB 91 at 99-100.

4 See Baxter *Administrative Law* at 485 & 496.

proof 'that the person upon whom the discretion is conferred had not applied his mind to the matter'.[1]

2.5 Statutory Interpretation

It should be apparent from the foregoing section that the courts have at their disposal an array of powerful rules upon which they can draw to control abuses of executive power. Indeed, the grounds of review just mentioned can be seen as a kind of implied common-law bill of rights which can be creatively employed to ensure that the individual is treated according to the basic principles of natural justice, and protected from irrational or arbitrary state action.

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1 Per Stratford JA in *Union Government v Union Steel Corporation (South Africa) (Pty) Ltd* 1928 AD 220 at 237, following *African Realty Trust v Johannesburg Municipality* 1906 TH 179. Two approaches to unreasonableness as a ground of review of administrative action can be discerned in the case law. The first, which may be termed the doctrine of 'substantive unreasonableness', allows the courts to set aside an administrative action if its effects are sufficiently unreasonable in one of the senses mentioned in *Kruse v Johnson supra*. The second, aptly dubbed 'symptomatic unreasonableness' (Taitz *Unreasonable Acts of Administrative Authorities* at 241) treats the unreasonableness of the effect of the administrative action as proof that the repository of the power has failed to comply with one or other of the requirements for validity specified in the previous sections (Forsyth *In Danger for their Talents* at 104-5; see also Taitz '"But 'Twas a Famous Victory"' 1978 *AJ* 109 at 111). Both approaches have their academic protagonists and detractors, and there is ample support from the courts for treating 'substantive unreasonableness' as a sufficient ground for review of subordinate legislation (see eg *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A) at 182; *R v Slabbert* 1956 (4) SA 18 (T). In the case of other forms of administrative action, however, there seems to be considerable judicial resistance to treating unreasonableness as a ground of review unless it can be said to constitute proof that the repository has failed to comply with one or other of the 'accepted' grounds for validity. The reason for this is fairly obvious. The court which pronounces the effects of an administrative action unreasonable is entering the grey area which separates the merits of an administrative action from those which relate to its legality. The courts have always been careful to avoid the charge of having usurped the authority entrusted to an administrative body by parliament (see *Duport Steel and others v Sirs and others* [1980] 1 All ER 529 at 550-51, where Lord Scarman warns that if judges were to depart from the plain language of acts of parliament and enter the field of policy- making, the courts' 'power to do justice will become more restricted by law than it need be, or is today'). Pronouncements on the reasonableness or otherwise of the exercise of discretion can come uneasily close to interfering with the policy-making prerogative of the executive. Hence the confusion which prevails over the content and application of this ground of review. Wiechers contends strongly for the acceptance of unreasonableness as an independent ground of review, describing it as 'an essential prerequisite if the entire system of judicial control is to be rescued from impoverishment and legalism' (Wiechers *Administrative Law* at 249). While acceptance of a doctrine of substantive unreasonableness would undoubtedly increase the scope of judicial review, the learned author probably overstates the consequence of its rejection. It is possible to view the difference between substantive and symptomatic unreasonableness as one of form rather than substance. For it is hard to imagine an administrative action, the effect of which is unreasonable to an extent which cannot be found to have been expressly or impliedly authorised by the enabling statute, not affording grounds for the conclusion that the repository had failed to comply with some 'formal' requirement for validity, in particular excess of power or 'failure to apply the mind'. An administrative act can be termed 'unreasonable' if it is irrational or unfair. Insofar as all the grounds of review can be seen as directed ultimately at ensuring that the administration acts in conformity with the principles of rationality and fairness — except, of course, to the extent that parliament has authorised it to act irrationally or unfairly — the elimination of unreasonableness as an independent ground of review would probably not significantly detract from the court's review jurisdiction. It is noteworthy that attempts to codify the grounds of review in Australia and Canada do not include 'unreasonabeness' as a separate ground (see the summaries of the reports of the Law Commissions of Western Australia and Canada in the South African Law Commission's Working Paper 15 *Investigation of the Courts' Power of Review of Administrative Acts* (1986) at 46-49. The South African Law Commission, although describing substantive unreasonableness as 'an essential extension of the [current] grounds of review' (at 55), makes no mention of the word in its recommended draft Bill (see at 107-110).

It must, however, be recalled that the applicability in a given case of all the grounds of review just enumerated is determined, in the first instance, by the court's interpretation of the terms of the empowering legislation under which an administrative authority has acted. When an administrative action is challenged, a court's first task is to establish whether it falls within the scope of the authority conferred by the statute in question. Some statutes delimit the powers which they confer and the conditions which govern their excercise in relatively clear terms. Others leave room for doubt about the precise limits of the discretionary powers which they confer.[1] In order to ascertain the meaning of such doubtful legislation, the courts have developed a number of canons or principles of interpretation meant to serve as guides to the legislature's intention.

The orthodox approach to statutory interpretation [2] posits a series of steps which the interpreter must follow to divine the will of the *lex auctoris*. First, the statute must be read in its ordinary meaning, and where the words are clear and unambiguous they must be applied in that meaning.[3] Where there is uncertainty about the meaning of the words used or their applicability to the given factual situation, however, a court may resort to such 'secondary' guides as may throw light on the meaning of the provision at issue, like the other parts of the statute (other sections, long title, marginal notes, grammatical divisions, punctuation, etc), the general context in which the statute was enacted, and its purpose as gleaned from these *indicia*.[4] If there is still doubt as to the meaning of the statute, the court may invoke one or more of the presumptions, for example that the legislature does not wish its enactments to achieve results more unjust or inequitable than are necessary for the effective attainment of the objective of the statute, to operate retrospectively, to violate international law, to bind the state, and so on.[5] It is by this

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1 As Baxter puts it ('A Judicial Declaration of Martial Law' (1987) 3 *SAJHR* 317 at 318): '[The courts] have...to identify the implicit guidelines which lurk within the skeletal frameworks of governing statutes so as to provide meaningful criteria by which the ultimate lawfulness of official conduct is to be assessed.'

2 For outlines of the 'orthodox approach', see Cowen 'The Interpretation of Statutes and the Concept of "the Intention of the Legislature"' 1980 (43) *THRHR* 374 at 379-82. Also Hahlo and Kahn *Legal System* at 176 *et seq*.

3 The classic statement of this approach is to be found in *Venter v R* 1907 TS 910 at 913.

4 See the judgment of Schreiner JA in *Jaga v Donges* 1950 (4) SA 653 (A) at 662-64. The various guides to statutory interpretation are fully discussed in Steyn *Uitleg* Chap IV. More recent expositions are to be found in Kerr, Grogan and Leyshon 'Punctuation in Statutes and Related Matters' (1988) 105 *SALJ* 533 and Devenish 'Interpretation from the Bowels of the Act' (1989) 106 *SALJ* 68.

5 For a conventional view of the status of the presumptions see Celliers 'Die Betekenis van die Vermoedens by Wetsuitleg' (1962) 79 *SALJ* 189.

process that the courts attempt to set limits on the scope of statutory prohibitions and, in the case of enabling instruments, on conferred powers.[1]

The interpretation of a statute often leaves considerable scope for the courts to flesh out the bare bones the draftsman's words with implied terms. Much has been written in support of the view that the courts enjoy considerable latitude in declaring the meaning of statutes, and thus can read into legislation limits which its authors in reality never intended.[2] Individual judges may disagree on whether the words of a provision have a 'plain meaning', or on what that meaning is, on whether a particular meaning can be inferred from external *indicia*, on whether a particular presumption has been impliedly incorporated or excluded, on which of two conflicting canons apply, and so on. There is some justification, therefore, for the view that the interpretation of statutes consists of

> 'learned formulas giving a deceptive appearance of logic which only serves to conceal the choice between opposing conclusions of equal logical validity, and of inarticulate ideological premises which depend on personal predelictions and changing trends of public and social policy' [3]

and that 'the choice of interpretations as a law-making act is determined by political motives'.[4]

The reference to 'political motives' in the above-quoted passage calls for explanation. Most judges would vehemently reject the allegation that their choices were 'political' in the partisan sense normally implied by that word. In theory, their task is simply to declare the law as laid down by the legislature. This is, no doubt, the spirit in which the overwhelming majority of South African judges approach their task. But there can equally be no doubt that in most areas of the law the idea of an absolutely impartial judiciary pronouncing the law 'as it is' is chimerical.[5] Impartiality in that sense is merely an idea towards which judges ought to strive, but unattainable in those cases in which an issue is logically and legally amenable to resolution in favour of either contending party. The mask of impartiality is the more difficult to preserve in those cases in which one party is an individual seeking to uphold one or more of his 'fundamental' rights, and the other the omnipotent state insisting on its right to violate those

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1 On the link between the interpretation of statutes and the rules of administrative law, see Mureinik 'Administrative Law in South Africa (1986) 103 *SALJ* 615 at 619-26.
2 See the literature referred to by Cowen *op cit* at 388- 90.
3 Friedman *Law and Social Change in Contemporary Britain* at 243-44.
4 Kelson *Law of the United Nations* preface at xv.
5 See Dugard *Human Rights* at 370-71.

liberties for the sake of some higher collective good. Where the empowering statute under which the state has acted clearly confers a power to violate individual rights, the courts cannot reasonably be accused of political bias for failing to intervene in favour of the individual.[1] But where a court is confronted with two *possible* interpretations, one of which will preserve the liberty of the subject, the other which favours the executive, it must plump for one or the other on the basis of considerations which flow as much from policy as from law. To the extent that the former intrude on the latter, the judicial choice may be described as 'political'.[2]

2.6 The interpretation of emergency legislation

The political dimension of judicial choice in cases in which individuals are seeking to uphold their rights against state power was dramatically described by Lord Atkin in his celebrated dissent in *Liversidge v Anderson.*[3] His lordship observed:

> 'I view with apprehension the attitude of Judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive....It has always been one of the pillars of freedom, one of the principles of liberty for which...we are now fighting, that the Judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that coercive action is justified by law.'[4]

These words were uttered during the darkest days of World War II, and Lord Atkin was attacking the view of the majority of the court that such circumstances justified an interpretation of the statute in question which least hindered the exercise of the power of detention without trial.[5] The other Law Lords, however, regarded the doctrine *salus reipublicae suprema lex* as overriding all other considerations. This enabled them to bend the language of the statute to widen the scope of the powers which it conferred. When the state was under threat, in their view, the courts had no right to interfere with the actions of those entrusted with its protection.

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1 They can, of course, be accused of giving legitimacy to an unjust law, but that is another matter.
2 See Mathews 'Omar v the Oumas' (1987) 3 *SAJHR 312 at 314-5.*
3 [1941] 3 All ER 338 (HL).
4 At 361A-E.
5 See especially the judgments of Lords Wright at 374-76 and Romer at 385.

In few South African cases, however, have judges been prepared to declare their pro-executive sentiments as openly as did the majority in *Liversidge*. Our courts have rather stressed their even-handedness even in conditions of political instability, including rebellion and war. Thus as long ago as the late 19th century De Villiers CJ observed that the disturbed state of the country 'ought not...to influence the court', the first duty of which was 'to administer justice to those who seek it, and not to preserve the peace of the country'.[1] And, more recently, in *Ganyile v Minister of Justice*, [2] De Villiers JP said:

> 'In Plato's Republic where one has the *res politica* the judiciary often has to state that action taken by the executive is justified on the principle *salus reipublicae suprema lex est*. On the other hand the Supreme Court is the protector of the rights of the individual citizen, and will protect him against unlawful action by the executive in all its branches.' [3]

The courts have stressed, however, that there are two sides to the equation — the interests of the state, also, cannot be overlooked. Occasionally, the courts have tipped the balance in favour of the latter.[4] But the professed judicial ideal is to strike a balance between the competing rights of individual and state. According to M T Steyn J in the case of *Bloem v State President*,[5] it was 'one of the most fundamental tasks' of the courts 'to maintain, as far as they are able in law, a proper balance between the exercise of executive power and the rights of the governed.'[6] The learned judge added that it was a 'fundamental responsibility' of the judiciary

> 'to keep the scales of justice in proper balance and, while constantly trying to avoid an "executive-mindedness", a Judge must be equally on guard against becoming "anti-executive minded", especially in matters where his sympathies may naturally and understandably be inclined towards the individual whose fundamental rights are infringed by measures emanating from the Executive. Concern for such infringements should never be allowed to blind or dim the judicial eye to the realities of a situation under which the Executive acted. *Salus reipublicae suprema lex* is a recognised rule of the ordinary civil law (i.e. non-martial law) and of effective statecraft in times of national danger.'[7]

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1 *In re William Kok and Nathaniel Balie* (1879) 9 Buch 45, quoted with approval in *Nkwinti v Commissioner of Police and others* 1986 (2) SA 421 (E) at 439H-J.

2 1962 (1) SA 647 (E) at 653.

3 Quoted with approval in *Bloem v State President* 1986 (4) SA 1064 (O) and *Omar v Minister of Law and Order* 1986 (3) SA 306 (C) at 325.

4 A good example is provided by Galgut J in *Brink v Commissioner of Police* 1960 (3) SA 65 (T): 'If a court of law were faced with a situation that the safety of the State was in danger, that court would not necessarily act in terms of the regulations *but would support any action taken by the authorities where such actions were bona fide*' (at 69A, emphasis added).

5 1986 (4) SA 1064 (O).

6 At 1075E-F.

7 At 1075G-H.

How the courts have in fact struck the balance between individual rights and executive power under emergency rule is a central theme of this work. Before picking it up, however, it is necessary to examine the legislative devices with which parliament has sought to prevent the courts from asserting their inherent power of review too vigorously *in favorem libertatis*.

3: Limiting the Role of the Courts

3.1 Introduction

A notable characteristic of the policy governing the framing of statutory emergency powers is to eliminate, or at least marginalise, judicial scrutiny of executive action. Several legislative devices have been developed to facilitate this end. Some do so directly, as in the case of partial or complete 'ouster clauses', others indirectly, such as the conferment of powers in wide and subjective terms, with vague criteria governing the exercise of the power. The effect of these devices is to eliminate or frustrate remedies which might otherwise have been at the disposal of parties wishing to challenge the exercise of emergency powers.

The Public Safety Act, like other South African security legislation, is liberally sprinkled with signs of the legislature's intention to insulate the executive from judicial interference. So, too, is subordinate legislation which has been issued under the parent Act. Thus the emergency regulations have empowered the authorities to deny detainees the right of legal advisers, eliminated the operation of the principles of natural justice before the exercise of emergency powers, and indemnified the police from crimes and delicts which they may have committed while carrying out emergency duties. These developments have led two observers to conclude that the dominant feature of the legal regime introduced under the states of emergency in South Africa

> 'is not so much the new powers which it confers on the executive, but its attempt to exclude the supervision of executive powers be legal institutions and the press. The emergency regime is essentially an attempt to confer power without accountability or restraint, more specifically without the intervention of lawyers or the courts.'[1]

This chapter examines the scope and effect of such ousting devices on the courts' ability to test the legality of administrative emergency action in terms of the principles outlined in the last.

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1 Haysom and Plasket 'The War against Law: Judicial Activism and the State of Emergency' (1988) 4 *SAJHR* 303 at 306.

3.2 The Direct Ouster Clause: Section 5B

The most explicit indication of parliament's resolve to exclude judicial involvement in statutory emergency rule is to be found in s 5B of the Act, which was inserted in 1986,[1] doubtless in response to signs of judicial activism by some provincial courts after the declaration of the state of emergency in 1985.

Section 5B provides:

> 'No interdict or other process shall issue for the staying or setting aside of any proclamation issued by the State President under s 2, any regulation made under s 3, any notice issued by the Minister under s 4 or 5A(1) or (2) or any regulation made under s 5A(4), and no court shall be competent to inquire into or give judgment on the validity of any such proclamation, notice or regulation.'

On the face of it, parliament could hardly have expressed itself more clearly. The validity of a proclamation of an emergency or an 'unrest area', as well as regulations made by the State President or the Minister, are apparently rendered unchallengeable in court. In the absence of any provision for the review of or appeal against the decisions of these two officials by any statutory tribunal, parliament is therefore the only body with the power to consider or pronounce upon emergency regulations.[2] The decision as to whether to declare a state of emergency is entirely within the discretion of the State President; the Act does not even require the declaration to be tabled in parliament.

By the enactment of s 5B, parliament has chosen the most complete form of exclusion possible, short of expressly declaring that the administrative powers conferred by it shall be the equivalent of an act of parliament, or adopting the measures enacted by the State President or the Minister as its own.

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1 By Act 67 of 1986.

2 In terms of s 3(5) of the Act the State President is required to table regulations made by him within 30 days, if parliament is then in session, or, if parliament is not then in session, within 30 days of the convening of the next session. The tabling requirement is considered at 5.8.2 below.

Similar attempts to oust the jurisdiction of the courts by provisions like s 5B are not a new phenomenon in South Africa. Cases dealing with them go back as far as the early years of the present century,[1] and are currently to be found in statutes dealing with immigration,[2] defence,[3] constitutional[4] and, to an an increasing extent, security matters.[5]

From the outset, judges have expressed disquiet about such blatant attempts to deprive them of their 'inherent' review powers. More than six decades ago, for example, Kotze JA had the following to say about an ouster clause which purported to deprive the courts of all power to review decisions to deport foreign nationals:

> 'I should like, without attempting to dictate to the legislature, to point out the grave danger involved in departing from a well-known rule of constitutional law in all civilised countries — namely, that the courts are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts.' [6]

This warning becomes the more apposite in the case of statutes like the Public Safety Act, which confer on officials virtually unlimited powers to invade the rights of ordinary citizens. Indeed, it may generally be observed that the kind of statutes in which ouster clauses are typically found are precisely those which license the kind of powers in which the restraining influence of possible judicial scrutiny is most desirable.

There are several considerations which serve to underscore the warning uttered by Kotze J in *Fakir*. Even without ouster clauses, the courts have traditionally demonstrated their sensitivity to possible charges of encroaching on matters regarded as falling within the preserve of

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1 See eg *Union Government v Fakir* 1923 AD 466; *R v Padhsa* 1923 AD 281; *De Wet v Deetlefs* 1928 AD 286; *De Bruin v Director of Education* 1934 AD 251.

2 Section 45(2) of the Admission of Persons to the Republic Amendment Act 59 of 1972.

3 Section 103 *ter* of the Defence Act 44 0f 1957.

4 Section 18(2) of the Republic of South Africa Constitution Act 110 of 1983.

5 See eg the Internal Security Act 74 of 1982, ss 8(11), 11(6), 12(2), 28(7), 29(6), 31(7), 41(4) and 42(2). The independent homelands have in this respect taken a leaf out of the South African Statute Book (see eg the Ciskei National Security Act 13 of 1982 (Ck), s 26(4), dealt with in *Sebe and others v Government of Ciskei* 1983 (4) SA 523 (Ck) at 531).

6 *Union Government v Fakir* 1923 AD 466 at 471.

the executive. This is manifested by their repeated statements that they are not concerned with the 'merits' of administrative action or with the policy considerations underlying it,[1] by their willingness on occasion to respect without demur officials' refusal to disclose the information on which their decisions were based,[2] and by the cautious approach often adopted in matters involving security.[3]

Legislation conferring vast powers on administrative officials, who are often not accountable to the electorate, increases rather than diminishes the need for surveillance by an impartial body. A fundamental task assigned to the courts by the constitution — that of adjudicating disputes between the authorities and citizens — should not be eliminated by the mere claim that the government needs special powers to act in the public interest. Whatever the object of administrative action, it is still in principle possible and necessary to draw a line between legal and illegal action by public officials. In the constitutional state there is no institution other than the judiciary to decide where that line should be drawn. To strip the courts entirely of the power to perform this task would be to turn the law into an instrument for sanctioning and protecting official lawlessness — an untenable and self-contadictory situation. If the concept of legality is to have any meaning, some limits must be placed on the effect of ouster clauses — even those which express the legislature's intention as unambiguously as s 5B.

But, how, if at all, can the legislature's apprently clear intention to exclude all possibility of review be overcome? The answer lies in the strong presumption that the legislature does not intend to limit the jurisdiction of the courts any more than it in express terms declares, as well as in the logic of statutory delegation.

The effect of the presumption just mentioned is that ouster clauses, even those as sweeping as s 5B of the Public Safety Act, should be restrictively construed.[4] Restrictive construction in this context means that a court should be astute to rescue as much of its review jurisdiction as the express wording of the ouster provision allows. That it is possible for them to rescue any-

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1 This follows from the rule that a court may not substitute its own decision for that of an administrative agency (see eg *Shidiack v Union Government* 1912 AD 651 and, more recently, *Harpur v Steyn NO 1972 (1) SA 54 (O)).*

2 See eg *Minister of Interior v Bechler* 1948 (3) SA 409 (A).

3 For two striking examples see *S v Meer* 1981 (4) SA 604 (A) and *South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A).*

4 See *Berning v Union Government (Minister of Finance) 1914 AD 180 at 185, per* Innes CJ: 'Conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law, should be strictly construed and not extended beyond the cases to which they expressly apply.'

thing at all in the face of an express 'total' ouster clause is explained by reference to the words in which such provisions are typically framed. An ouster clause, if it is to have any meaning, must give the courts some direction as to the matters over which parliament intends their jurisdiction to be excluded. These are, of course, actions carried out under the authority conferred by the enactment in question. If the legislature is to prevent judicial scrutiny of such actions, it must use some words to identify them. The phrases employed to do this refer to action taken 'in terms of' or 'under' the empowering statute. Yet these very terms imply legality: for an action to qualify as one performed 'in terms of' or 'under' a statute it must fall within the limits of the powers conferred. If it falls outside those powers, it is not one performed 'in terms of' or 'under' the enabling statute — ie one of the class of actions which the legislature intends to protect from judicial review. The question whether a court should heed an ouster clause therefore simply begs that confronting the court in all review proceedings, namely, whether the action concerned was *intra vires*.[1]

The Appellate Division seemed to have adopted the reasoning outlined in the foregoing paragraph just before the declaration of the nation-wide state of emergency in June 1986. In *Minister of Law and Order v Hurley*, [2] the court summarised the effect of an ouster clause in the Internal Security Act[3] in the following terms:

> 'An arrest as contemplated by s 29(1) is an arrest by an officer of the required rank "if he has reason to believe" that the person whom he arrests or causes to be arrested is a person as described in para (*a*) or (*b*) of the subsection. An arrest by, or caused by, an officer who is not of the required rank would, therefore, not be an arrest in terms of s 29. Similarly, an arrest by, or caused by, an officer who does not have reason to believe that the person concerned is a person as described in para (*a*) or (*b*) of s 29(1) would not be an arrest as contemplated by s 29(1) and therefore not an arrest "in terms of" s 29. It follows from this that the jurisdiction of the court will be ousted by s 29(6) only if the officer who arrested or caused the arrest of a person was an officer of the required rank, and if he had reason to believe — ie if he had reasonable grounds for believing — that the person concerned was a person as described in para (*a*) or para (*b*) of s 29(1).'[4]

In other words, for an arrest to qualify as one performed under the authority of the empowering section it must at least be effected by a person who possesses the necessary qualification (ie

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1 This point was made in *Nqulunga v Minister of Law and Order 1983 (2) SA 696 (N) at 698G. See also Sebe v Government of the Ciskei* 1983 (4) SA 523 (Ck) at 530C-G.

2 1986 (3) SA 568 (A). The judgment was delivered on 22 May 1986.

3 Section 29(6) of Act 74 of 1982, which reads: 'No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section.'

4 At 504F-H.

rank) to act, and be carried out after the stipulated jurisdictional facts have come into existence (ie reasonable grounds for suspecting that the person arrested falls within the designated category).

A close examination of the *Hurley* judgment discloses, however, that the court was not prepared to go so far as to conclude that the ouster clause was entirely ineffectual. In response to appellant's contention that the interpretation just cited would render s 29(6) redundant, the court conceded that the ouster clause indeed precluded an inquiry from being taken further than into the matters mentioned — ie whether the officer concerned was of the required rank and whether he had 'reasonable grounds'. Given the existence of grounds on which the arresting officer could reasonably have based the belief that he purported to hold, however,

> 'the court cannot hold that it would have come to a different conclusion on those grounds, or that the officer did not exercise his discretion properly, and that his action should, therefore, be found to be illegal.'[1]

This disclaimer reiterates the trite principle that a court may not substitute its own opinion as to how the power should have been used for that of the responsible official. *Hurley*, therefore, goes no further than providing authority for the proposition that an ouster clause does not ex-

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1 At 586H-I.

clude the courts' authority to review matters relating to formal compliance with statutory requirements, including, specifically, authority to act and conformity with the stipulated grounds. The question remains: does an ouster clause like s 5B exclude grounds of review other than those specified by *Hurley*?[1] We turn now to consider how the courts treated this problem when they came to assess the effects of the new s 5B on their power to review emergency regulations.

In *Nqumba v State President* [2] and *Bishop of the Roman Catholic Church of the Diocese of Port Elizabeth and another v Minister of Law and order and three others*[3] Kannemeyer and Kroon JJ, respectively, held that the approach adopted in *Hurley* was applicable to s 5B. In *Nqumba*, the court rejected respondent's attempt to distinguish *Hurley* and its predecessors on the basis that the privative provision at issue in the former case ousted the jurisdiction of the court to inquire into acts done 'in terms of' the empowering provision, while in s 5B the phrase 'made under' was used.[4]

In neither case, however, was any attempt made to distinguish *Hurley* and its predecessors on the basis that, while s 5B might not preclude a court from inquiring into whether an emergency

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1 Earlier judgments provide no clear solution to this problem. In *Union Government v Fakir* 1912 AD 466, a case dealing with an ouster provision stronger than Innes CJ recalled having seen, the Chief Justice nevertheless held that cases could be conceived in which interference would be justified, for example where there was 'a manifest absence of jurisdiction or if an order were made or obtained fraudulently' (at 469-70). To these broadly- stated grounds he added the rather sweeping phrase 'or similar element' in the later case of *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675. Taking into account the somewhat loose terminology used at the time these cases were decided, it would seem that by the words 'manifest absence of jurisdiction' and 'fraud or other similar element' Innes CJ probably intended to encompass most, if not all, the various grounds of review now separately classified in modern administrative law. This is the construction placed on the words by Baxter *Administrative Law* at 730 (see also remarks of Miller J in *Singh v Umzinto Rural Licencing Board* 1963 (1) SA 872 (N) at 877H). It seems that Innes CJ was attempting to distinguish the various grounds of review from flaws in the merits, which do not go to the jurisdiction of the repository. *Nairansamy* and *Fakir* therefore seem to provide authority for the view that an ouster clause, no matter how widely framed, does not preclude a court from inquiring into whether an administrative action purportedly performed under statutory authority was indeed lawful. An ouster clause can at most be regarded as a strong indication that the legislature intended the courts to adopt a benevolent approach in interpreting and so setting the limits of the powers conferred by the enabling Act in question. It can thus serve to dampen a court's willingness to find implied restrictions on the exercise of the powers conferred. But it does not in principle preclude a finding, where necessary, that such implied restrictions had been breached.

2 1987 (1) SA 556 (E).

3 ECD 11 August 1986 Case No 110/86, unreported.

4 The learned judge noted that in *Hurley* Rabie ACJ had found support for his finding on s 29(6) of the Internal Security Act in *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A). In that case, Rumpff and Trollip JJA had concluded that the partial ouster clause concerned applied only to cases where a person was held 'under' the enabling provision. More evidence of the spurious nature of the distinction which was sought to be drawn between the phrases 'in terms of' and 'made under' could have been found in *Fakir's* case, in which the ouster provision concerned used the latter expression.

regulation satisfied the so-called formal or 'narrow' grounds of validity, it did indeed prevent review on the so-called wider grounds. Those provincial courts in which the argument was raised were unsympathetic to it. In *Metal and Allied Workers Union v State President,*[1] for example, the court held that the ouster clause did not prevent a court from striking down a regulation on the ground of vagueness or uncertainty. The reason for so doing, said the court, was the same as that which authorised a court to strike down a 'clear excess of power' notwithstanding the ouster clause. In the case of vague subordinate legislation, the court observed that

> 'the rationale for the Court's interference...is that the enabling statute does not authorise the person concerned to make such regulations, and that therefore, but for different reasons, he has acted *ultra vires.*'[2]

The court did not, however, explain the nature of the difference it had in mind between the reasons for holding an administrative act *ultra vires* for improper purpose, on the one hand, and for vagueness, on the other. One assumes that it was alluding to the difference between a violation of the express provisions of the act, and those limitations (including obscurity) which the court felt entitled to read into it. It was plainly the court's view, however, that whether the State President had violated an express or implied limitation, his regulation was nevertheless *ultra vires*. Once a court had decided that an implied limitation could be read into the act, the State President's powers were as effectively curtailed in respect of that limitation as if the limitation had been set down in express words. One implicit limitation was on the making of uncertain or incomprehensible regulations. A regulation which failed to meet a satisfactory standard of clarity was *ultra vires* because the State President had no more power to issue it than he had to make regulations for purposes not contemplated by the act. This was what the court was seeking to convey when it described the two forms of invalidity as 'falling jurisprudentially within the same category'.[3] Thus, as far as s 5 B of the Public Safety Act was concerned:

> 'The vital words for present purposes are "any regulation made under s 3" and "the validity of such regulations", which is to say of one made under s 3. If a regulation or any part of it is void for uncertainty, it is *ultra vires*. If it or any part of it is *ultra vires*, to that extent it was not made under s 3, because s 3 contemplates the State President acting within his powers, not outside them. It follows that, if in any respect the

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1 1986 (4) SA 358 (D).
2 At 365H.
3 At 365I.

> regulations with which we are concerned were not made under s 3, they are not, to that extent, "any such regulation" into the validity of which the court may not inquire.' [1]

In the next two major challenges to be launched against the emergency regulations, *Natal Newspapers v State President*[2] and *United Democratic Front v State President*,[3] counsel for the State President persisted with the argument that s 5B was only ineffective where the court was dealing with 'questions of *ultra vires* in the narrow connotation', by which was meant the absence of 'some prerequisite to the exercise of the power described in the enabling statute'.[4]

In *Natal Newspapers v State President*,[5] the court narrowed the protective umbrella afforded by the ouster clause so far as to render it inoperative with respect to the review of all acts 'exercised in the manner not contemplated or which would not have been countenanced by Parliament',[6] thus suggesting, without expressly stating, that it remained open to a court to review the State President's regulations on the ground of unreasonableness.[7]

Such acts were *ultra vires*, the court held, because the *delegatus* had done something 'which Parliament had never intended'. Thus

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1 At 367E-G.
2 1986 (4) SA 1109 (N).
3 1987 (1) SA 296 (N).
4 *Natal Newspapers supra* at 118D-E; *United Democratic Front supra* at 304G-H.
5 *Supra*.
6 At 118F.
7 This is confirmed by the fact that two of the regulations concerned were in fact struck down on that ground (see at 1132I & 1134E-F).

> '[i]n our opinion there is no difference between the one species of *ultra vires* and the other: Parliament did not intend to oust the jurisdiction of the courts where the State President acted beyond his powers under the Act.'[1]

In *United Democratic Front v State President*,[2] the court rejected the submission that the ouster clause precluded the striking down of the State President's regulations on the grounds that they were void for vagueness, constituted an unlawful delegation of powers, or that the State President had not properly applied his mind to the relevant data or principles before making the regulations, and had thus adopted an 'arbitrary approach'. Counsel for the respondent had pursued a new line of argument by seeking to draw a distinction between regulations which were void *ab initio* for want of compliance with the express provisions of the statute, and those which were merely voidable. The only jurisdiction left to the court by the ouster clause, so the argument went, was over those which were void *ab initio*.[3]

The court rejected the contention that it retained its jurisdiction only over those regulations which were void *ab initio*, observing that

> '[w]hether a court declares a regulation void *ab initio* because it was made under the empowering section, or whether the court declares a void regulation to be void because it was made under the empowering provision, the order is on both cases based on a finding that it was not made under the section; and once this is so, the inquiry falls outside the ambit of the ouster provision.'[4]

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1 At 1118H.

2 *Supra.*

3 This distinction between void and voidable administrative acts is suggested by Professor Wiechers in an attempt to rescue ouster clauses like s 5B from being reduced to complete ineffectiveness (see Wiechers *Administrative Law* at 383-5). He submits that an express statutory exclusion of judicial control affords no protection to void administrative acts, but that it insulates from judicial scrutiny only those which are merely voidable. On the question when an administrative act can be regarded as so tainted as to be void *ab initio*, however, Wiechers' solution becomes somewhat less than clear-cut. He suggests two instances of non-compliance with requirements for validity which would result in nullity, notwithstanding an ouster clause: first, a 'clear excess of power' and, second, *mala fides* or conscious non- compliance with one or other of the requirements for validity. It is suggested, however, that this proposal, for which the learned author cites no authority, goes too far. In the first place, it is not altogether clear what Prof Wichers means by 'a clear excess of power'. Among the examples he cites of this form of 'void' administrative act are 'the use of the power for purposes not authorised by the statute'. But, as is argued below (at 3.3 and 5.3), the inquiry into whether a power has been used for an improper purpose goes further than a mere comparison of the effect of the administrative act with the express words of the statute. Whatever these express provisions may be, it is always presumed that the *delegatus* is required to choose appropriate and rational means of attaining them. Grossly unreasonable or incomprehensible methods are therefore not sanctioned by the enabling provision.

4 At 305B-C.

Assuming that the above passage was correctly reported, it is with respect, somewhat unhappily phrased. It is hard to imagine how a declaration that a voidable regulation is void 'because it was made under the empowering provision' could be 'based on a finding that it was not made under the section'. What the court appears to have been driving it is, however, plain enough.

The unanimous view of all provincial courts which have been concerned with the issue up to and including the *United Democratic Front* case was, therefore, that s 5B did not oust the power of the courts to strike down regulations purportedly made under s 3(1)(a) on any of the the accepted grounds of review.

The Appellate Division, too, had seemingly given implicit support to this view in the first two cases involving challenges to regulations made by the State President after the declaration of the emergency in 1985.[1] In the first, the ouster clause was not raised in argument, but Rabie CJ's statement that the State President's powers under s 3(1)(a), though wide, were nevertheless not above judicial challenge was interpreted by at least one court as providing support for the provincial division's approach to the ouster clause.[2] This impression was strengthened when, in the second case, the court decided that it was unnecessary to evaluate the effect of s 5B.[3]

In the appeal against the *United Democratic Front* case,[4] however, the court dispelled the impression that it had, at least implicitly, lent support to the complete emasculation of s 5B. Pointing out [5] that the Appellate Division had not yet fully considered the effect of the new ouster clause, Rabie ACJ then advanced a view which had the effect of significantly extending the scope of the provision. His lordship's analysis proceeded from the following proposition:

> 'Om te kan kwalifiseer as 'n regulasie wat kragtens art. 3(1)(a) van die Wet uitgevaardig is en wat derhalwe deur art. 5B van die Wet teen ongeldigverklaaring beskerm is, hoef 'n regulasie na my mening...nie aan alle geldigheidsvereistes te voldoen nie'.[6]

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1 *Tsenoli v State President/Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A) and *Omar v Minister of Law and Order* 1987 (3) SA 859 (A).

2 See *United Democratic Front v State President supra* at 303E.

3 See *Omar's* case *supra* at 904C. This led one commentator to conclude that the section was 'wholly ineffective' (see Lawrence Baxter 'A Judicial Declaration of Martial Law' (1987) 3 *SAJHR* 317 at 319).

4 *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).

5 At 852G.

6 At 853F-G.

Regulations which were defective for want of clarity were nevertheless regulations made under the empowering provision.[1] They were only defective to the extent that the State President had in the exercise of his power failed to make regulations which were as clear as the law required of him ('so duidelik as wat die reg van hom vereis'), or which, because of their vagueness, could not be applied.[2]

This did not mean, however, that he had not made the regulations 'in terms of' or 'under' ('ingevolge of kragtens') the enabling provision. An imperfect ('onvolmaakte') or ineffective exercise of his power resulting in vague legislation did not mean that the State President had exceeded his powers and acted *ultra vires*. A finding to the contrary, said Rabie ACJ, could only be justified if a tacit limitation ('versweë beperking') were to be read into the enabling provision — namely that the State President was not authorised to make vague regulations. Such an inference was, according to the learned Acting Chief Justice, incorrect. Vagueness was not one of the criteria which demonstrated that an administrative act of the kind under consideration was *ultra vires*, but an independent ground upon which subordinate legislation could be attacked.

Rabie ACJ's reasoning is, with respect, open to criticism. Apart from his finding that vagueness is not an example of *ultra vires*, a point which is dealt with elsewhere in this work,[3] Rabie ACJ's dismissal of the possibility that the State President was implicitly denied the power to make vague regulations is not satisfactorily justified. The two cases on which he relied to demonstrate the narrowness of the jurisdiction left to the court by an express ouster clause [4] do not necessarilly lead to the conclusion that s 5B, or for that matter any similar ouster clause, prevents a court from striking down subordinate legislation on the ground of vagueness. Moreover, his lordship's finding that s 5B did indeed have this effect is difficult to reconcile with his lengthy rebuttal of the appellant's contention that the State President's powers were 'equal to those of Parliament',[5] his re-affirmation of the point already made in

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1 At 853C-D.
2 At 853D-E.
3 At 5.5 below.
4 *Narainsamy v Principal Immigration Officer* 1923 AD 673 and *Barday v Passport Control Officer and another* 1967 (2) SA 346 (A).
5 See 848E-52A.

Tsenoli/Kerchhoff that regulations could be impugned on the grounds mentioned in *Shidiack*,[1] and his express statement that vagueness could be added to those grounds.[2]

The concurring judgment of Hefer JA, in which the learned Judge of Appeal elaborated extensively on Rabie ACJ's finding that obscurity is a ground for invalidity distinct from those enumerated in *Shidiack*, also fails satisfactorily to explain why review on the former ground should be excluded by s 5B.[3]

The majority decision on the effect of s 5B in the *United Democratic Front* appeal is based on a particular and, with respect, outmoded distinction between 'narrow' and 'wide' grounds of review. Not only is this distinction questionable in the light of modern developments in administrative law, which have tended to view all the accepted grounds of invalidity as proof that an administrative act is *ultra vires* or unlawful,[4] it is also an unnecessary act of judicial self-abnegation. As is demonstrated by the lone dissent of Van Heerden JA, the court could have preserved the scope of judicial review already carved out by the provincial divisions in the face of the new ouster clause without sacrificing an important ground that could at least ensure that the powers conferred by s 3(1)(a) were used rationally.

Van Heerden JA, however, refused to follow the view of the majority that the legislature, by inserting s 5B, had intended to confer on the State President the authority to make vague regulations. In his view, the court had already by clear implication ruled in *Tsenoli/Kerchhoff* and *Omar* that s 5B did not exclude the power of the court to strike down regulations purportedly made under s 3(1)(a) on the grounds of *mala fides* (which, according to Van Heerden JA, included improper purpose), and manifest failure to apply his mind in the exercise of his powers.[5]

The crucial question, therefore, was why the courts should retain their jurisdiction in these two cases. And the answer, according to his lordship, was that by acting *mala fide* or failing to apply his mind the State President had failed to comply with tacit or implied indications contained in the Public Safety Act. If the court was prepared to read into the act the aforementioned implied limitations on the State President's powers, why, then, did it refuse to impute to the legislature

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1 *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642.
2 At 851I-J.
3 Hefer JA's judgment is discussed at 5.5 below.
4 See eg Baxter *Administrative Law* at 309-40 and Wade *Administrative Law* at 40.
5 At 857D.

the intention that the State President should not make regulations which those bound by them could not understand?

The rule that a *delegatus* is not empowered to make vague regulations was, after all, among the limitations that could, or should, be read into all enabling provisions. It is hardly conceivable, as Van Heerden JA noted,[1] that the legislature would ever expressly confer on authorities the power to make regulations which those bound by them could not understand. Such a provision would be nonsensical. If, then, there was a general presumption that the legislature did not intend to authorise the making of vague subordinate legislation, the *delegatus* who did so was not acting under authority conferred by the act. Vague regulations were, accordingly, not regulations 'made under', 'in terms of', or within the limits of the empowering provision. This was, said Van Heerden JA, a general rule.[2] There was, therefore, no conceivable reason why the insertion of s 5B should lead the court to conclude that the legislature had intended, on the one hand, to authorise the making of vague regulations, and, on the other, to allow the courts to retain jurisdiction over some of the other grounds of invalidity. To adopt the contrary view was to ignore the presumption that the legislature did not intend the placing of purposeless ('kragtelose') provisions on the statute book.[3] Insofar as it was purposeless, vague legislation failed to serve the objectives stipulated in the enabling provision. Moreover, subordinate legislation which did not meet the required standard of clarity could be seen as evidence that the State President had failed properly to apply his mind to their making.[4] The tacit rule against the making of vague subordinate legislation was therefore a part of the broader rule that the *delegatus* must apply his mind to the exercise of the conferred power, and that it must be used for the purposes stipulated in the Act.

The approach adopted by Van Heerden JA unquestionably accords more comfortably with modern developments in administrative law than that followed by the majority. There is, with respect, nothing in the contrary judgments of Rabie ACJ and Hefer JA which convincingly supports their conclusion that vagueness is a ground of review *sui generis* which falls outside the

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1 At 859F-G.

2 At 857C-I. Other cases in which the same point of view is adopted are *R v Shapiro and another* 1935 NPD 155, *per* Feetham JP: '[S]tatutes do not *empower* the authorities to make regulations so uncertain that people will not know how to comply with them or whether they are subject to them or not'; *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A) 182, *per* Van den Heever JA: 'In neither case is the Controller *empowered* to publish a notice setting out an unintelligible jumble of words which render the subject criminally liable.' (Emphasis added in both extracts.)

3 At 858H.

4 At 859I-860A.

group of grounds accepted by them as proof that the *delegatus* had acted *ultra vires*, or that satisfactorily answers the question why, if vagueness it is a distinct ground of review, s 5B should oust the jurisidiction of the court to review on that ground but not on other accepted grounds of invalidity. Rabie ACJ's assertion[1] that

> 'vaagheid gesien moet word as 'n selfstandige grond waarop onderskikte wetgewing soos die onderhawige aangeveg kan word, en nie as 'n geval van *ultra vires* nie'

merely begs the question: even if obscurity is a ground distinct from those generally serving as proof of excess of power, why should s 5B exclude it as a ground of review?

3.3 Subjectively phrased enabling provisions

A common device for minimising the risk of judicial interference with administrative action is the framing of empowering legislation in subjective terms, with vague criteria governing the exercise of the power. The object of such legislation is to indicate that the preconditions for the exercise of the power (the so-called jurisdictional facts) are not objectively determinable, but lie in the repository's autistic assessment of the extent and purposes of the powers, and of the circumstances in which they may be exercised. Where an official is authorised to act when 'in his opinion' it is necessary, or for such purposes as he deems 'necessary', 'desirable' or 'expedient', the signal is that no other person or body, courts included, have any right to interfere. The official is the final arbiter of the matters over which he has been made judge.

Both the Public Safety Act and regulations issued under it are liberally sprinkled with 'subjective' enabling provisions. The declaration of a state of emergency or an 'unrest area' is rendered dependent on the opinion of the State President or the Minister of Law and Order, respectively, that circumstances render such action necessary.[2] Again, these two officials are empowered to make such as regulations as 'appear to [them] to be necessary or expedient' for various purposes [3]. Enabling provisions in subordinate legislation have generally followed the model of the parent statute. So, for example, officials of varying seniority have been empowered to detain, seize, ban people, organisations and publications, use lethal force, prohibit

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1 At 855G.
2 Sections 2 and 5A of the Public Safety Act.
3 Sections 3(1) and 5A(1) of the Public Safety Act.

gatherings and take other drastic steps if 'in their opinion' such actions are necessary for various broadly stated purposes.

A distinction is generally drawn in administrative law between enabling clauses of the type just cited, which are said to confer a 'free' or 'unfettered' (hence non-justiciable) discretion and those in which the preconditions for the exercise of the power are set out in relatively clear and objective terms, which are said to confer a 'bound' or 'objective' (hence justiciable) discretion.[1] The difference between these two types of administrative powers lies in the fact that in the former category, the decision as to whether to exercise the power is left to the subjective judgment of the official concerned, while in the latter, certain objective facts must exist before the power can lawfully be exercised. It is, however, difficult to draw a hard and fast line between determinations of fact and those which require the exercise of judgment. As Galligan points out,[2] questions characterised as factual may entail elements of discretion, either in classifying the meaning of concepts, or in deciding whether evidence establishes its existence. Thus a requirement that X should have reason to believe that a person is a member of a particular organisation is one thing,[3] but it is quite another to require him to have 'reason to believe' that he is advancing its objectives. The latter requirement entails the kind of subjective evaluation with which a court may be reluctant to interfere, because the judgment of the *delegatus* requires an assessment of variable criteria which are neither stipulated nor readily susceptible to objective identification. Even enabling statutes which ostensibly limit the repository's discretion in 'objective' terms may therefore effectively shield him from judicial scrutiny.[4]

Do such phrases as 'if X is of the opinion' or 'if X is satisfied', confer — as apparently intended — a discretion the exercise of which is entirely immune from judicial scrutiny? There is considerable weight of judicial authority to support an apparently unqualified affirmative

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1 See eg Nienaber 'Discretions, Ouster Clauses and the Internal Security Act' 1983 (46) *THRHR* 211 at 212.

2 Galligan *Discretionary Powers* at 315.

3 See eg *Tefu v Minister of Justice* 1953 (2) SA 61 (T) at 70G-H, where the court held that whether a person was a past or present member or active supporter of a particular organisation were 'clear cut and relatively simple questions of fact'.

4 See eg the debate over the meaning of the phrase 'if X has reason to believe' in *Liversidge v Anderson* [1942] AC 206; *Sigaba v Minister of Police* 1980 (3) SA 535 (Tk); *Mnyane v Minister of Justice* 1980 (4) SA 223 (Tk); *Honey v Minister of Police* 1980 (3) SA 800 (Tk); *Mbane v Minister of Police* 1982 (1) SA 223 (Tk); *United Democratic Front (Western Cape Region) v Theron NO* 1984 (1) SA 315 (C). The question whether the phrase conferred an 'objective' or 'subjective' discretion was finally settled in *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).

answer to this question.[1] But to assume without further ado that an official upon whom a 'subjective' discretion has been conferred may simply do as he pleases is incorrect. Whether a court will interfere with the exercise of such a discretion depends on a number of factors, including the nature of the administrative act concerned, the factual circumstances in which it was exercised, and the construction of the empowering provision.

In *Katofa v Administrator-General for South West Africa*,[2] for example, the court was not deterred by the broad subjective nature of the power-conferring provision [3] from striking down a detention affected pursuant to it on the ground of want of evidence. The court observed:

> 'To be "satisfied" the Administrator-General must have reason to be satisfied. In other words objective reasonable grounds must exist to make him satisfied and he must apply his mind to the consideration thereof.'[4]

Katofa therefore represents as strong an affirmation as is possible to find in South African law of judicial insistance that an official exercising a quasi-judicial discretion must base his decision on some objective facts, no matter how wide the discretionary power which he enjoys.

The overwhelming weight of authority, however, goes against this approach. Most South African courts place a literal construction on empowering provisions, and regard phrases like 'if X is of the opinion' or 'if X is satisfied' as meaning just that. According to this approach, where the formation of an opinion or belief is made the precondition for the exercise of a power, the content of the opinion and the ground (or lack thereof) upon which it was formed are of no consequence. What matters is merely that the repository held, or purported to hold, the opinion concerned.

Sacks v Minister of Justice; Diamond v Minister of Justice [5] provides an example of this view. In that case, the court dismissed the argument that the exercise of the power could only be used against persons actually falling within the categories specified in the enabling provision as 'entirely ignoring the fact that the provision empowered the repository to act against persons

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1 See *inter alia R v Sachs* 1953 (1) SA 392 (A) at 400E-F; *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 35A-B; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 579B.
2 1985 (4) SA 211 (SWA).
3 Reg 2(1) of Proc AG 26 of 1978: 'If the Administrator-General is satisfied...'.
4 At 221I. This point was, however, overruled on appeal (1987 (1) SA 695 (A)).
5 1934 AD 11.

whenever he was satisfied that they fell within those categories'. This phrase, according to the learned Chief Justice,

> 'leaves the selection of the individual on whom he serves notice entirely to his discretion. If he is satisfied that such an individual is promoting feelings of hostility he can validly serve the notice on him *whether in fact he is promoting hostility or not.* The appellant's contention [to the contrary] involves an inquiry on, and the determination of, a question of fact which would defeat the whole of the section and render prompt action impossible. *The only question of fact with which the court is concerned is whether the Minister was satisfied..*'[1]

A more categorical description of an absolute discretion can hardly be imagined. On the face of it, the formation of the repository's opinion is entirely sundered from the factual substratum on which it was purportedly based. His opinion, no matter how fallacious or demonstrably incorrect it may be , is entirely immune from scrutiny or correction. The good judgment, sagacity and honesty of the repository are the only safeguards against abuse.

This does not mean, however, that discretionary powers conferred in 'subjective' terms are entirely imune from judicial challenge. In most cases, the legislature sees fit to give some direction to the repository as to the matters on which it expects him to form his opinion. Enabling provisions vary from one to another only in the degree of precision, or lack thereof, with which the matters on which the repository is required to form an opinion are described. However imprecise or incapable of judicial definition they may be, however, the repository is neverthless

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1 At 37-38, emphasis added. For a more recent re-statement of this view see *Winter and others v Administrator-in-Executive Committee and another* 1973 (1) SA 873 (A).

required to form an opinion *of a particular kind.* It therefore in principle remains open to court to say, 'you may hold an opinion, but it is not the kind of opinion required by the statutory provision under which you purported to act'. A defective opinion cannot serve as the required precondition for the exercise of the power. The action guided by such an opinion is *ultra vires.*

The mere insertion of phrases like 'if X is of the opinion/satisfied/deems it expedient' into enabling provisions therefore cannot mean that the discretion conferred has no limits whatever. The phrase 'unfettered discretion' is a contradiction in terms.[1] The degree of discretion which such phrases confer, and hence the extent to which it is susceptible to review, must vary according to the relationship between those phrases and the other parts of the enacting formula. [2] To disregard those other parts would be to impute to the legislature the irrational intention of at once imposing restrictions on the responsible official and licensing him to ignore them. [3]
'Decisional referents which are aimed at guiding the repository in the exercise of his discretion may be relevant to different aspects of his decision. They may be intended to categorise the circumstances in which he may act, or the purposes to which he must put the power.

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1 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1060; Baxter *Administrative Law* at 88 & 409-10. As Wade has pointed out ('The Myth of Unfettered Discretion' (1968) 84 *LQR* 166 at 166-7): 'In theory every discretion is capable of unlawful abuse; and in fact the courts have usually been astute to detect implied limits in the vague subjective expressions which Parliament uses so freely.'

2 Rabie 'Diskresies en Jurisdiktionele Feite in die Administratiefreg' (1978)41 *THRHR* 419 at 420. Mary Mathews effectively captures the difficulties associated with the idea of unfettered statutory discretionary powers in the following passage: 'If one did attempt to formulate a purely subjective clause it would perhaps read: "If the Minister is satisfied he may detain any person". Satisfied with what? His digestion? It provokes the question because it is linguistically complete but conceptually incomplete, which means that it does not make sense. An alternative subjective phrasing which excludes terms such as "satisfied", "suspects", "has reason" which naturally call for conceptual completion would be: "The Minister may detain any person". However, this is legally incomplete because it calls for an answer to the question: "Why, for what offence?" An attempt at a purely subjective formulation clearly results in conceptual and legal nonsense and this the legislature could never have intended.' (M L Mathews, 'OK for Starters' (1986) 2 *SAJHR* 333 at 336-37).

3 G M Nienaber 'Discretions, Ouster Clauses and the Internal Security Act' 1983 (46) *THRHR* 211 at 212. This was recognised by Lord Denning MR in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* ([1977] AC 1014 (HL)) when he said (at 1025B-C): 'Much depends on the matter on which the Secretary has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another.'

The latter formulation is frequently encountered in the Public Safety Act and the emergency regulations, in which the wording of the parent statute is widely repeated. Thus s 3 of the Act empowers the State President to make such regulations as 'appear to him to be necessary or expedient' for providing for 'the safety of the public, the maintenance of public order or the termination of the state of emergency'. The regulations also confer a variety of administrative powers to be used where various officials are 'of the opinion' that their exercise is necessary for the same purposes. The decision as to whether an action is functional to the attainment of a given end clearly entails a high degree of judgment.[1]

The ambivalent approach adopted by the South African courts towards subjectively-phrased enabling provisions appears to arise from the attempt to draw a line between non-reviewable errors of fact and reviewable errors of law. This can be seen in thelandmark decision of *Shidiack v Union Government*,[2] in which Innes CJ attempted to enumerate the circumstances in which a court might properly interfere in the exercise of an administrative decision conferred in subjective terms:

> 'The decision of the Minister being essential, it becomes necessary to consider the circumstances under which the courts can properly question his decision. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own.'[3]

Having said this, however, the learned judge added:

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1 Lord Denning also pointed out in the *Tameside* case that the degree of judicial diffidence required by the phrase 'if X is satisfied' also depends on the object of the enabling provision, and the circumstances in which it was enacted and in which the *delegatus* was required to act. Thus, said the learned Master of the Rolls, judgments in respect of wartime regulations, in which the courts had concluded that enabling provisions in which the phrase occurred indicated an unlimited discretion not susceptible to judicial challenge, were not necessarily applicable to peacetime legislation which empowered officials to act in situations in which time was not of the essence (see 1024H-25B; also *Nakkuda Ali v Jayarathe* [1951] AC 66 at 67 and *Ridge v Baldwin* [1964] AC 40 at 73). *Tameside* and the cases cited in this note did not involve the exercise of emergency powers. The Court of Appeal has, however, adopted the same view with regard to the emergency procedure in the Industrial Conciliation Act 1971 (see *Secretary of State for Employment v ASLEF (No. 2)* [1972] (2) QB 455, 487).

2 1912 AD 642

3 At 651.

> 'There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if considered the decision inequitable or wrong.'[1]

The above passage indicates that Innes CJ appreciated that the circumstances in which judicial review was possible varied according to the context in which the subjective phrase occurred. A motive can only be regarded as 'ulterior' when gauged against the purposes for which the power was conferred. The question whether the repository had properly applied his mind to the matter can also only be decided by having regard to the factual circumstances which the enabling provision expressly or impliedly enjoins the repository to consider.

The Appellate Division has recently affirmed that the effect of subjectively-phrased enabling provisions is relative. In the appeal against the *Katofa* judgment *supra*,[2] Rabie CJ observed:

> ''n mens moet in elke besondere geval vasstel wat die bedoeling van die wetgewer is. Die wetgewer kan immers, indien hy wil, sowel die vraag of sekere feite bestaan as die evaluêring van die feite aan die subjektiewe oordeel van 'n persoon laat.'[3]

The court's approach to discretionary powers conferred by emergency legislation[4] has been influenced by the wording of the enabling provision, the status of the official to whom the power has been entrusted, and the nature of the power to be conferred.

The decision to declare a state of emergency, being a matter of pure policy, has been declared entirely beyond judicial scrutiny even though the enabling provision (s 2 of the Public Safety Act) is framed in ostensibly objective terms.[5] Initially, the courts adopted the same approach to

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1 At 651-52.

2 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A).

3 At 753C. The learned Chief Justice did not explain, however, whether it was the mere use of the phrase 'if the Administrator-General is satisfied', or the nature of the matters upon which he was required to be satisfied, or a combination of the two, which led to his conclusion that the enabling provision concerned left both the existence and the evaluation of the facts to the subjective judgment of the repository.

4 This problem is addressed in greater detail in the discussion of specific provisions in later chapters. For present purposes, the general approach adopted by the courts is outlined only insofar as it is necessary to avoid repetition in later chapters.

5 *Stanton v Minister of Justice* 1960 (3) SA 353 (T) at 337A-B; *Omar/Fani v Minister of Law and Order* 1987 (3) SA 859 (A) at 819I, discussed in Chapter 4 below.

the legislative powers conferred on the State President (then Governor-General) by section 3(1)(a).[1] In *R v Maphumolo*,[2] the court seemed prepared entirely to preclude the possibility of review when it interpreted s 3(1)(a) as depriving the courts of any capacity to inquire into the reasonableness of an emergency regulation or into 'whether or not it is, in fact, necessary or expedient for any of the stated purposes'.[3] In the next breath, however, the court proceeded to consider the regulation at issue

> 'on the basis that it is open a court to hold, apart from the question of *bona fides*, that a regulation purporting to be made under s 3(1) of the Act, is *ultra vires* because it "could not possibly" or "could not conceivably" aid in securing any of the objects set out.'[4]

How one concludes that a regulation 'cannot conceivably' or 'cannot possibly' be related to a given purpose without first addressing the question whether it is 'in fact' so related the court did not explain. It appears, however, that the court was compelled to draw this, with respect, sophistic distinction in order to avoid overstepping what it saw as the dividing line between the merits and the legality of the Governor-General's decision.

The attempt to preserve some grounds of review in the face of the sweeping wording of s 3(1)(a) led the Appellate Division into similar logical difficulties 26 years later in *State President v Tsenoli/Kerchhoff v Minister of Law and Order*.[5] Describing the State President's emergency legislative power as 'a most extensive one', [6] Rabie ACJ proceeded to say:

> 'The State President can, it is clearly stated in s 3(1)(a), make such regulations as appear to him to be necessary or expedient for the purposes mentioned in the section. He can, in regulations made by him, prescribe the methods and means to be employed for the achievement of the purposes stated in the section.'[7]

Expanding further on this passage in *Omar v Minister of Law and Order*,[8] Rabie ACJ added that the word 'expediency' was further illustration of the breadth of the State President's discretion. From this it followed that

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1 See Chapter 5 below.
2 1960 (3) SA 793 (N).
3 At 798E-F.
4 At 799D-E.
5 1986(4) SA 1150 (A).
6 At 1182C.
7 At 1182D.
8 1987 (3) SA 859 (A).

> 'it is not open to court, when considering a regulation, to substitute its assessment of what would be necessary or expedient to achieve the purposes mentioned in the section for that of the State President and to hold that the regulation is invalid because the State President could, in its opinion, have dealt with the matter in another, less harsh way.'[1]

The court hastened to add, however, that the State President's discretion was not entirely unfettered and unchallengable. A regulation could still be impugned on the grounds mentioned in *Shidiack's* case. In other words, the law still required him to act in good faith and to exercise the powers conferred on him for the purposes mentioned in the section. A court could not, however, question the means by which the State President chose to attain those ends. Provided, therefore, that a regulation could conceivably be related to the stated purposes, it was valid no matter how unreasonable or unjust the means appeared to be.[2]

The important point established by the authorities this far considered, however, is that in spite of its wide and subjective terms, s 3(1)(a) does not render emergency regulations issued by the State President or, by parity of reasoning, the Minister of Law and Order in relation to an 'unrest area', entirely dependent on their autistic assessment. *Mala fides*, improper purpose, and failure to apply the mind remain grounds upon which a court can strike down emergency regulations.[3]

The courts' have adopted an equally uncertain approach when it comes to the review of administrative action exercised in terms of the wide powers conferred by emergency regulations. In the case of regulations authorising detention without trial, for example, the phrase 'if in the

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1 At 892B-G.

2 Used in relation to legislation, however, the distinction between 'means' and 'ends' is in reality untenable. All legal rules are in fact statements of means for the attainment of particular ends. To regard the means as beyond judicial criticism is therefore in practice to insulate them entirely from review.

3 The extent to which the courts have been prepared to invoke these grounds of review is considered in the next chapter.

opinion of' has been held in some cases to exclude judicial review on all grounds other than *mala fides*.[1] In some cases , courts have come close to excluding all possibility of an inquiry into the factual basis of the exercise of what is termed a 'free discretion'.[2] But in others it has been recognised that the provision authorising detention without trial, even though framed in subjective terms, nevertheless requires an arresting officer to hold a particular kind of opinion — ie one shaped by consideration of facts which can reasonably lead to the conclusion that arrest and detention was necessary to secure the purposes for which such power was conferred.[3]

This broadening by the courts of their review jurisdiction reflects an appreciation that the legal effect of subjectively-phrased enabling clauses should be assessed, not *in vacuo*, but in relation to the decisional referents set out in the enabling provision. These were not placed there *ex abundanti cautela*, but to ensure that the drastic power of detention was used only where necessary for the ends stated. The formula 'if a member of the Force is of the opinion that' might indicate that the circumstances justifying the exercise of the power were intended to be left to the determination of the responsible official and were not meant to be justiciable in a court. But, as Rose Innes J observed in *Swart v Minister of Law and Order*,[4] it did not denote that the power conferred could be used gratuitously. The regulation prescribed the purposes for which the power of arrest and detention might justifiably be exercised. From these could be inferred the limitations which the lawgiver had seen fit to place on the exercise of that power.[5] The alternative would be to disregard the provisions of the regulation which prescribed the circumstances in which the power of arrest and detention might justifiably be exercised and, accordingly, such limitations as the lawgiver had seen fit to place on the exercise of that power.[6] Adopting this

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1 In *Stanton v Minister of Justice* 1960 (3) SA 353 (T), for example, it was said (at 356F-G): 'It would appear that the only manner in which applicant can establish [sc:the] unlawfulness of an arrest and detention is to show that [the responsible officer] acted *mala fide*.'

2 See eg *Nkwinti v Commissioner of Police* 1986 (2) SA 421 (E), in which the court held that the sole 'fact' with which it was concerned was whether the arresting officer held an opinion, not whether that opinion was right or wrong. Kannemeyer J observed (at 435B): 'If A thinks he has a broken ankle he is of the opinion that he has a broken ankle. If A thinks he has a right of way, he of the opinion that he has a right of way. His opinion is not something capable of determination by a third party. However biased, fanciful or demonstrably incorrect it is, it remains his opinion.'

3 See, eg *Radebe v Minister of Law and Order* 1987 (1) SA 586 (W); *Dempsey v Minister of Law and Order* 1986 (4) SA 530 (C); *Gumede v Minister of Law and Order* 1987 (3) SA 155 (D); *Jaffer v Minister of Law and Order* 1986 (4) SA 1027 (C).

4 1987 SA (4) 452 (C) at 462H-463B.

5 At 463F-G.

6 At 463F-G.

approach, the courts declared emergency detentions unlawful in a number of cases on the basis that the arresting officer or the Minister, as the case may be, had not applied his mind to relevant circumstances.[1]

The Appellate Division has, however, held certain administrative emergency powers to be essentially non-justiciable even though the enabling provisions under which they were taken were couched in ostensibly 'objective' words. In *Van der Westhuizen NO v United Democratic Front*,[2] for example, the court was concerned with an act performed under a regulation in which an 'opinion clause' had not been inserted.[3] Hefer JA rejected the trial court's view that the regulation conferred an 'objectively justiciable' discretion, saying

> 'without derogating in any way from the importance of the freedom of assembly, but taking into account matters such as the nature and purpose of the powers, the status on those on whom they were conferred, and the fact that they were conferred and are to be exercised in a declared state of emergency, there is every reason to believe that the intention was to constitute the Commissioner the sole arbiter of the necessity or expediency of exercising his powers.'[4]

In reality, Hefer JA's assessment of the probable intention of the State President is unquestionably correct. Even a nodding acquaintance with the development of the emergency regulations leaves no doubt whatsoever about their draftsmen's intention to undermine or entirely to eliminate common law limitations on delegated powers. But whether a court interpreting legislation which confers drastic powers over the recognised rights of the subject should side so reflexively with the executive on the grounds cited in the above-quoted passage is another question. A close reading of the judgment of the court *a quo*[5] indicates that it was adopting a fundamentally different and, with respect, correct, approach towards the interpretation of such legislation. What that court had in mind when postulating the limits set by the regulation was not the head of an executive which has historically demonstrated its contempt for the niceties of the law, but the intention of an *ideal* lawgiver, which must be presumed at the very least to desire that the drastic powers which it has seen fit to delegate should be used rationally and with the most scrupulous regard for the democratic rights of the subject. That the *delegatus* was

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1 These cases are discussed in detail at 6.2 below.
2 1989 (2) SA 242 (A).
3 This was the regulation empowering the Commissioner or Divisional Commissioners of Police to prohibit meetings (reg 7(1)(bA) of Proc R 109 of 1986) which, together with the case, is discussed at 6.5 below.
4 At 251B-C.
5 *United Democratic Front v Van der Westhuizen NO* 1987 (4) SA 926 (C).

made 'sole arbiter' of the necessity or expediency of exercising the power does not indicate that the intention was to authorise him to use the power irrationally, capriciously, or arbitrarily.

Like many emergency regulations, that at issue in *Van der Westhuizen* was couched in purposive terms — ie the lawgiver had specified the objectives for which he intended the power to be used. An assessment of whether a prohibition was necessary to serve these purposes necessarily presupposes a factual inquiry into whether the conditions in which the power was exercised were such as to warrant the conclusion that the holding of the meeting in question would, in an objective sense, have endangered the safety of the public, the maintenance of law and order or have prolonged the emergency. In *Omar's* case,[1] Rabie ACJ, while stressing the subjective nature of the legislative powers conferred on the State President by s 3(1)(a) of the Public Safety Act, nevertheless recognised that his discretion had some objective limits, and that these limits were set by the purposes specified in that provision. Thus, according to the learned Acting Chief Justice, the State President 'must exercise the powers conferred on him by s 3(1)(a) of the Act *for the purposes mentioned in that section*'.[2] And in *State President and others v Tsenoli/ Kerchhoff and another v Minister of Law and Order*[3] Rabie CJ, as he then was, had this to say about the purposive dimension of the power conferred by s 3(1)(a):

> 'The power which s 3(1)(a) confers on the State President is to make regulations for providing for the safety of the public or the maintenance of public order during the existence of the state of emergency. It is not a power which includes the power to control (or curtail) the movement of persons, such as common criminals, whose conduct is not related to the existence of continuance of a state of emergency.'[4]

It is submitted that the question whether the regulation at issue in *Van der Westhuizen* conferred a 'subjective' or 'objective' discretion should not have been treated as if it finally disposed of the matter. The court of appeal acknowledged[5] that the Divisional Commissioner's prohibition could still be assailed on one of the grounds mentioned in *Shidiack*.[6] But its treatment of 'jurisdictional facts' as something distinct from the grounds of review mentioned in *Shidiack* is unfortunate and, with respect, misleading.

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1 *Omar v Minister of Law and Order* 1987 (3) SA 859 (A).
2 At 892H. Emphasis added.
3 1986 (4) SA 1150 (A).
4 At 1180B-C.
5 At 249H & 251F.
6 *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651.

Shidiack, it must be remembered, was decided before the finer principles of judicial review of discretionary powers had been developed. It must be remembered too, that the passage from that case referred to by Hefer JA was an attempt to set forth the grounds on which a court could interfere with the exercise of a discretionary power conferred by a statute framed in subjective terms. In *Shidiack*, as we have seen, Innes CJ affirmed the trite principle that in such cases a court may not interfere with 'a due and honest exercise of discretion, even if it considered the decision inequitable and wrong'.[1] Where, however, the repository of the subjective discretionary power 'had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of the statute', the court could interfere.[2] There was no mention in *Shidiack* of 'jurisdictional facts' in the sense in which that word was used by Corbett J, as he then was, in *South African Defence and Aid v Minister of Justice*[3] and understood by Hefer JA in *Van der Westhuizen*. All Innes CJ was saying was that the court could not interfere with a so-called subjective discretion 'on the merits'. His judgment in *Shidiack* cannot be seen as an endorsement of the view that wherever the legislature confers a 'subjective' discretion, or fails to specify the matters on which he must form his opinion, the repository can act without any regard to the factual circumstances or states of affairs in which the power is to be exercised.

Support for this view can in fact be derived from the judgment of Corbett J in *Defence and Aid*. After differentiating between 'subjective' (non-justiciable) and 'objective' (justiciable) 'jurisdictional facts', the learned judge went on to observe that, even in the case of discretionary powers the exercise of which were dependent on the subjective judgment of the repository as to the existence of certain facts, a court may interfere when the repository 'gives a decision which is such that it could not properly have been given by any reasonable man'.[4] This was because

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1 At 652.

2 At 651-2.

3 1967 (1) SA 31 (C), in which the court distinguished between two categories of 'jurisdictional facts', one consisting of 'a fact, or state of affairs, which, objectively speaking, must have existed before [a] statutory power could validly be exercised', the other of 'instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power'. In the former category, said Corbett J, a court finding that the jurisdictional fact did not exist in an objective sense could declare the purported exercise of the power invalid. But in the latter the jurisdictional fact 'was not whether the prescribed fact, or state of affairs, existed in the objective sense but whether, subjectively speaking, the repository of the power had decided that it did' (see at 34H-35C).

4 At 37D, quoting Greenberg J in *Scottes and Callanicos v City Council of Johannesburg* 1935 TPD 101 at 104.

the court could then assume that the repository had been activated by improper motives or had failed to apply his mind to the matter.

The rule that a court may not interfere with the exercise of a subjective discretion 'even if it considers the decision to be wrong' and that which allows a court to interfere where the repository has 'failed to apply his mind to the matter' have never been satisfactorily reconciled. Although the Appellate Division has frequently affirmed that the exercise of emergency powers may be assailed on the grounds mentioned in *Shidiack*,[1] it had to the time of writing not upheld a single provincial division judgment in which emergency actions were set aside on any of those grounds. Only in one case, *Visagie v State President*,[2] has an appeal been allowed against an emergency action, but even then the court held that it was precluded from inquiring into the grounds on which the decision was made.[3] This has tended to encourage the confusion which presently bedevils the law relating to the review of discretionary powers, and particularly of discretionary emergency powers.

It is submitted that the question whether the repository of an administrative discretion has formed the kind of opinion required by law is merely another way of asking whether the jurisidictional precondition to the exercise of the power has been satisfied. Every statute which confers power on a public official to remove or limit the rights of the subject presupposes that he should base his decision on evidence which shows that the exercise of the power is reasonable in the circumstances. Even statutes which entrust the exercise of delegated powers to the subjective judgment of the repository require the formation of an opinion stipulated by the enabling statute. And that opinion, in order to be legally acceptable, must be shaped by consideration of relevant facts and circumstances — ie it must be reasonable. What else could Innes CJ have meant when he said in *Shidiack* that an official entrusted with a 'subjective discretion must apply his mind to '*the matter*'? He could not have meant by 'the matter' merely the formal legal requirements for the exercise of the power, or he would not have mentioned 'failure to comply with the express provisions of the statute' in the very next breath. The duty of a court to set aside the existence of a discretionary power on the ground of the repository's 'failure to apply his mind' must therefore mean it is in principle *always* open to court to inves-

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1 See eg *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 35C and *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) at 851I.

2 AD 1 June 1989 Case No 553/87, unreported.

3 The court set aside part of a restriction order imposed on a former detainee on the ground of unauthorised purpose. *Visagie* is discussed at 6.3 below.

tigate the facts upon which an official exercised a statutory discretion, no matter how 'subjective' the terms of the enabling statute may be.

The above survey indicates that, in spite of the apparently unlimited discretionary powers which have been conferred on members of the security establishment during emergency rule, some of the principles of judicial review remain intact. 'If in the opinion' provisions do not preclude all inquiry into the rationality of decisions taken under them, whether the test is formulated in terms of *mala fides*, unreasonableness, failure to apply the mind or improper purpose. The courts are entitled to ask whether the opinion held by the repository of emergency powers conforms with that required by the enabling provision, and whether the power was used for ends specified by the relevant enabling legislation.. The degree to which a court will insist on compliance with the principles of administrative rationality depends, however, on a number of factors. Not the least of these is the information at its disposal against which to test the factual foundation on which an official's decision rests.

3.4 Witholding reasons

The valid exercise of a discretion conferred and confined by law presupposes that the repository has applied his mind to the provisions of the enabling statute in order to establish the extent and nature of his powers, the circumstances in which and persons against whom it can be used, and the purposes for which the power has been conferred. Clearly, a court can only establish whether the holder of a power has done all of these things if it has at its disposal the information to which the repository applied his mind before acting. Denial of such information to the court will render nugatory even such limited basis as exists for review of wide discretionary powers. [1] Any device that is used to confer on the authorities a privilege against disclosure may therefore be regarded as a severe limitation of the court's review jurisdiction.[2]

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1 The arguments for and against giving reasons for administrative decisions are succinctly summarised by Viljoen 'Reasons of Necessity or the Necessity for Reasons' *South African Public Law* (1988) 3 92 at 93-8. It is perhaps worthy of note that s 2(2) of the South African Law Commission's draft bill 'to provide for the extention of the powers of review of the Supreme Court of South Africa...' imposes a duty on administrative authorities to furnish reasons for their decisions: See the Commission's Working Paper 15, Project 24 at 109.

2 See eg *S v Naicker* 1965 (2) SA 919 (N); Baxter *Administrative Law* at 740.

Absent an obligation expressly created by statute, there is no duty on administrative authorities to give reasons for their decisions. The only real inducement for officials to do so lies in the adverse inference that might be drawn against them by a court if they refuse to give reasons.[1] In some contexts, especially those of emergency detentions, where the onus has been held to lie on the detaining officer to justify the detention, this inducement may be real.[2]

The principal source of statutory privilege in regard to matters of state security is s 66(1) of the Internal Security Act,[3] which authorises the Minister or the provincial Administrators to prohibit the production of any evidence in court if in their opinion 'it affects the security of the State and that disclosure thereof will, in his opinion, prejudicially affect the security of the State'.[4] This provision is clearly wide enough to be used to prevent judicial scrutiny of actions taken under the Public Safety Act.

Even where this drastic expedient has not been resorted to, however, the courts have on occasion regarded a refusal or failure to provide information as sufficient to justify an inference of unlawfulness.[5] The kind of evidence which the responsible official needs adduce depends, again, on the terms of the statute under which he acted. In the case of empowering provisions framed in objective terms, the courts can insist on production of the factual information which the repository has claimed shaped his decision.[6]

But what of empowering provisions in which the principal jurisdictional fact is the opinion of the repository? Can an official vested with a so- called subjective discretion simply state that he was of the opinion that his action was necessary for the purposes stated in the enactment? If

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1 See eg *Pretoria North Town Council v A1 Electric Ice Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A); *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (A); *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board* 1985 (2) SA 234 (SE) at 246G; *Jeffery v President, South African Medical and Dental Council* 1987 (1) SA 387 (C) at 395D-G.

2 See eg *Sigaba v Minister of Defence and Police* 1980 (3) SA 353 (Tk) at 551G-H.

3 74 of 1982.

4 The predecessor of s 66(1), s 29(1) of the General Law Amendment Act 101 of 1969, was a response to the decision in *Van der Linde v Calitz* 1967 (2) SA 239 (A), in which the Appellate Division affirmed the right of the courts to satisfy themselves that the refusal to disclose information on the ground of state security was not a pretext designed to mask the absence of any real justification for a detention.

5 See eg *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) and *Sigaba's* case *supra* at 534A.

6 *Hurley and another v Minister of Law and Order* 1985 (4) SA 709 (D) at 725D-I.

this is the case, all the official has to do is match his affidavit with the terms of the enabling provision, and the task of the reviewing court is reduced to a mechanical comparison of the former with the latter. If the official's declaration faithfully echoes the enabling provision, then *caedit quaestio*: the action is immune from judicial interference no matter how suspicious or specious the actual reasons for it may appear to be from the applicant's evidence or whatever else the authority may have chosen to say or refrain from saying.[1] Judicial interference will only be warranted where the act is sought to be justified by an averment falling short of the terms of the enabling provision.[2]

In *Tussentydse Regering vir Suidwes-Afrika v Katofa*,[3] the Appellate Division was unable to reach agreement on the nature of the burden of proof required in cases turning on powers exercised pursuant to subjectively-phrased enabling provisions. *In casu*, the detaining authority had stated on affidavit that he was and remained satisfied that the detainee was a person covered by the enabling provision. Rabie CJ (Jansen JA concurring) was of the opinion that this bald averment was sufficient to discharge such onus as rested on a detaining officer to justify the detention. The only fact with which the court was concerned, said the learned Chief Justice, was whether the repository was satisfied. Where *mala fides* was neither alleged nor proven, it was enough for him to say so.

Trengove JA (with whom Botha JA concurred) was not prepared to accept that the mere *ipse dixit* of the arresting officer was sufficient to discharge the onus. He accordingly found that the Administrator-General's mere assertion that he was satisfied that the detainee was a person of the kind stipulated in the empowering provision was not enough to show that he was aware of the requirements imposed on him by the empowering provision.[4] According to his lordship, the Administrator- General's mere statement that he was satisfied that the arrested person was one contemplated by the regulation proved nothing. What should in addition appear from his declaration was that he fully understood the sense ('strekking en kumulatiewe werking') of the provisions defining the matters to which he was expected to apply his mind. As it stood, respondent's declaration failed to persuade Trengove JA that the Administrator-General had satisfied himself on the factual circumstances set out in the provision and had not taken irrelevant considerations into account. It was thus, in his lordship's opinion, not possible for the

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1 Grogan 'Judicial Control of Emergency Detentions: A Glimmer of Hope' 1988 (4) *SAJHR* 225 at 227.
2 *Swart v Minister of Law and Order* 1987 (3) SA 452 (C) at 465F.
3 1987 (1) SA 695 (A).
4 At 743F.

court to adjudge whether the Administrator-General believed in good faith that the factors on which his opinion was grounded fell within the frame of reference of the empowering provision, or whether the factors that he did take into account justified the opinion which he had formed.

The different views expressed in *Katofa* on the question of the quantum of evidence required to justify the inference that an opinion had been formed may, however, be more apparent than real. A careful reading of the judgment of Rabie CJ discloses that he probably intended his observations to be confined to the case before him, or at most to cases in which the applicant's plea for relief was not based on an allegation of *mala fides* or on one of the grounds mentioned in *Shidiack*.[1] If, however, the judgment of Rabie CJ can be interpreted as authority for the proposition that officials acting under 'subjective' enabling clauses are *in all circumstances* relieved of the duty to provide reasons for their actions when challenged in court,[2] it is submitted that it should not be followed as a matter of principle. Enough has been said to support the view that the exercise of all statutory discretionary powers are subject to legal limits. There can be no purpose in recognising, as the courts have unquestionably done, that the exercise of wide subjective powers are subject to review on certain grounds, however limited these may be, if the repository of the power can effectively ward off all judicial scrutiny by merely asserting that he holds the opinion required by the statute.

In a later case involving detention under emergency regulations, *Minister of Law and Order v Dempsey*,[3] the Appellate Division, appeared not to accept the attempt by appellant's council to rely on Rabie ACJ's judgment in *Katofa*, although the approach of Trengove AJ was also not supported. Hefer JA chose a *via media*, namely, that the onus resting on the detaining authority was *prima facie* discharged by his mere *ipse dixit* that he had formed the required opinion, whereupon the party disputing that the opinion had been properly formed then assumed the burden of proving that allegation.[4] The effect of this judgment is, of course, for all practical purposes to reverse the rule, laid down in *Hurley* and affirmed in *Katofa*, that in cases of detention the onus rests on the detaining authority to prove its lawfulness.

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1 *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642. See esp 735G-H of *Katofa*, in which applicant entered a plea simply that the detaining authorities show cause why he should not be released from detention.

2 Which was the construction placed upon his judgment by Rose Innes J in *Swart v Minister of Law and Order* 1987 (4) SA 452 (C) at 464I.

3 1988 (3) SA 19 (A).

4 See esp 38G-I.

Thus far we have been dealing with cases where there is no statutory obligation on the responsible official to disclose reasons for his decision. In some cases, however, such a duty is expressly laid down. So, for example, s 28(3)(b) of the Internal Security Act [1] requires the Minister to provide a detained person with the reasons for his detention, together with as much of the information on which the Minister had acted as in his opinion can be disclosed without prejudice to the public interest.

Initially, the courts were willing to accept a mere regurgitation by the Minister of the terms of the enabling provision as sufficient to discharge even this obligation.[2] Those which did were clearly confusing the concepts 'findings' and 'reasons'. The matters stated in the enabling provision specify the kind of opinion the repository of the power is expected to hold, or, to put it another way, the conclusion he is required to draw. The reasons he is obliged to disclose are the inferences which he has drawn from the information to which he has applied his mind, and it is only this information which he is empowered to withhold when in his opinion its release would be against the public interest. The conceptual confusion between the concepts grounds, findings, reasons and information into which the courts had stumbled was clarified in *Nkondo & Gumede v Minister of Law and Order*,[3] which has now made it clear that it is not sufficient to inform a s 28 detainee of the statutory grounds on which the Minister had purported to act, and that reasons must be spelled out with sufficient clarity to enable the detainee to make representations against them.[4]

Nkondo/Gumede does not resolve the problem of what degree of detail the Minister should provide when specifying his reasons. The release of the applicants was ordered in that case, not for want of substantive proof, but for non-compliance with what the court held to be a

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1 Act 74 of 1982.

2 See, for example, *Kloppenberg v Minister of Justice* 1964 (1) SA 813 (D) (upheld on appeal (1964 (4) SA 31 (N)) and cited with approval *obiter* in *Minister of Justice v Alexander* 1975 (4) SA 530 (A)) and criticisms of these judgments in Mathews *Freedom* at 67; Mathews *Law, Order and Liberty* at 77; Mathews *Darker Reaches* at 148; Baxter *Administrative Law* at 745-6; Dugard *Human Rights* at 139.

3 1986 (2) SA 756 (A).

4 See esp 772J-773A and 775J-776B: 'The Minister did not...inform the persons concerned why he ordered their detention. What he did was to inform them — in very vague and general terms — that at some time in the past (note the use of the past tense) they "did...attempt to create a revolutionary climate in the Republic of South Africa thereby causing a situation endangering the maintenance of law and order". What the Minister did not do was to set forth the reasons for their detention. The purpose of the detention order is to prevent the commission of certain crimes, or the endangering of the maintenance of law and order, etc, as set out in s 28(1), and the Minister did not inform the persons against whom he issued notices...why he had ordered their detention on the ground of what they had said or done at some unspecified time in the past.'

peremptory procedural requirement. But it seems clear that the court expected the Minister at least to identify the specific acts which had led him to conclude that the detained persons were 'endangering the maintenance of law and order' etc. The case therefore suggests that where there is a statutory duty to provide reasons to the person affected by an administrative action, complete failure to do so will render the act procedurally defective. *Non constat*, however, that the provision of *any* reasons will be sufficient. It still remains open to court to decide whether the reasons provided justify the formation of the opinion. If they do not, the act can be vitiated due to failure by the repository of the power to apply his mind to material considerations.

This does not, of course, help people detained under the emergency regulations, which contain no express provision compelling the detaining authorities to give reasons to the detainee or to anyone else. The Appellate Division has ruled that no such obligation can be implied from the detention provisions of the emergency regulations.[1] There are, however, some cases in which the State President has seen fit to impose such an obligation — even if in attenuated form — on officials vested with emergency powers. One example is the regulation authorising the banning or censorship of publications for 'systematic or repetitive publishing of subversive propaganda',[2] which provided that before the Minister of Home Affairs could ban a publication he was required to give written notice to the publisher that the publication was being 'examined', and to state the 'grounds' for such an examination. Another paragraph then expressly limited the 'grounds' which the Minister was required to disclose to:

> '(a) a list indicating the reports, comments, articles, photographs, drawings, depictions, advertisements, letters and other items published in that periodical and which are being taken into account against that periodical by the Minister in such examination for the purpose of establishing whether, in his opinion, there is [*sc*: in] that periodical a systematic or repetitive publishing of matter, or a systematic or repetitive publishing of matter in a way, which, in his opinion, has or is calculated to have an effect described in paragraph (a) of subregulation (1); and
>
> (b) an indication why each such item is being taken into account for such purpose.'

This provision clearly compels the Minister to disclose reasons, in the sense enumerated in *Nkondo/Gumede*, for his conclusion that the statutory grounds for a banning are present in a

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1 See *Omar v Minister of Law and Order* 1987 (3) SA 859 (A).
2 Reg 7 of the 1988 Media Emergency Regulations (Proc R 99 of 1988).

particular case. Unfortunately, the statutory grounds are themselves so vague and value-laden [1] that there is little prospect of a publisher successfully challenging the Minister's discretion.[2]

3.5 Deeming provisions

Perhaps the crassest method employed by the executive to render subordinate legislation 'judge-proof' is to seek to compel the courts to interpret regulations in such a way as to exclude the presumptions on which various grounds of review are founded.

One such provision, enacted in 1986, was aimed at preventing the State President's regulations from being impugned on the ground of excess of power. This provision, which was incorporated into the 1986 media regulations by way of a special proclamation, was doubtless a response to earlier judgments[3] in which a number of regulations had been struck down because they were so sweeping as pontentially to hit conduct which had nothing to do with the purposes set out in s 3(1)(a). It read:

> 'A provision of these regulations which does not already by itself limit the application, effect or scope thereof to matters connected with the purposes referred to in s 3(1)(a) of the Act shall, notwithstanding the fact that the words of that provision may naturally have a wider meaning, be construed in such a manner as to limit the application, effect or scope thereof to the said matters.'

This regulation was justifiably described as 'curious' by the full bench of the Natal court in *United Democratic Front v State President.* [4] While it was clearly directed at judges, the court pointed out that it also placed an obligation on ordinary persons who were bound by the regulations to construe them in a particular manner, without enlightening them on how to do so. Ordinary citizens were, said the court, in effect required to reformulate regulations which literally went beyond the scope of the enabling provision so as to bring them within its scope before they could determine whether they were in fact bound by them. Those attempting such a reformulation could never be certain where the boundaries set by the enabling provision were to be found. Moreover, the reader was required to construe the regulations according to limitations which depended on what the State President considered necessary or expedient for achieving

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1 Including the promoting or fomenting of revolution, which, it is interesting to note, was among the purported reasons cited by the Minister in *Nkondo/Gumede supra.*

2 See 6.9.3 below.

3 *Metal & Allied Workers Union v State President* 1986 (4) SA 358 (D) and *Natal Newspapers v State President* 1986 (4) SA 1109 (N).

4 1987 (3) SA 296 (N) at 317I.

the purposes stated in s 3(1)(a), and possibly also to decide what circumstances in the opinion of the State President had arisen or were likely to arise as a result of the emergency. The State President was in truth the only person capable of determining when a regulation fell within the purposes of s 3(1)(a), since the determination of what was necessary or expedient for their realisation fell solely within his discretion. The court therefore concluded that this attempt to save other regulations from possible invalidity was itself void for vagueness![1]

And, said the court, the defects which it had pointed to in that provision were not cured by a later amendment, aimed at curing the defects of the earlier, which read:

> 'A provision of these regulations which does not already by itself limit the application, effect or scope thereof to matters connected with the safety of the public, the maintenance of public order or the termination of the state of emergency shall, notwithstanding the fact that the words of that provision may literally have a wider meaning, be construed in such a manner as to limit the application, effect or scope thereof to the said matters.' [2]

The basis on which reg 1(2) of the 1986 emergency regulations was overturned in the *United Democratic Front* judgment did not, of course, survive the ruling on appeal that s 5B of the Public Safety Act precluded review on the ground of vagueness. There is, however, another line of attack which was not considered by the court *a quo*. This begins with the question whether the legislature could be presumed to have intended the powers conferred on the State President by s 3(1)(a) to be used to deprive the court of its duty to establish whether he was acting *ultra vires* in the narrow sense. The provision could not, of course, prevent a court from striking down a regulation which was totally unrelated to the matters specified in s 3(1)(a), since the scope of such a regulation could with the best will in the world not be limited to the matters specified in that section. The provision is only relevant to those regulations which, though related to the matters specified in s 3(1)(a), also travel beyond them to hit matters not so related. It is arguable that a regulation which does so is as much of an excess of power as one which is totally unrelated. The subordinate law-making authority has gone beyond the purposes for which he is authorised by the legislature to make regulations. To expect people bound by such regulations to predict for themselves whether their conduct, though literally prohibited, is nevertheless lawful because it is not connected with the safety of the public, the maintenance of

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1 At 318D.

2 Proc R 18 of 29 January 1987. In addition, although not necessary for the ultimate finding, the court rejected respondent's contention that this provision, which was promulgated after *litis contestatio*, should be given restrospective effect as it was merely declaratory of the existing law.

public order or, more problematic, the termination of the emergency is surely so unreasonable as to warrant the inference that parliament could never have contemplated the making of such a regulation.

The regulations just discussed did not appear in successors to the 1986 emergency regulations. But the judgment of the trial court in *United Democratic Front* did not deter the authorities from attempting a similar ploy in the next set of emergency regulations, this time to weaken the operation of the rule against unauthorised delegation. Reg 1(2) of the 1988 Security Emergency Regulations [1] provided that

> '[n]o provision of these regulations conferring a power on an authority specified in such provision, shall be construed as purporting to authorise such authority to exercise the relevant power in conflict with section 3(3) of the Act.'

Section 3(3) expressly prohibits the State President from making regulations which, *inter alia*, impose liability to render compulsory military service, affecting laws relating to the qualifications, nomination, election or tenure of office of members of the President's council, parliament or provincial councils, or the powers, privileges and immunities of those bodies, or rendering unlawful actions which are lawful under the Labour Relations Act.[2] The regulation quoted above was clearly designed to protect far-reaching powers conferred on the Minister of Law and Order in 1988 to prohibit persons or organisations from performing specific acts or acts of a particular nature class or kind. This provision may well have been vulnerable to attack on the ground that the powers conferred were so sweeping as to authorise the Minister to issue orders relating to matters over which the State President had himself been expressly denied power to legislate. In terms of the regulation, the Minister could, for example, have prohibited trade union members from performing activities relating to its functions under the Labour Relations Act.[3] A court entertaining an attack on such a ground would, if not inclined to read such a limitation into the enabling provision in any event, be compelled to do so by reg 1(2).

Again, it may be asked whether parliament could have intended the powers conferred by s 3(1)(a) to be used to protect regulations which potentially empower a sub-*delagatus* to violate the express provisions of the Act. It is submitted that the answer must be no.

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1 Proc R 96 of 1988.
2 Act 28 of 1956.
3 Which would have been a contravention of s 3(3)(d) of the Public Safety Act.

3.6 Denial of Access to the Courts

The efficacy of judicial review can also be reduced by devices aimed at preventing the victims of emergency powers from gaining access to the courts. By the time of writing, the State President had not attempted to interfere with the common law rules relating to *locus standi* by emergency regulation. Generally-speaking, any legal persona can sue for relief, provided that he, she or it can prove sufficient interest in the matter.[1] Even organisations banned from performing any action under the emergency regulations are expressly allowed to litigate.[2] In general, the courts have adopted a generous approach to the question of title to sue,[3] allowing all manner of extra-constitutional organisations to seek to protect general liberties which are essential to their functions.[4]

Emergency detainees and their relatives also enjoy title to sue for their release, and any attempt to prevent them from so doing by emergency decree would undoubtedly be *ultra vires*. This has not, however, deterred the authorities from placing one serious obstacle before those seeking the release of a detainee through court action. This takes the form of a regulation depriving detainees of their right to access to a lawyer without official permission. It reads:

> '3(10) No person, other than the Minister or a person acting by virtue of his office in the service of the State —
>
> (a) shall have access to any person detained in terms of the provisions of this regulation, except with the consent of and subject to such conditions as may be determined by the Minister or a person authorised thereto by him; or
>
> (b) shall be entitled to any official information relating to such person, or to any other information of whatever nature obtained from or in respect of such person.'[5]

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1 On the test applied to determine *locus standi* in cases involving personal liberty see *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A). On the question of title to sue under emergency rule, see Cameron 'Legal Standing and the Emergency' in Haysom and Mangan (eds) *Emergency Law* 61 and Loots 'Keeping Locus Standi in Chains' 1987 (3) *SAJHR* 66.

2 See eg orders issued under reg 7(1) of the 1988 security emergency regulations, discussed at 6.6 below.

3 But see *National Education Crisis Committee v State President* WLD 9 September 1986 Case No 16736/86, unreported, the relevant extract of which is cited at 6.10.1 below.

4 Among these, the United Democratic Front has undoubtedly been the most tireless litigant. Trade unions, newspaper companies, church representatives and universities have also featured among litigants.

5 See eg reg 3(10) of Proc R 109 of 1986, repeated in identical form in all subsequent regulations.

The Appellate Division's decided in *Omar v Minister of Law and Order* [1] that the term 'no person' included lawyers. One effect of this judgment was seriously to reduce detainees' chances of gaining access to the courts during their period of detention.[2]

When *Omar* was decided, the possibility remained that this regulation could have a yet more far-reaching effect on detainees' chances of invoking the protection of a court if they wished to contest the legality of their detention or prevent unlawful treatment by the authorities. The question, which the Appellate Division was not called on to consider in *Omar*, was whether reg 3(10) extended so far as to prevent *the Supreme Court itself* from calling on detainees to appear before it for the purpose of giving *viva voce* evidence and, if necessary, from compelling the detaining authorities to produce him for that purpose.

In two East Cape Provincial Division cases in which the question had already been raised, *Nkwentsha v Minister of Law and Order*[3] and *Apeleni v Minister of Law and Order*[4] Eksteen J, as he then was, and Mullins J thought that it did. Both learned judges considered themselves bound by the case of *Schermbrucker v Klindt* NO,[5] in which a divided Appellate Division ruled that the courts did not have the power to order that a person detained under the General Law Amendment Act 37 of 1963 — sec 17(2) of which prevented access to detainees — be brought before it to testify in person.

In *Apeleni's* case, the applicants alleged that they were being assaulted and subjected to unlawful interrogation during their detention. Nkwentsha's wife contended that her husband's detention was unlawful because he had been arrested in Ciskei. In both cases, material disputes of fact appeared from the affidavits. In *Nkwentsha*, the matter was referred for oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court. The authorities, however, refused to release the detainees for this purpose, and a further application for an order that the detaineee be produced in court was refused with costs by Eksteen J. In *Apeleni*, Mullins J likewise refused an application for an interim interdict, to operate until such time as the matter was referred for

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1 1987 (3) SA 859 (A).
2 On the link between the right to consult a lawyer and the right of access to the courts see the remarks by Ogilvie Thompson JA in *Rossouw v Sachs* 1964 (2) SA 551 (A) at 559D.
3 ECD 18 November 1986 Case No 1028/86, unreported.
4 SECL 25 September 1986 Case No 2315/86, unreported.
5 1965 (4) SA 606 (A).

oral evidence during, or, in the alternative, after, the detainees' release. On appeal, both judgments were reversed.

In *Apeleni/Lamani v Minister of Law and Order and others*,[1] Vivier JA (Rabie ACJ, Viljoen, Hefer and Grosskopf JJA concurring) held [2] that Mullins J had erred in not referring the applications for oral evidence and granting interim interdicts pending final determination. The judgment therefore overuled *Ngxale v Minister of Justice of Ciskei and others*,[3] on which Mullins J had also relied. In *Ngxale*, Cloete JP had ruled that in the case of a person detained under reg 8(2) of Proc R252 of the Regulations for the Administration of Ciskei,[4] the court had no power to call for oral evidence and, furthermore, that the granting of an interim interdict pending the hearing of oral evidence after the detainees' release was not competent as it would amount to the granting of a final interdict in motion proceedings where the facts were in dispute.[5]

In *Apeleni*, however, the Appellate Division did not find it necessary to rule on the contention by appellants that Reg 3(10) did not preclude a court from calling on a detainee to testify in person. It merely found that Mullins J had refused the application prematurely. As Vivier JA pointed out, [6] the affidavits did not disclose that the Minister had refused to release the detainee for the purpose, or that he would do so. Moreover, given the fact that the police had refused to disclose crucial medical reports in the motion proceedings, and that *prima facie* it appeared that certain inferences might be drawn from this evidence, there was a distinct possibility that the detainees would not even have to testify for the purpose of determining whether a final interdict should be granted.

Apeleni did not therefore decide the wider question whether reg 3(10) prevented the courts from calling on a detainee to testify in person; it merely indicated that the Appellate Division was not prepared lightly to deprive the courts of their responsibility to take what steps were necessary to get at the truth in matters before them.

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1 1989 (1) SA 195 (A).
2 At 199C.
3 1981 (2) SA 554 (E).
4 Ciskei *GG* 5757 of 30 September 1977.
5 *Ngxale's* case at 561F-H.
6 At 199D.

In *Nkwentsha v Minister of Law and Order*,[1] however, the question could not be avoided. As in *Schermbrucker*, the police had thrown down the gauntlet by refusing to allow the detainee to comply with a subpoena directing him to come to court.[2] In *Schermbrucker's* case, the Appellate Division had teetered on a knife- edge between a decision *in favorem libertatis* and one in favour of the executive. The majority [3] weighed the scales down on the side of the latter.

The material parts of the statutory provision at issue in that case read:

> 'Notwithstanding anything to the contrary in any law contained, any commissioned officer...may...without warrant arrest or cause to be arrested any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit ..[one of a number of specified offences] or in his opinion is in possession of any information relating to the commission of any such offence or the intention to commit any such offence, and detain such person or cause him to be detained in custody for interrogation in connection with the commission of or intention to commit such offence, at any place he may think fit, until such person has in the opinion of the Commissioner of the South African Police replied satisfactorily to all questions at the said interrogation....'

Sub-sec (2), the counterpart of Reg 3(10), added:

> 'No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under sub-section (1): Provided that not less than once during each week such person shall be visited in private by a magistrate or additional or assistant magistrate of the district in which he is detained.'

Like the emergency regulations, Act 37 of 1963 did not expressly exclude the court's power to call a detainee to testify. The primary question, therefore, was whether it did so by necessary implication. Botha JA found that such an inference could be drawn if the purpose of the provision as a whole was considered. The Act, he noted, empowered the security authorities to hold a detainee at any place they deemed necessary until he had 'in the opinion of the Commissioner of the South African police replied satisfactorily to all questions'. From this, said the learned judge, it could be said the principle purpose of detention under s 17 of the Act was 'to

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1 1988 (3) SA 99 (A).
2 At 112C.
3 Steyn CJ, Botha JA and Trollip AJA.

induce the detainee to speak'.[1] Any access to a detainee by persons other than security officials, or his exposure in any way to the public, would therefore be calculated to frustrate that purpose.[2] Furthermore, to require the detainee to leave his place of detention, albeit temporarily, would mean that for a period he was not being held at a place determined by the detaining authorities, as was required by the statute.[3]

In Trollip JA's view, this latter point was the real nub of the conflict between the Rule of Court and the statute, for even if a person might conceivably be held to be still in detention while attending court, such detention would not be at a place selected for interrogation by the detaining authority. A detainee, the learned judge observed 'cannot be in two different specific places for two different kinds of interrogation at one and the same time, unless the language of sec. 17(1) is to be violated or at least strained....'[4] In any event, Trollip JA added, the court had other means at its disposal for eliciting testimony from a detainee, for example by ordering that it be taken on affidavit or by commission or interrogatories, if necessary using magistrates who were expressly authorised to have access to detainees.[5] Finally, the conflict between the Rule of Court and the statute had to be resolved in favour of the latter because the legislature had expressly provided that the provisions of s 17(1) should apply 'notwithstanding anything to the contrary in any law contained'.[6]

Rumpff and Williamson JJA found it impossible, however, to conclude that the legislature had intended preventing the courts from calling detainees as witnesses where they considered this necessary. In Williamson JA's view, the purpose of s 17(2) was merely to prevent a detainee from having access to outside persons during interrogation, and so preventing him from disclosing what had been put to him by the security authorities. Appearance before a court would not enable him to do this.[7] Rumpff JA went further. That the legislature had empowered the police to hold a person in isolation did not, in his view, mean that it had also impliedly sanctioned 'third- degree' methods of interrogation. To suggest that a necessary and temporary interruption of detention would hinder the interrogation process would be to acknowledge a form of

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1 At 619B.
2 At 619H.
3 At 619D-E.
4 At 626 B.
5 At 627D-E.
6 At 626 C-D.
7 At 621B.

psychological compulsion, and so admit via the backdoor an unlawful form of eliciting information.[1]

The express exclusion of the court's power to order the release of a detainee did not mean, said Rumpff JA, that it could not inquire into the lawfulness of methods of interrogation or of the detention itself. To hold otherwise would be to impute to the legislature the intention that whenever the police contravened s 17(1) they could arbitrarily prevent the detainee from testifying. It could not be assumed, therefore, that the legislature had intended frustrating the courts in the task of ensuring that the powers conferred by the statute were not abused.[2]

Whatever may be said about the majority judgment in *Schermbrucker*, its practical effect was plain. No court had the power to order the police to bring a person before it to testify once he had been detained under security legislation providing for interrogation.[3]

What, then, of those detained under the emergency regulations? In *Nkwentsha*, the court found little difficulty in distinguishing *Schermbrucker* from cases involving emergency detainees. Vivier JA observed that the *ratio decidendi* of Botha JA's judgment lay in his finding that the legislation in question was designed to 'induce the detainee to speak', which purpose would in the view of Botha JA have been frustrated by a temporary break in detention. Vivier JA pointed out, however, that by providing for the isolation of emergency detainees the emergency regulations were designed simply to prevent them from taking part in activities which in the opinion of the security authorities threatened the safety of the public, the maintenance of public order, or the safety of the detainee himself.[4] None of these purposes would be frustrated by bringing the detainee temporarily before court. To do so would not violate the regulation even in its strictest construction, for the person leading evidence or cross-examining him would not have access to him in the sense in which that word is used in reg 3(1),[5] and security officials would have no insuperable difficulties preventing anyone else gaining unlawful access to the detainee.[6] Finally, observed Vivier JA, the detainee's testimony would not be 'information' in the sense in which that word was used in reg 3(10)(b).[7]

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1 At 612H-613A.
2 At 613.
3 The current provision is s 29 of the Internal Security Act 74 of 1982.
4 At 115D-G.
5 At 115H.
6 At 115I.
7 At 115J-116A.

One has, with respect, to agree with his lordship's conclusion that the regulation was never intended to deal with a situation where a detainee was needed to give evidence in court. Had the State President intended to deprive detainees of the right to testify, he could have said so in clear language. In the result, therefore, a detainee held under the emergency regulations was not precluded from giving evidence in court.[1]

But what if the detaining authorities refused to allow him to do so? This question raises a number of points of similarity between *Schermbrucker's* case and those involving emergency detainees. Proc R 109 also implicitly conferred on security officials the power to determine the place of detention.[2] It also expressly give them the right to interrogate.[3] But these powers are plainly no more than incidental to the main objective of the regulations, as enumerated by Vivier JA.

In *Schermbrucker*, however, Trollip JA had raised an additional point that needed to be disposed of if Vivier JA's view was to be sustained. It was held by the majority in *Schermbrucker* that the Transvaal Rules of Court did not empower the courts to direct the detaining authority to produce a prisoner by a writ of *habeas corpus ad testificandum*, such as had been evolved for this purpose by the courts of England and the United States of America. South African courts, he said, were confined by their rules to issuing process only to the witness himself. Trollip JA, however, left open the question whether the courts had such a power at common law, since the appellant in *Schermbrucker* had relied only on the Rules of Court.[4]

In *Nkwentsha*, Vivier JA suggested that the *interdictum de libero homine exhibendo* [5] was wide enough to be used for this purpose.[6] He did not pursue this point, however, as in his opinion rule 6(5)(g) — which empowers a court, whenever a matter cannot properly be decided on affidavit, to 'make such an order as to it seems meet with a view to ensuring a just and expeditious decision' and to 'order any deponent to appear personally or grant leave for him or any other person to be subpoenaed' — impliedly conferred on the courts the power to grant an order to produce a detainee for the purposes of testifying. Again, one has respectfully agree. To

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1 At 116B.
2 See regs 3(1) and (3).
3 See reg 3(6).
4 At 624F-625G.
5 On which see 6.2.2 below.
6 At 116J-117B.

affirm a detainee's right to testify would be quit meaningless if at the same time the authorities were allowed to refuse him permission to do so.[1]

3.7 Indemnity Provisions

Of the various devices aimed at shielding the actions of state officials from judicial correction, that indemnifying the authorities from civil and criminal liability is among the most far-reaching. Ouster clauses are inoperative where the responsible official has acted illegally;[2] indemnity provisions attempt to protect the perpetrators of illegal acts.

It is a general principle of South African law that where persons acting in the service of the state unlawfully infringe the rights of private citizens, the state is bound, like any wrongdoer, to compensate the injured party for his loss.[3] Similarly, a servant of the state is liable under the criminal law for conduct amounting to an offence.[4] Unlike ordinary citizens, however, the state can limit or exclude its own civil liability, as well as the criminal or delictual liability of its servants, and has done so in various statutes.[5] Parliament frequently grants a general indemnification to the state and its servants after periods of martial law and statutory states of emergency.

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1 In October 1989 Nienaber J ordered a detainee and the police officers concerned to give oral evidence before him in the case of *Papyane v Minister of Law and Order* D & CLD 6 October 1989, Case No 6302/89, unreported.

2 Subject, of course, to the qualification placed on this rule by the majority in *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A), discussed at 3.2 above.

3 This principle is recognised in the State Liability Act 20 of 1957, s 1 of which reads: 'Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such a servant.' Rose- Innes comments (*Judicial Review* at 231): 'As a consequence of the co-extensive liability of the State and citizen as enacted by the State Liability Act, the State is placed in exactly the same position as any other principal or master in respect of liability on contracts entered into on its behalf or for a wrong committed by a servant acting in his capacity and within the scope of his authority as such a servant.' On the State's liability for the delicts of its servants see, generally, Wiechers *Administrative Law* at 305-37.

4 All the general and special defences to a criminal charge are, of course available to them. Defences of particular relevance are performance of a statutory duty and acting under lawful instruction (on these defences see, generally, Burchell and Hunt *Criminal Law* Vol I at 354-9 & 359-65, respectively). Another method of defeating a charge is to invoke the presumption that the state did not intend to bind itself and its servants by its own prohibitions (see eg *R v De Beer* 1929 TPD 104; *R v Church* 1935 OPD 70; *S v De Bruin* 1975 (3) SA 56 (T)).

5 See eg s 103 of the Defence Act 44 of 1957 and s 31 of the Police Act 7 of 1958.

One noteworthy feature of emergency indemnity provisions is that they are prospective rather than retrospective in operation. In other words, they protect officials *in advance* from the consequences of illegal acts which they may commit in the discharge of their emergency functions. While some measure of protection of the public purse from claims for damages is defensible when the state has to deploy exceptional force for the restoration of order, a blanket advance indemnification of its officials from legal accountability is disquieting. Officials are, after all, automatically protected if they can show that their actions fall within the limits of the extensive powers conferred upon them. There is no good reason for affording them additional protection where they negligently or intentionally exceed their powers and cause damage or injury.[1] Given the scale of state violence deployed during the various states of emergency,[2] the scope of these provisions is of the utmost importance to innocent persons who suffer damage to their person or property during emergency action.

The indemnity provisions adopted during the various states of emergency assume a standard form, providing that no civil or criminal proceedings shall be instituted against the state or certain named officials [3]

> 'by reason of any act in good faith advised, commanded, ordered, directed or performed by any person in the carrying out of his duties or the exercise of his powers or the performance of his functions in terms of these regulations or any other regulation made under the Act, with intent to ensure the safety of the public, the maintenance of public order or the termination of the state of emergency or in order to

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1 In this regard, it is perhaps appropriate to note Dicey's views on restrospective indemnity Acts: '[O]f all laws which a Legislature can pass an Act of Indemnity is the most likely to produce injustice. It is on the face of it the legalisation of illegality; the hope of it encourages acts of vigour, but it also encourages violations of law and of humanity. The tale of Flogging Fitzgerald in Ireland, or the history of Governor Eyre in Jamaica, is sufficient to remind is of the deeds of lawlessness and cruelty which in a period of civil conflict may be inspired by recklessness or passion, and may be pardoned by the retrospective sympathy or partisanship of a terror- stricken or vindictive Legislature.' (Quoted in Mathews *Freedom* at 207.

2 On which see 6.11 below.

3 Including the State President, members of the cabinet and the security forces, persons in the service of the state or the self-governing territories, and any person acting 'by direction or with the approval of' any of these persons.

deal with circumstances which have arisen or are likely to arise as a result of the said state of emergency.' [1]

The courts are further instructed to discontinue proceedings against the state, government or the designated officials or persons where the presiding officer is of the opinion that the provisions of the above-quoted regulation apply, whereupon the proceedings shall lapse and be deemed void.[2]

At first glance, this provision appears simply to rule out all civil and criminal actions against officials exercising emergency powers. On closer examination, however, it becomes apparent that the protection afforded is not absolute. Indeed, if it were so, the question which was raised but left open in *Mawo/Mbadlanyna v Pepler* NO,[3] namely whether the indemnity provision was void for unreasonableness, would warrant serious consideration.[4]

The first and obvious limitation is that the protection afforded by the indemnity clause extends only to those acts advised, performed, etc *in good faith. Bona fides* is therefore an indispensible requirement; if the official concerned is shown to have acted in bad faith, he cannot rely on the indemnity. The meaning of *bona fides* is, however, no more clear in this context than in others. According to Wiechers an official can be said to act *mala fide* where he consciously ignores any of the requirements for the valid exercise of his statutory powers. If this meaning were to be attributed to the term in the context of the indemnity clause, it would follow that state officials are absolutely exempted from liability if they negligently exceed the bounds of their authority.[5] Given the notorious difficulty of proving *mala fides*, there is something repugnant about such a conclusion. It may well happen, to take but one example, that an official, genuinely believing that he is acting in order to quell unrest, fires indiscriminately with an automatic weapon into a fleeing crowd. There seems no justifiable reason why the state should not be held

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1 The wording is that of reg 15 of the 1989 security emergency regulations (Proc R 86 of 1989). Earlier versions were regs 28 of Proc 167 of 1960, 16(1) of Proc R 109 of 1986, 12 of Proc R 96 of 1987 and 15 of Proc R 97 of 1988. Parliament itself adopted general retrospective indemnity Acts after the 1960 emergency (Act 61 of 1961) as well as after the Soweto riots of 1976 (Act 13 of 1977).

2 Reg 15 (2) of Proc R 97 of 1988.

3 1961 (4) SA 806 (C).

4 Mathews *Freedom* at 205 & 207 is of the view that, even strictly interpreted, the indemnity clause is *ultra vires* the subordinate law-making authority of the State President; Prof Burchell adoptes the same view (see Jonathan Burchell 'Beyond the Glass Bead Game: Human Dignity in the Law of Delict' 1988 (4) *SAJHR* 1 at 14-15).

5 Wiechers is of the view that the state was not liable under the Indemnity Act 61 of 1961 if its servants were merely negligent (whether in regard to the objective of their actions or in regard to the means whereby the threat or danger was averted): see Wiechers *Administrative Law* at 329.

accountable for what would in normal circumstances be regarded as utter recklessness on the part of one of its servants. This view is in any event supported by the following passage from Wiechers, viz:

> 'When an administrative organ...acts *mala fide*, it knows *or should know* that, *but for its ignorance, negligence or failure to comply with the requirements for validity*, its act would be invalid...but nevertheless persist in performing the invalid act.' [1]

Mala fides on the part of an official exercising a statutory power consists therefore in the intentional or negligent disregard of the requirements of the authorising instrument. To exempt officials entirely from liability for negligence would be virtually to eliminate the citizen's right to civil action against the state. This is so because of the presumption appended to the indemnity provision that any act performed, advised, ordered etc shall be presumed to have been in good faith 'until the contrary is proved'.[2] Whether the effect of this provision is to cast an onus of proof rather than an evidential burden on the party alleging *mala fides*,[3] it renders the task of a party seeking compensation all but hopeless unless the courts are prepared to recognise that, for purposes of establishing the scope of the indemnity provision, evidence of negligence may in principle be accepted as *prima facie* proof of bad faith. Thus, to take a further example, the policeman who, seeking to apprehend a fleeing person in the honest belief that his detention is necessary for the purposes of the public safety, etc, sprays high velocity bullets down a crowded street ought not to be able to invoke the indemnity clause against action for damages from innocent bystanders who may have been injured. *Mala fides* in this context ought not to be equated with moral blameworthiness.

The second and possibly more important limitation on the scope of the protection afforded by the indemnity clause is that it covers only acts performed by persons carrying out duties or exercising powers '*in terms of*' regulations '*made under*' the Public Safety Act '*with intent*' to

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1 *Op cit* at 254. Emphasis added.

2 See eg reg 15(4) of Proc R 97 of 1988.

3 The courts appear to have adopted the view that the presumption casts an onus rather than a mere evidential burden on the party seeking to rebut it (see *Gumede v Minister of Law and Order* 1987 (3) SA 155 (D) at 159E and *Radebe v Minister of Law and Order* 1987 (1) SA 586 (W) at 596B-D). The principle laid down in these cases should not, however, be regarded as of general application since they were concerned with applications for release from detention, in which the question of onus is affected by the special requirements of the *interdictum de libero homine ad exhibendo* (on which see 6.2.2 below). In any event, it is difficult to reconcile the words 'until the contrary is proved' with the view that the overall onus in such cases remains with the official (see Burchell *op cit* at 13). Even if the statutory presumption of good faith casts the onus of proving *mala fides* on the injured party, however, his position can be somewhat alleviated by a court adopting the approach advocated by Goldstone J in *Radebe's* case *supra* at 596B-D, namely, that where the applicant establishes a *prima facie* case on a balance of probabilities, the respondent is bound to rebut it.

secure objectives specified in the Act. An applicant seeking compensation from the state ought not therefore to be frustrated by the indemnity provision where he is able to show that the action concerned was not sanctioned by the regulations. This is an entirely objective question of law, not dependent on the subjective disposition of the official concerned. Where he performs an act not sanctioned by the regulations, he is not exercising powers 'in terms of' them. Thus, for example, the use of firearms without the required warning would, *ceteris paribus*, be an action not sanctioned by the regulations and hence not protected by the indemnity provision, even if the responsible oficial genuinely believed he was entitled to do so.

Similarly, where the action was performed pursuant to an invalid regulation or order it cannot be said to have been performed 'in terms of' a regulation 'made under' the Act and hence, again, does not qualify for protection. This, too, is a question wholly independent of the state of the mind of the responsible official.

It follows from the words 'in terms of' that the indemnity provision cannot be invoked by officials acting in terms of any law other than the emergency regulations. Security forces have frequently conducted major search operations in black townships for the avowed purpose of ordinary crime prevention. In such cases, the police are acting under the general powers derived from the Police Act [1] and the emergency indemnity clause is not applicable. The mere existence of a statutory state of emergency does not automatically indemnify every act performed by law enforcement agencies or their members.[2]

Finally, it can be pointed out that the indemnity provision covers only acts performed 'with intent' to realise certain specified, if vaguely described, objectives. A policeman who shoots his wife's lover cannot be said to have acted with such intent, even if his judgment was so distorted by emotion as to induce him to believe that he was entitled to act in such a manner in terms of his emergency powers. It is arguable, as well, that security officers who employ excessive force against manifestly innocent people cannot be said to have formulated the required intent.

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1 Act 7 of 1958.

2 The same can be said for the indemnity afforded by s 103 of the Defence Act, which applies only to anti-terrorist operations.

4: The Invocation of Emergency Powers

4.1 Introduction

The Public Safety Act requires that a state of emergency must be formally proclaimed before the executive can assume statutory emergency powers. Section 3 of the Act stipulates that the State President can exercise emergency legislative powers only in areas 'in which the existence of a state of emergency has been declared under section *two*'. He may, moreover, only make regulations 'for as long as the proclamation declaring the state of emergency remains in force'.[1] A statutory state of emergency exists for at most twelve months,[2] and can be brought into existence up to four days prior to the proclamation.[3] The retrospective declaration of a state of emergency is, presumably, to allow the State President to indemnify acts performed before the declaration.[4] The State President is expressly empowered to renew or withdraw the proclamation of a state of emergency at or before the expiration of the twelve month period.[5]

There is no restriction as to the area over which a state of emergency can be declared; it may be over the entire Republic or part thereof. Despite the State President's ability to localise a state of emergency, the Act was amended in 1986[6] to empower the Minister of Law and Order to declare parts of the country 'unrest areas'. The new s 5A(1) of the Public Safety Act gives the Minister roughly the same legislative powers over 'unrest areas' as those previously reserved for the State President *vis a vis* areas under states of emergency, although it places

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1 Section 3(1)(a).
2 Section 2(2).
3 Section 2(1).
4 On indemnity provisions in general see 3.6 above.
5 Sections 2(2) and (3).
6 By s 4 of Act 67 of 1986.

slightly stricter time limits and procedural requirements on the Minister.[1] It does not however limit the extent of the areas which can be so proclaimed.

Formal declaration of a state of emergency or 'unrest area' is thus a precondition to the exercise of the powers conferred by the Public Safety Act. Such a declaration has no practical effect in law; it merely lays the legal foundation for the adoption of the substantive emergency measures authorised by s 3(1) or 5A(4). The nature and form of the emergency are determined by regulations promulgated after its declaration and by administrative actions pursuant to the regulations.[2] Conversely, no administrative action can be performed under the Public Safety Act until the declaration of a state of emergency has been formally proclaimed in the *Government Gazette.*[3]

The legal effect of a proclamation of a state of emergency should not therefore be confused with that of the declaration of martial law, which is of no legal significance, other than to serve as an indication, of which a court may take judicial notice,[4] that the government intends resorting to extraordinary measures.[5] Martial law powers are normally exercised in time of war, although, if the Roman-Dutch principles are accepted, namely that martial law is based on the doctrine of necessity or self-defence,[6] there is nothing to prevent their invocation during internal uprisings, insurrection or rebellion. The rule that the courts may not question the actions of the military autorities during a state of martial law[7] operates only while circumstances justify

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1 See 4.5 below.

2 As was observed in *R v Sutherland* 1961 (2) SA 806 (A): 'It is clear...that the sole purpose of the declaration under sec. 2(1) of the existence of a state of emergency, with retrospective or prospective effect...is to make, for that area, the necessary regulations to provide for the safety of the public or the maintenance of public order. The declaration of a state of emergency...can serve no other purpose, and such a declaration, without the promulgation of regulations under sec. 3 for the area concerned, would be futile and purposeless.'

3 Thus in *Brown v Deputy Commissioner of Police, Natal* 1960 (2) SA 809 (N), the court ordered the release of detainees who had been arrested after the proclamation of the state of emergency had been signed, but before it was published in the *Gazette.*

4 *In re Fourie* (1900) 17 SC 173 at 177.

5 The declaration of martial law, in other words, is only 'a notification to the public of the fact that danger prevails, and that if they do certain acts they are liable to arrest and punishment' (*Dedlow v Minister of Defence* 1915 TPD 543 at 553; see also *Krohn v Minister of Defence 1915 AD 191). It would appear that the common law position is not changed by the fact that authority to declare martial law is now listed as one of the State President's prerogatives in the Republic of South Africa Constitution Act 110of 1983, s 2(1)(f).*

6 Which is the view of Wiechers (see Wiechers *Verloren van Themaat:Staatsreg* at 162).

7 *Trumpelman v Minister of Justice and Minister for Defence* 1942 TPD 242.

the exercise of martial law powers. Where no war has been declared, the question whether a state of war prevails appears to be objectively determinable by the courts.[1]

Is the declaration of a state of emergency similarly objectively justiciable? To answer this question, we must examine the construction placed by the courts on the provision under which a statutory state of emergency is brought into existence.

4.2 Section 2(1) of the Public Safety Act

Authority to proclaim a state of emergency is conferred by s 2(1) of the Public Safety Act, which reads:

> 'If in the opinion of the State President it at any time appears that —
>
> (a) any action or threatened action by any persons or body of persons in the Republic or any area within the Republic is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or
>
> (b) circumstances have arisen in the Republic or any area within the Republic which seriously threaten the safety of the public, or the maintenance of public order; and
>
> (c) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order,
>
> he may, by proclamation in the *Gazette*, declare that as from a date mentioned in the proclamation...a state of emergency exists within the Republic or within such area, as the case may be.'

It is clear from the terms of this provision that parliament has entrusted the State President with the widest discretion to decide when and over what areas a state of emergency should be declared. Indeed, there is copious judicial authority to this effect. Thus in *Release Mandela Campaign v State President*,[2] the court observed:

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1 See *End Conscription Campaign v Minister of Defence* 1989 (2) SA 180 (C), being the most recent case in which a court has been called upon to scrutinise a claim by the defence authorities to be acting under martial law powers. The court rejected the claim by the Minister of Defence that unlawful actions taken against an anti-conscription organisation were justified because the military authorities were at war in Namibia and on the Angolan border.

2 1988 (1) SA 201 (N).

> 'The provisions of s 2(1) of the Act...confer upon the State President an unfettered discretion to decide whether the circumstances in the country are such that a state of emergency should be declared....The decision is his alone, and the objective existence of the facts and circumstances which in his opinion appear to exist is not justiciable in a court of law.'[1]

And in *Stanton v Minister of Justice* [2] it was said:

> 'Parliament has entrusted the Governor-General with the responsibility of evaluating the circumstances, and he must declare circumstances to exist making the ordinary law of the land inadequate to enable the Government to ensure the safety of the public or the maintenance of public order.'[3]

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1 At 205J-206A.
2 1960 (3) SA 353 (T).
3 At 357 A-B.

This view has been affirmed by the Appellate Division:[1]

> 'The decision as to whether circumstances in the country are such that a state of emergency should be declared is that of the State President and the State President alone'.[2]

It would appear from the above-quoted dicta that the State President's decision to declare a state of emergency is entirely beyond judicial challenge.[3] The declaration of a state of emergency is *par excellence* the kind of 'policy' decision with which the courts are loathe to interfere. This is so for a number of reasons. First, the information upon which such a decision rests is likely to lie in the exclusive knowledge of the executive. As has been observed by an English court:[4]

> '[T]he onus of proof [of abuse of discretion] on anyone challenging a proclamation of emergency may well be heavy and difficult to discharge since the policies followed and the steps taken by the responsible Government may be founded on information on apprehensions which are not known to, and cannot always be made known to, those who seek to impugn what has been done.'

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1 *Omar v Minister of Law and Order* 1987 (3) SA 859 (A).

2 At 891I.

3 The reluctance of the courts to inquire into whether circumstances justified the declaration for a state of emergency is illustrated by the Privy Council decision in *Ningkan v Government of Malaysia* [1970] AC 379. In that case, appellant, who was Chief Minister of Sarawak, was requested by the Governor to resign when he ceased to command the confidence of the legislature. After the Chief Minister refused, the Governor informed him that he had ceased to hold office. The High Court at Kuching declared, however, that appellant remained Chief Minister, notwithstanding his dismissal. A week later, the reigning monarch, His Majesty the Yang di-Pertuan Agong, proclaimed a state of emergency throughout the territories of the state of Sarawak. Acting pursuant to emergency powers conferred on it in terms of the declaration, the legislative assembly then passed an act which specifically provided that the Governor might, in his absolute discretion, dismiss the Chief Minister after a resolution of no confidence by the legislature. This was promptly done, and the Governor, then acting under the provisions of the Emergency (Federal Constitution of Sarawak) Act, 1966, dismissed the appellant from the position of Chief Minister. Appellant contended *inter alia* that the proclamation of a state of emergency had been *in fraudem legis* and of no effect because no state of emergency of the gravity required by the Act existed, and therefore that the Act which was founded on the declaration also fell in its entirety (the Constitution of Malaysia, Art 150, provided that if the Yang di-Pertuan Agong could declare a state of emergency if he was satisfied that a 'grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened'). Fiction could scarcely have provided a more graphic example of the use of emergency powers for securing patently political ends. Yet, notwithstanding the fact that the empowering statute restricted the declation of a state of emergency to circumstances in which the monarch was 'satisfied that a grave emergency exists whereby the security or economic life of the Federation...is threatened', their lordships (Lords MacDermott, Hodgson, Upjohn, Donovan and Pearson) found on the facts that there was no reason to say that the emergency was not grave and did not constitute a threat to the security of Sarawak (see at 385). In spite of its finding (at 391) that the decision as to whether circumstances justified the declaration of a state of emergency was essentially a matter 'to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience', the Privy Council was not prepared to go so far as to decide that the declaration of the state of emergency was in principle not justiciable. In the light of their findings on the facts, however, their lordships did not consider it necessary to decide this 'far-reaching constitutional question' (at 392).

4 See the *Ningkan* case *supra* at 390.

Second, the 'decisional referents',[1] or criteria which parliament has laid down to guide the responsible authority in the exercise of his discretion, do not lend themselves to objective appraisal. Third, and perhaps conclusively, the decision to declare a state of emergency is ultimately a form of political strategy — ie a general plan of action purportedly designed to advance the interests of the state as a whole and the interests of the community which it represents and protects. An inquiry into the 'merits' or factual basis of a decision to declare a state of emergency would therefore invariably drag the reviewing court into the realms of executive policy, a terrain from which the judiciary is anxious to distance itself.

If the State President's decision to declare a state of emergency is beyond judicial challenge, there would be little purpose from a legal point of view in analysing the matters to which the State President is required to apply his mind before invoking emergency powers. The decisional referents set out in sub-sections (a) to (c) of s 2(1) are, however, not merely statutory verbiage. For from them one can discern the broad purposes for which parliament intends emergency powers to be exercised. They are therefore of importance, not only for determining whether the State President has acted lawfully in declaring a state of emergency, but also in delimiting the purposes for which specific emergency powers can lawfully be directed. Section 2(1) merits analysis because it sets out the nature of the threats against which, and the circumstances in which, parliament intends the authorities to deploy emergency powers. These requirements are examined *seriatim* below.

4.3 The nature of the threat

The Public Safety Act requires that the threat to the safety of the public or the maintenance of public order be occasioned by 'any action or threatened action by any persons or body of persons' or by 'circumstances' that have arisen in the Republic. The nature of the action or circumstances is not specified, save that they must have a particular effect. The threat occasioned by the actions, threatened actions or circumstances mentioned must not only endanger the safety of the public or the maintenance of order; it must do so to a *serious* extent. In addition, the extent of that threat must be so grave that the authorities are unable to ensure the safety of

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1 See Baxter *Administrative Law* at 89-90; Gifford 'Decisions, Decisional Referents and Administrative Justice' (1972) 37 *L & CP* 3.

the public and maintain order with the powers otherwise at its disposal, including the whole panoply of special powers conferred on it by standing legislation.[1]

Since s 2(1)(a) allows the State President to act on the basis of 'threatened action', the legislature clearly envisages the possibility of a state of emergency being declared for pre-emptive purposes. One cannot. however, infer from this that the legislature intended the power to be used only where the threat was imminent or actual. Our courts are, therefore, in this context unlikely to favour anything akin to the 'clear and present danger test' adopted by the United States Supreme Court in cases involving alleged violations of the First Amendment to that country's constitution[2] to test the necessity of the invocation of emergency powers under the Public Safety Act.[3]

'Circumstances' are clearly the products of events, which need not have been occasioned by human action. A state of emergency could thus be declared in consequences of some natural disaster. Section 2(1) can also be interpreted as embracing actions or circumstances threatening the public safety in an indirect manner, for example by psychological or propaganda techniques.[4]

It is not within the scope of this work to describe the historical circumstances in which states of emergency have been declared in South Africa. Of importance, however, is the way in which judges perceive these circumstances, because their assessment of the gravity of the threat must inevitably colour their approach when deciding the legality of specific emergency actions. In

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1 On which see 4.4 below

2 See eg *Schenck v United States* 249 US 47 (1919) at 52; *Abrams v United States* 250 US 616 (1919) at 628.

3 In *King-Emperor v Benoari Lal Sarma* [1945] AC 14, the House of Lords had no hesitation in rejecting an attack on the declaration of a state of emergency in India based on the ground that the language of the proclamation indicated that the Governor-General did not consider that an emergency existed but was making provision in case one should arise in future. Pointing out (at 22) that 'the question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge', Viscount Simon LC observed that the government could well declare a state of emergency and set up special courts in terms of emergency powers in anticipation of some expected crisis. Any other view, he said (at 23), would prevent the authorities from exercising any foresight in the protection of the state because it would 'deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became more critical....'

4 Regulations passed during recent states of emergency indicate that the 'propaganda onslaught' against the country has been a factor of great concern to the government (see 6.9 and 7.1 & 2 below).

most cases, the judge's view of the socio-political background to the law being interpreted remains inarticulate. In *Bloem and another v State President of the RSA and others*,[1] however, M T Steyn J, as he then was, attempted to set the regulation at issue in its socio-political *milieu*. The learned judge's 'conspectual exposition' [2] of that *milieu* is worth quoting at length.

> 'South Africa is in the mid-1980s a society in travail, wherein constitutional, socio-economic and political change and reform are being accompanied by social turbulence and unrest generated mainly by resistance to that change and reform not only as to its tempo but also as to its ambit, nature and direction. Much of that resistance is violent and is directed not merely at the authorities of government and administration but also at certain sections of the private sector, at members of the security forces and other individuals, and also indiscriminately at the general public. So notorious have the facts and nature of this resistance and its effects become by virtue of its ongoing occurrence over many months and the wide publicity accorded there to that a court of law can now take judicial notice thereof.And I will do so.' [3]

His lordship proceeded to outline his view of the events which had given rise to the state of emergency in the following words:

> 'Much of the violent resistance consists of mob action and includes widespread damage to property and acts of gruesome cruelty such as the so-called "necklace" methods of murder whereby a petrol-soaked tyre is placed around a person's neck and then set alight, resulting in the victim's death by fire — a grim modern version of the medieval *auto-da- fe*. This mob violence is usually instigated by agitators and accompanied by widespread intimidation. But to a substantial degree the violent resistance also consists of acts of organised terror such as assassinations and the planting of land mines or placing of bombs whereby many private individuals, and members of the security forces are killed and maimed or otherwise injured and private property or public installations destroyed or damaged. There is, however, also a socio-economic dimension to this resistance which consists, *inter alia*, in boycotts of classes at schools or lectures at universities and other institutions of tertiary education as well as trade boycotts. And for many months this domestic turbulence has been accompanied and intensified by a mounting political, psychological, socio-economic and terror onslaught upon the Republic of South Africa from beyond its borders. Much of this inner or outer action is clearly a power struggle aimed at making the Republic ungovernable, subverting by violence the existing dispensation and substituting an entirely different one therefor. And the South African community has already been gravely hurt by this domestic turbulence and foreign onslaught, *inter alia* materially contributing to the weakening of its unit of currency and the economic distress it is enduring.'

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1 1986 (4) SA 1064 (O).

2 At 1067F-1068D.

3 It is perhaps worth noting that the court in *United Democratic Front v State President* 1987 (3) SA 358 (N) expressed doubt on whether it was permissible for a court to take judicial notice of the facts and inferences drawn by the court in *Bloem* (see at 362D).

This exposition of what the judge saw as the background to the emergency has been heavily criticised, one writer going so far as to suggest that the expression of such views by a judge in a security case 'indicates either insensitivity to, or ignorance of, the perceptions and views of those before the court'.[1] There can be no doubt that this concern is justified. M T Steyn J's assessment of the causes of the crisis to which the state of emergency was a response unquestionably echoes the government's justification for the adoption of emergency powers, and overlooks the contrary view that much 'mob action' was merely a response to government policy and heavy-handed security force action against legitimate protest politics. People on different sides of a divided polity inevitably hold conflicting perceptions of the causes of events. Unfortunately, the views expressed by M T Steyn J appear to place the judiciary squarely behind the executive in the latter's campaign to portray the state of emergency as a necessary adjunct of reform.[2] If the learned judge's views were be taken as reflecting those of the judiciary in general, there can be little doubt that confidence in the court's ability to dispense justice to the victims of emergency action would be severely shaken.[3]

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1 Forsyth, 'The Sleep of Reason: Security Cases Before the Appellate Division' (1986) 105 *SALJ* 679 at 707.

2 As Cameron comments, the exposition 'was pregnant with the phrases of government policy, official pretexts and authoritarian excuses' (Edwin Cameron 'Judicial Endorsement of Apartheid Propaganda: An Inquiry into an Acute Case' (1987) 3 *SAJHR* 223 at 225.

3 It is perhaps worth noting that shortly after *Bloem* was decided, M T Steyn J was elavated to the Appellate Division, where he sat on a number of emergency cases.

4.4 The object of the threat

The action, threatened action or circumstances must seriously threaten the safety of the public or the maintenance of public order. Although the threat must therefore be directed at the public generally or a significant section thereof, it need not go so far as to endanger the security or existence of the state itself.[1]

The courts have not attempted rigidly to define the concepts 'public safety' and 'public order'. Indeed, they are probably incapable of precise definition.[2] The meaning of the phrase 'law and order', which is roughly synonymous with 'public order', received attention in *S v Cooper and others*.[3] At issue in that case was s 2 of the Terrorism Act,[4] which listed as one of the elements of the crime of terrorism the intent to 'hamper or deter any person from assisting in the maintenance of law and order'.[5] Noting that the phrase 'maintenance of law and order' was not defined in the Act and that the court had not been referred to any judicial pronouncement as to its meaning, the court observed:

> '[i]n its ordinary sense the phrase "law and order" refers to the law-abiding state of society, that is to say, the absence of riot, turbulence and violent crime and the prevalence of constituted authority.'[6]

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1 In *Brink v Commissioner of Police and others* 1960 (3) SA 65 (T), the court held that the inquiry into the validity of the regulation at issue would proceed on the assumption that the safety of the state was not endangered because, it was found, there was nothing in the papers before court 'which suggests to me that His Excellency the Governor-General, in proclaiming the state of emergency in the areas specified, had any reason to believe that the safety of the State was endangered.' The court also held that the proclamation declaring a state of emergency 'was not intended to convey that the safety of the State was in any way endangered'.

2 In *Geldenhuys v Pretorius* 1971 (2) SA 277 (O), the court, interpreting the phrase 'openbare veiligheid' in s 29 of Act 101 of 1969 (the English version of which used the phrase 'public security') went so far as to observe (at 279G) that '[o]penbare veiligheid is 'n begrip van so 'n radikale and gespesialiseerde aard, dat dit vir die doeleindes van hierdie bespreking buite rekening gelaat kan word'. In *S v Hartman; S v Jacobs* 1968 (1) SA 279 (D), it was found unnecessary to attempt to define the terms 'veiligheid van die publiek' (public safety) or 'openbare orde' (public order) in s 108 *bis* of Act 56 of 1955. The court noted (at 281H) that the words denoted a general concept — 'die veiligheid van die publiek in die algemeen'. In response to the state's contention that any conduct endangering a few persons ('n paar spesifieke persone') could constitute a threat to the public safety, the court stated that the concept public safety did not embrace the safety of 'a few specific persons' only, and that 'public order' denoted 'die openbare order in die algemeen en nie 'n regsverbreking aangaande 'n paar spesifieke persone nie' (at 281-2).

3 1967 (2) SA 875 (T).

4 Act 83 of 1967.

5 See ss (1)(a) replaced by s 54(2) (e) of the present Internal Security Act 74 of 1982.

6 At 878A-B.

The learned judge concluded:

> 'There are therefore two sides to the concept "law and order"; the constituted authority responsible for its existence and the general body of law abiding members of society in which it exists. To endanger the maintenance of law and order, an act has therefore to be directed either at the constituted authority or the general body of law-abiding members of society in the Republic or portion thereof or both.'[1]

This *dictum* establishes the link between two classes of legal objects for the protection of which the State President is empowered to declare a state of emergency: on the one hand, the physical safety of members of society (public safety), on the other, the effective functioning of the institutions responsible for securing it (state security). A carefully-planned attack on state institutions, avoiding civilian casualties, would therefore, clearly constitute sufficient ground for the invocation of emergency powers. The classic state of emergency is, however, a combination of both: wide-spread turbulence aimed at weakening the authority of the institutions of state.

The linking of 'public safety' with 'state security' in the sense contrued above does, however, carry with it an inherent danger. This is the tendency to shift the focus from the safety of the public to such nebulous considerations as 'national security', which can easily be confused with 'government security' as denoting the interests not of the state *per se*, but of the government of the day.[2] Thus legitimate opposition which does not constitute a threat to the well-being of the public in any physical sense can be confused with subversive activities which do indeed threaten public safety.

In this respect, it is instructive to compare the way in which the British parliament has sought to describe the effects of the events, occurrence of which empowers the monarch to proclaim a state of emergency. These must have been of such a nature and on so extensive a scale

> 'as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, with the essentials of life.'[3]

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1 At 878D-E.
2 See *LAWSA* Vol 21 'Public Safety' at 297 n 3.
3 Emergency Powers Act 1920 10 & 11 Geo 5c 55, s 1.

This provision spells out in fairly concrete detail the nature of the threats as well as of the objects against which they are directed. It would thus, in principle, be possible for a court to determine whether circumstances objectively justified the assumption by the government of emergency powers. Even so, the English courts are reluctant to question the government's motives in this respect.[1] By contrast, the South African State President can declare a state of emergency on the basis of far wider and vaguer circumstances. The kind of 'circumstances' which may be deemed to constitute a 'threat to the maintenance of public order' are legion, and, indeed, need not even be of a physical nature. Moreover — and this is probably the most fundamental obstacle to judicial challenge to the declaration of a state of emergency — according to the prevailing judicial approach they need not actually exist in an objective sense, but only in the mind of the State President.[2]

4.5 The inadequacy of the ordinary law

Not only must it appear to the State President that threats or circumstances of the nature described above exist. He must also be of the opinion that the 'ordinary law of the land is inadequate to enable the government to ensure the safety of the public, or to maintain public order'.[3] In the context of a legal system replete with permanent emergency measures under which the

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1 See Wade *Administrative Law* at 394; Bonner *Emergency Powers* at 63.

2 As Venter observes in his discussion of the general security framework of which the Public Safety Act forms the apex (Venter *'Salus Reipublicae Suprema Lex' (1977) 40 THRHR* 233):'Die Suid-Afrikaanse wetgewer identifiseer...'n groot verskeidenheid van meer abstrakte en subtiele omstandighede en bedrywighede wat optrede deur die staat 'n noodweer kan regverdig of 'n staatregtelike noodtoestand kan skep. Wat die wetgewer dus in effek met sy veiligheidswetgewing gedoen het, is 'n aantal omstandighede en bedrywighede te vermeld of vir identifiseering in die hande van owerheidsorgane gelaat het, wat na sy mening telkens 'n beperkte staatsregtelike noodtoestand skep of die staatsowerheid regverdig om die staat 'n noodweer te verdedig, en om spesiale owerheidsorgane, prosedures and metodes te skep vir sodanige optrede in noodweer of noodtoestand (at 242).

3 S 2(1)(c). Note that the sub-section stipulating this requirement is conjunctively linked to those preceeding it.

government can act without the formality of declaring a state of emergency, this requirement is plainly intended to restrict the assumption of additional powers to circumstances of the utmost gravity.

A host of security provisions forming part of the 'ordinary law' confer powers on the executive to perform acts normally restricted in democracies to wartime or formally-declared periods of emergency rule. Under the Internal Security Act,[1] individuals can be restricted, banned[2] or detained without trial,[3] organisations declared unlawful,[4] gatherings permanently prohibited either generally or in specific areas,[5] areas sealed off,[6] and publications banned.[7] All of these powers may be exercised on grounds which are only narrowly justiciable.[8]

The Defence Act[9] makes provision for the use of the South African Defence Force for the prevention of terrorism and internal disorder within the Republic.[10] Terrorism is so widely defined by statute that the circumstances in which the army may be so deployed are almost legion.[11] The State President has the power to mobilise the whole or part of the Defence Force for the 'prevention or suppression of terrorism or the prevention of suppression of internal disorder in the Republic or the preservation of life, health or property or the maintenance of essential supplies'.[12] He may do so either by formal proclamation or 'in such other manner as he

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1 Act 74 of 1982.
2 Sections 18-22.
3 Sections 28 and 29.
4 Section 4.
5 Section 46.
6 The method used most frequently to prevent access to black residential areas is the denial of permits.
7 Section 5(1).
8 Acts calculated to endanger the security of the state or the maintenance of law and order, the promotion of communism as defined, and the fomenting of inter-group hostility are among the grounds on which the Minister of Law and Order can exercise his various powers under the Internal Security Act.
9 Act 44 of 1957.
10 S 3 7(2).
11 The Act defines 'terrorism' somewhat tautologically as 'terroristic activities in the Republic or directed against the Republic or any authority in or inhabitants of the Republic' (s 1). See also the acts enumerated under the statutory offence of terrorism in s 54 (1)-(3) of the Internal Security Act 74 of 1982.
12 Section 92(1).

may deem expedient' [1] Otherwise than in the case of mobilisation to wage war beyond the borders of the Republic,[2] the State President is not required after a mobilisation for these purposes to communicate the reasons to parliament.

Under the Defence Act the State President may also invoke several other far-reaching powers for the prevention of terrorism or internal disorder.[3] These include, *inter alia*, the power to commandeer property, material, food [4] and vehicles,[5] to control movement, [6] and impose censorship over all postal and telecommunications.[7]

Other provisions which confer emergency powers are to be found scattered throughout the statute book. The Protection of Information Act,[8] for example, confers on the State President authority to declare any place or area a 'prohibited place' if he is satisfied that 'the loss, damage, disruption or immobilisation thereof could be of use to a foreign State or hostile organisation' [9] and any foreign association, movement or institution a 'hostile organisation' if in his opinion it encourages persons in the Republic to perform acts of violence.[10] Organisations declared unlawful in terms of the Internal Security Act automatically become 'hostile organisations'. Certain acts done in relation to these places or organisations are punishable by severe sentences. The National Key Points Act [11] supplements this piece of legislation. It confers on the Minister of Defence power to declare any place or area a 'key point' or 'key point

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1 Section 92(1).
2 Section 91.
3 These special powers were all effected by amendments to the principal Act in 1978.
4 Section 100.
5 Section 102.
6 Section 100 *bis*.
7 Section 101. Although censorship powers are limited to post and telecommunications, they may of course be used to intercept and censor mass communications conveyed through these channels.
8 Act 84 of 1982.
9 Section 14(a).
10 Section 14(b).
11 Act 102 of 1980.

complex', the effect of such declaration being to empower him to compel the owner of the complex to take such steps as are to the satisfaction of the Minister necessary to ensure the security of the key point,[1] to provide certain information [2] and to prohibit all unauthorised persons from furnishing information relating to the security measures taken at a key point, or to any incident occurring therein, to any other person.[3] Merely being in the neighbourhood of a key point 'for purposes prejudicial to security or other interests of the Republic' is severely punishable [4]. The Civil Defence Act[5] authorises regional authorities to make ordinances for the purposes of combating civil disruption in a state of emergency or disaster, a state of emergency being one declared under s 2 of the Public Safety Act.[6] The Civil Defence Act also authorises the Minister of Defence, if he is of the opinion that any disaster requires extraordinary measures to protect the Republic and its inhabitants and to combat civil disruption, to declare a 'state of disaster', and if he deems it necessary to take over any power or duty conferred or imposed under the Act.[7] In addition to the statutory duty of the South African Police to preserve the internal security of the Republic and the maintenance of law and order,[8] police officers have common-law powers to use force to control emergency situations.[9] A miscellany of other statutes, too numerous even to outline in the present context, confer powers on the government to restrict information. [10]

Not only does the 'ordinary law' confer on the executive the powers enumerated in the preceding paragraphs. It also contains many statutory offences in terms of which the state can prosecute individuals in the courts for a range of conduct not normally regarded as criminal in

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1 Section 3.
2 Section 4.
3 Section 10(2)(c).
4 Section 10 read with s 2 of the Protection of Information Act 84 of 1982.
5 Act 67 of 1977.
6 Sections 1 and 3 of Act 67 of 1977. The Ordinances made pursuant to the Civil Defence Act are Ord 20 of 1977 (Tvl), Ord 10 of 1977 (OFS), Ord 8 of 1977 (Cape) and Ord 5 of 1978 (Natal), all of which empower the respective Administrators to activate civil defence programmes.
7 Section 5.
8 See s 5 of the Police Act 7 of 1958.
9 See title on 'Police' in *LAWSA* vol 20 and *Wolpe v Officer Commanding SA Police, Johannesburg* 1955 (2) SA 87 (W).
10 See eg the National Supplies Procurement Act 89 of 1970; the Petroleum Products Act 120 of 1977; the Nuclear Energy Act 92 of 1982. See generally Lane *et al Kelsey Stuart's Newspaperman's Guide* and Klopper Strauss, Strydom and Van der Walt *Mediareg*. For a somewhat dated but still valuable examination of the effect of emergency laws on mass communications in South Africa see Mathews *Darker Reaches*. See also Grogan 'News Control by Decree' (1986) 103 *SALJ* 118.

constitutional states. These include many 'security crimes', some of which render punishable conduct not associated with violence or sedition, as that term is generally understood.[1] Administrative action against individuals, publications and organisations, and the prohibition of gatherings, also extends the range of criminal prohibitions. Once a person is banned or restricted, for example, the mere act of communicating his words becomes a criminal offence.[2] So, too, does the performance of any act calculated to 'advocate, advise, defend or encourage the achievements of any of the objects of [an unlawful organisation] or objects similar to the objects of such organisation'.[3]

It has been observed [4] that 'the cumulative effect of the entire corpus of permanent security legislation in South Africa...is to vest the government indefinitely with many of the powers normally associated with martial-law or crisis rule'. In view of the extensive control powers just outlined, it may well be asked what kind of circumstances require the adoption, as a matter of necessity, of additional powers and indeed, whether any crisis, short of impending total collapse of state authority, could justify the grant to the executive of additional powers.

The answer probably lies in another aspect of the 'ordinary law' which is attenuated or displaced by emergency rule. This 'ordinary law' not only confers on the state control powers of the kind just enumerated, but also subjects their exercise to certain standards of legality which, in terms of the doctrine of separation of powers, the courts are responsible for overseeing. The capacity for the kind of flexible, decisive and drastic action necessary to meet an emergency may require the executive to override these standards and to be freed from the restraining hand of the courts, acting in their capacity as buttresses between the state and the individual. Timid

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1 The propogation of communism is a good example: see s 55 of the Internal Security Act 74 of 1982. The term 'communism' is so broadly defined (s 1) as to include the propagation of mere opinion.
2 See s 56(1)(p) of the Internal Security Act.
3 Section 13(1)(a)(v) of the Internal Security Act 74 of 1982.
4 Mathews *Freedom* at 194.

as the courts may at times appear to have been in checking security- related actions, there have been numerous occasions in which the improper exercise of state power has been checked by due process of law.[1]

Another inadequacy of the 'ordinary law' in times of crisis is arguably the narrowness of the range of criminal offences in terms of which the state can act against those undermining or defying its authority. Emergencies enable individuals to abuse freedoms, and conduct which in stable times can be tolerated may, in a time of civil tension or conflict, have explosive consequences. Governments faced with emergencies arising from a collapse of their legitimacy, in particular, have a tendency to create offences which cloud the dividing line between 'legitimate' opposition and subversion. As will be seen in later,[2] this especially is true of many of the penal emergency regulations promulgated in South Africa.[3]

Yet another 'inadequacy' of the ordinary law arises from the procedures followed by the courts in ordinary criminal prosecutions and the adjudication of civil disputes between subjects and the state. In criminal trials, such aspects of procedural justice as the presumption of innocence, clear specification of charges, fair rules of evidence (including proper methods of eliciting it), open court proceedings, the right to legal representation, and so on, can make for protracted proceedings and hamper prosecution. In civil cases, the onus placed on the state to prove, for example, the lawfulness of detentions places a heavy burden on the authorities. Moreover, the right of citizens to sue the state for damages unlawfully caused in the exercise of emergency powers may prove ruinously costly. It is undoubtedly far more convenient for the executive temporarily to suspend these safeguards for the duration of the emergency.

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1 Of these, perhaps the most noteworthy in the present context was the ruling by the Appellate Division in *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) that the grounds for arrest under s 29 of the Internal Security Act, which requires that the arresting have 'reason to believe' that the individual concerned has committed one of the actions mentioned in that section, were justiciable in the sense that a court was free to determine the validity or otherwise of the arresting officer's belief against objective criteria.

2 Chapter 7 below.

3 The Deputy Minister of Information and Constitutional Planning, Dr C J van der Merwe expressed this view point in a television interview (SATV *Network* 11 October 1987, quoted in Gilbert Marcus 'Fine Distinctions: Scientific Censorship and the Courts' 1988 (4) *SAJHR* 82 at 85) when he observed that the courts were created and maintained for 'ordinary run-of-the-mill cases'. The ordinary law, he said was 'not actually so refined' as to be the kind of 'sharp cutting instrument' needed for drawing distinctions between 'legitimate opposition', on the one hand, and the 'propagation of revolution' on the other. In other words, politicians were better equipped than the courts to decide when opposition was 'legitimate'.

Is it possible, then, to argue that the State President could not possibly have formed the required opinion that the ordinary law of the land was inadequate to ensure the safety of the public or to maintain public order? Such a contention formed part of the basis of an attack on the re- proclamation of a state of emergency in June 1987 in *Release Mandela Campaign v State President and others.*[1] In that case applicants argued that in view of the addition to the statute book just before the declaration of the state of emergency in June 1987 of two far-reaching emergency measures, s 5A of the Public Safety Act and s 50A of the Internal Security Act, [2] the State President could not have held the opinion required by s 2(1) of the Public Safety Act or, alternatively, that he had not properly applied his mind to the matter and so failed to appreciate the nature and limits of his discretion because he did not have regard to s 5A of the Act[3] and s 50A of the Internal Security Act or that he had mistakenly concluded that they did not provide adequate alternative machinery for dealing with the emergency.[4]

In support of these contentions, applicant referred to a statement in parliament by the State President in March 1986 — ie before the enactment of the two amendments — to the effect that the objective of the amending legislation was to enable the government to 'deal with continuing cases of unrest without subjecting the population to the inconvenience of a state of emergency'. The State President had expressed regret that the legislation was not then available.[5] It was argued that the augmenting of the ordinary law by ss 5A and 50A accordingly meant, by the State President's own admission, that the government possessed effective powers at the time of the declaration of the state of emergency in June 1986.

In his answering affidavit, however, the State President explained that his comments in parliament were intended only to convey that the amendments provided sufficient power to cope with circumstances comparable to those prevailing at the time his address was delivered — ie to meet emergencies in specific areas. The amendments were not intended to be a complete alternative to the adoption of full-blown emergency powers under s 2 of the Public Safety Act.[6] By

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1 1988 (1) SA 201 (N)

2 Which provides, *inter alia*, for the arrest without warrant and detention for up to 180 days of a person whose detention will in the opinion of the arresting officer 'contribute to the termination, combating or prevention of public disturbance, disorder, riot or public violence at any place in the Republic'.

3 Which empowers the Minister of Law and Order to declare 'unrest areas'.

4 At 210I.

5 His words are cited at 218G-H.

6 209F-G.

June 12 1986, he said, the security situation had deteriorated to such an extent that it was necessary to declare the existence of a state of emergency. But it still made sense to proceed with the amending legislation in case the situation should revert to what it had been in March of that year. The court agreed with the State President:

> '[T]he provisions of the amendments themselves tend to confirm that they were designed to deal with sporadic and short-lived outbreaks of violence and unrest, not country-wide states of emergency. In particular, there is no reason whatsoever to doubt his [the State President's] averment that he held the opinion on 11 June 1987 and at all other relevant times that the *ordinary* law of the land was inadequate in the prevailing circumstances to enable the Government to ensure the safety of the public and to maintain public order.'[1]

The court found no merit in the alternative argument that the State President had failed properly to apply his mind to the matter and to appreciate the nature of his discretion because he did not have regard to the amendments or had mistakenly concluded that they did not provide adequate alternative machinery for dealing with the emergency situation.[2] It was contended that such an error was one of law, and hence reviewable.[3] The court observed that this argument, if taken to its logical conclusion, would create 'the absurd result' that

> 'in every case where a resort to s 5A would afford an adequate alternative, the State President is deprived of his power to declare the existence of a state of emergency under s 2(1) of the Act. It could never have been the Legislature's intention to excise from s 2(1), by the enactment of s 5A, the power granted to the State President to declare a state of emergency if in his opinion the facts and circumstances contemplated in subparas (*a*), (*b*) and (*c*) of s 2(1) justify such action.'[4]

The court also rejected the argument that the principle laid down in *Dempsey v Minister of Law and Order*[5] was applicable to the exercise of the State President's powers under s 2(1). In that case, Marais J had set aside the detention of a nun on the ground that the arresting officer's

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1 At 210F-G. Emphasis in original.
2 210H-I.
3 At 211B.
4 At 211F-G.
5 1986 (4) SA 530 (C), discussed below at 6.2.4.

affidavit had not disclosed that he had least considered the alternative of arrest under the ordinary law.[1] In the *Release Mandela Campaign* case, the court accepted as obvious that in exercising his power under s 2(1) on 11 June 1986, the State President was fully aware of the amendments. There was accordingly nothing to give rise to the inference that he had not properly applied his mind to the matter or properly appreciated the nature of his discretion.[2]

In *Sisulu v State President*,[3] counsel for applicant argued that the State President had not conformed with the requirements of sub-secs 2(b) or (c) of the Public Safety Act, in that he had purported to base his decision to declare the state of emergency on the view that circumstances had arisen 'which seriously threaten the safety of the public *or* the maintenance of law and order', and that the ordinary law of the land was inadequate 'to ensure the safety of the public, *or* to maintain public order'.[4] The Public Safety Act, it was pointed out, authorises the State President to declare a state of emergency only he is of the opinion that circumstances have arisen which 'threaten the safety of the public *and* the maintenance of law and order' and that the ordinary law of the land is inadequate to 'maintain the safety of the public *and* the maintenance of law and order'. The court dismissed this argument, holding that the State President's decision was 'plainly a cumulative conclusion covering both the jurisdictional facts'.[5]

4.6 'Unrest areas'

Section 5A(1) authorises the Minister of Law and Order to declare an area an 'unrest area' when he

> 'is of the opinion that public disturbance, disorder, riot or public violence is occurring or threatening in an area and that measures additional to the ordinary law of the land are necessary to enable the Government or any governmental institution to ensure the safety of the public or the maintenance of public order or to combat or to prevent such public disturbance, disorder, riot or public violence.'

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1 The point was in any event rejected by Nedstadt JA on appeal: see *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 43D-45C. The appeal court acknowledged, however, that the alternative of arrest under the ordinary law nevertheless played an important role in the formation of the arresting officer's opinion, and that the facts could disclose that his opinion was in this respect impaired (see at 44I): 'The more appropriate or feasible the alternative of conventional arrest and the less likely the detainee would in the future indulge in activities contrary to the public order, the stronger may be the inference that the discretionary power had been abused.'

2 At 212E-G.

3 1988 (4) SA 731 (T).

4 The wording of the declaration is set out in Proc R 95 of 1987.

5 At 733D-E; see also 733D-E.

The declaration of an 'unrest area' remains in force for a maximum of three months, but may be extended for further periods of three months at a time with the approval of the State President.[1]

The grounds on which the Minister may proclaim an 'unrest area' are slightly narrower than those on which the State President is authorised to declare a general state of emergency, but, practically-speaking, probably little more susceptible to judicial challenge. It is worthy of note, however, that the circumstances on which the Minister must form his opinion in terms of s 5A(1) are more tangible than those on which the State President is enjoined to satisfy himself in s 2(1). Public disturbance, disorder, riot and public violence are visible forms of social conflict, and the Minister could clearly not be said to have formed the requisite opinion were he to invoke his powers under s 5A(1) at a time of general social tranquility in the area concerned. On the other hand, he is authorised to make a declaration when these forms of social violence are merely threatening, and a court will presumably hold that he is the sole judge of when this is the case.[2]

A further difference between the requirements for the declaration of an 'unrest area' and those for the declaration of a general state of emergency is that, for the latter, the Minister must be of the opinion not merely that the ordinary law of the land is 'inadequate', but that 'measures *additional to* the ordinary law of the land are necessary' to enable the government to restore order. The words emphasised appear to set the requirements for the declaration of an unrest area somewhat higher than those for the declaration of a state of emergency. The phrase 'measures additional to the ordinary law of the land' suggests that parliament intended the power to be invoked in circumstances where the administrative powers conferred on the executive were inadequate and existing common law and statutory penal provisions did not suffice. The conjunction 'and' before the phrase indicates that the need for 'additional measures' is regarded as an independent factor to which the Minister must at least give consideration before forming

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1 Section 5A(2).

2 See remarks on this aspect of the State President's discretion at 4.3 above, and the observations by Viscount Simon LC in *King-Emperor v Benoari Lal Sarma* [1945] AC 14 at 22-23.

the required opinion. 'Necessity' is a stricter requirement than 'expedience'.[1] It seems to follow, therefore, that the question whether the declaration of an 'unrest area' was necessary may be gauged against some objective criteria independent of the Minister's purely subjective assessment. These criteria, it is suggested, may be derived from the circumstances under which the Minister is empowered to act in terms of s 5A(1). He must be of the opinion that a state of civil unrest which *actually* exists or is *actually* threatening in an objective sense is of such a nature as to require the additional measures mentioned.

4.7 Procedural aspects

The reluctance of the courts to inquire into the objective necessity for the declaration of a state of emergency explains why most legal challenges to the exercise by the State President of this power tend to be based on narrow procedural grounds.[2] One such relates to the declaration of a new state of emergency before the expiration of its predecessor.

Sub-section 2(2) limits the duration of a proclaimed state of emergency to a maximum of 12 months. This means that all regulations issued under s 3(1)(a) and all administrative acts executed under them cease to have effect upon the expiration of this period, and must be proclaimed or performed anew after a fresh declaration. A proviso to sub-sec 2(2) expressly provides, however, that a new proclamation may be issued at or before the expiration of the said 12 months. It reads:

> '[N]othing in this sub-section contained shall be construed as precluding the issue of another proclamation in respect of the same area at or before the expiration of the said period of twelve months.'

The legislature thus contemplates the possibility of a permanent state of emergency, subject only to formal renewal at the required intervals.

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1 See *Omar v State President* 1987 (3) SA 859 (A), where Rabie ACJ observed (at 892F) that the power which s 3(1)(a) of the Public Safety Act confers on the State President is not only to make such regulations as he considers necessary for achieving the purposes set out in the section, but also to make such regulations as appear to him to be expedient for achieving the said purposes. The learned Acting Chief Justice stated: 'The test of what is expedient is obviously a less stringent one than that of what is necessary. This illustrates how wide the discretion is which the Act confers on the State President.'

2 It should be noted that challenges to the validity of a declaration of a state of emergency can be, and usually are, raised as a defence to a prosecution under an emergency regulation or during an attack on a particular exercise of emergency power; the prosecution or administrative act would be invalid if the state of emergency was itself improperly declared.

This did not deter the applicant in *Release Mandela Campaign and others v State President and others* [1] from arguing that, while the proviso to ss 2(2) might authorise the State President to *proclaim* a new state of emergency, this did not mean that a new state of emergency could *take effect* before the expiry or withdrawal of an existing proclamation. The court found that no such qualification could be read into the words of the proviso. It observed:

> 'The Legislature obviously foresaw the possibility that the circumstances giving rise to a state of emergency could outlast the 12 months for which the proclamation remained in force, with the consequence that a fresh proclamation would have to be issued, and the proviso to s 2(2) was clearly intended to authorise a measure of overlapping to avoid any hiatus in dealing with the emergency.'[2]

The most that could be said, ruled Howard J, was that a proclamation issued during the currency of an existing emergency was repugnant to the latter, with the result that the later proclamation impliedly repealed the earlier. The fact that s 2(3) required the State President to effect the repeal of any proclamation by further formal proclamation in the *Government Gazette* was of no consequence: the permissive authorisation of power to repeal could not be construed as prohibiting implied repeal by a new proclamation.[3]

In an earlier case, *R v Sutherland*,[4] the Appellate Division observed that the repeal of a law was a 'matter of substance and not of form', and could be effected in ways other than by express repeal. So, for instance, subordinate legislation was to be regarded as impliedly repealed on the repeal of the enabling statute.[5] There was implied repeal when the same or a superior legislature passed a law repugnant to an earlier one (*leges posteriores priores contrarias abrogant*).

Mokwena v State President [6] turned on a similar point. Applicant had been detained under regulations issued in terms of Proc R 109 of 1986. A new emergency was proclaimed on 11 June 1987, approximately 24 hours before the earlier proclamation was due to expire. Soon after the new proclamation, applicant was visited in jail by a police officer who informed him

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1 1988 (1) SA 201 (N).
2 At 206H.
3 206J-207B.
4 1961 (2) SA 506 (A) at 815A.
5 Relying on *Lockhat Bros and Co Ltd v Minister of Finance* 1932 NPD 469 at 475-6; *Hatch v Koopoomal* 1936 AD 190 at 197.
6 1988 (2) SA 91 (T).

that a new state of emergency had been declared and that his further detention was thought necessary. It was argued on behalf of the applicant that his detention in terms of regulations issued under the later proclamation could not be effected during the currency of the first. The court dismissed the application, relying on the *Release Mandela* case.[1]

The effect of these judgments is that, if the State President proclaims a new state of emergency at any time during the currency of an existing emergency, the later proclamation supersedes the earlier and a new state of emergency is brought into effect immediately. Any regulations issued under the earlier proclamation likewise cease to be of legal force, and are replaced by their successors.

In *Mbeki v State President of the Republic of South Africa and others*,[2] counsel for applicant relied on another apparent anomaly to support the argument that there cannot be two emergency declarations operative at the same time in respect of the same area. This was that regulations issued under the two emergencies might differ, as was indeed the case with the regulations authorising the restriction of persons in the 1987 and 1988 regulations, respectively. The former entrusted that power to the Commissioner of Police, while the latter granted it to the Minister of Law and Order. This meant that conflicting regulations and orders could be operative within the same area at the same time — a situation which, so it was argued, could never have been intended by the legislature.[3] Counsel was, however, forced to relinquish this argument when it was pointed out to him that the 1987 state of emergency had also been declared and promulgated before the lapse of that of 1986. If his argument was good, the 1987 declaration would therefore have been invalid, and that of 1988 would, accordingly, not have been made while an existing state of emergency was in force![4]

In *Nkwinti v Commissioner of Police and others*,[5] an unsuccessful attempt was made to impugn the declaration of the state of emergency in July 1985 on the ground that the proclamation had been signed by the State President and counter-signed by the Minister of Law and Order, whose signature appeared over the words 'by order of the State President-in-Cabinet'. Counsel for the applicant contended that the words indicated that the State President had acted 'on the

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1 At 94J-95B.
2 ECD 13 October 1988 Case No 427/88, unreported.
3 At 6-7 of the typed judgment.
4 At 8.
5 1986 (2) SA 421 (E).

advice of' Ministers of the government. It was argued that in terms of s 19(1) of the Republic of South Africa Constitution Act,[1] the State President was required to act 'on the advice of' the Ministers of the executive council with regard to 'own affairs' only. The declaration of a state of emergency was a 'general affair', however, and in terms of the constitution the State President was required to act 'in consultation with' and not 'on the advice of' the Ministers-in-Council when it came to general affairs. In proclaiming the state of emergency the State President had acted as State President-in-Council and had therefore followed the advice of the Ministers-in-Council. This indicated, so it was argued, that he had not applied his own mind independently to the declaration of the state of emergency as was required by s 2 of the Public Safety Act. The court pointed out, however, that the Minister's signature appeared over the words 'by order of the State President-in-*Cabinet*', and not 'by order of the State President-in-*Council*'. The State President had clearly indicated that in his opinion circumstances had arisen necessitating the declaration of the state of emergency. The words 'by order of the State President-in Cabinet' did not mean that the State President had acted on the advice of the Cabinet; they merely indicated that he did so 'in consultation with the Ministers who are members of the Cabinet', which is what he was required to do in 'general affairs' by s 19(1)(b) of the Constitution Act.[2]

4.8 Conclusion

It appears from the foregoing paragraphs that a decision by the State President to declare a state of emergency is for all practical purposes above judicial correction. The Public Safety Act, therefore, renders the courts more impotent with respect to the invocation of statutory peacetime emergency powers than they are in regard to the assumption of martial law powers.[3] The State President is the final arbiter of whether circumstances justify the invocation of statutory emergency powers, and not even parliament has the power formally to annul a declaration. We turn next to the manner in which the State President can apply those powers in order to give substance to a state of emergency.

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1 Act 110 of 1983.

2 See at 429B-D.

3 In the latter case, as has been pointed out (at 4.1 above), the courts can investigate whether the state of necessity which purportedly justified the introduction of martial law can be said to have existed.

5: Emergency legislative powers

5.1 Sections 3(1)(a) and 5A(4)

The legal effect of a declaration of a state of emergency under section 2 of the Public Safety Act is to vest awesome law-making powers in the State President. Authority to make regulations is conferred on him by section 3(1)(a) of the Act, which reads:

> 'The State President may in any area in which the subsistence of a state of emergency has been declared under section *two*, and for as long as the proclamation declaring the existence of such a state of emergency remains in force, by proclamation in the *Gazette*, make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or for 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.'

Section 5A(4) of the Act grants legislative powers to the Minister in terms almost equally wide:

> 'The Minister may with [*sc* in] relation to an unrest area, by notice in the *Gazette* make such regulations as appear to him to be necessary or expedient for providing for the combating or prevention of public disturbance, disorder, riot or public violence or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such public disturbance, disorder, riot or public violence or the combating or prevention thereof.'

On the face of it, these provisions appear to raise the State President or the Minister, as the case may be, to the position of supreme and unchallengable law-making authority for the areas concerned during the currency of an emergency, subject only to the limitations expressly laid down in the Act.

Parliament has seen fit expressly to deny the State President and the Minister power to make regulations on certain matters.[1] They may not impose liability to render military service other than that provided for by the Defence Act,[2] or which alter or suspend any law relating to the qualifications, nomination, election or tenure of office of members of parliament or of the President's Council or to the holding of sessions of those bodies, or to their powers, privileges and immunities.[3] The State President and the Minister are also expressly prevented from declaring unlawful any conduct permissible under the Labour Relations Act 28 of 1956.[4] While the State President and the Minister are expressly authorised to make legislation retrospective to the proclamation of a state of emergency, they may not render punishable any act which was not punishable at the time it was committed.[5]

That Parliament has seen fit to limit the executive's emergency rule- making powers in respect of the above matters is arguably, in terms of the maxim *expression unius, exclusio alterius*, an indication of an intention to confer absolute legislative powers in respect of all others. This was, in fact, the approach adopted by the court in *R v Maphumolo and others.*[6] When the court described the State President's emergency lawmaking powers in that case as 'equal to those of Parliament', it appears to have meant to indicate that no court may question the validity of his regulations in respect all matters other than those expressly excluded. This was the interpretation placed on *Maphumolo* in *Fani and others v Minister of Law and Order and others*,[7] in which it was said:

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1 The limitations on the State President's powers are set out in sub-secs 3(1)(a)-(d), and are made *mutatis mutandis* applicable to the powers of the Minister by s 5A(9).

2 Act 44 of 1957, subsec 3(3)(a).

3 Subsec 3(3)(c).

4 Subsec 3(3)(d). This limitation explains why the State President has not penalised attempts to incite or encourage members of the public to take part in *lawful* strikes under the prohibition of 'subversive statement' (on which see 7.1 below) and why the Minister did not prohibit Cosatu from performing 'any act whatsoever' in terms of his power to restrict organisations (see 6.6 below).

5 A further restriction on the State President's power to impose penal restrictions was removed in 1976. Prior to that date he could impose a maximum fine of £500 or imprisonment not exceeding five years. There is now no limit on the punishment the State President may impose for violations of his regulations. The maximum penalties provided for in the regulations promulgated after 1985 are fines of up to R20 000 or jail sentences of ten years, or both.

6 1960 (3) SA 793 (N).

7 ECD 4 December 1985 Case No 1840/85, unreported.

> 'However, where the powers which the State President has exercised are authorised by the enabling Act, and do not fall within any limitation contained therein, his powers can be described as being equal to those of Parliament....' [1]

This approach means that emergency regulations are unimpeachible except where it can be shown that they have breached one of the express provisions. For other than the express limits, the enabling legislation contains no objective yardstick by which the necessity of any regulation issued by the State President or the Minister can be gauged. It is enough that it should *appear* to them to be suitable for the attainment of the stated purposes. Any regulation, however far-reaching its implications for the liberty of the subject, need not be considered by them to be *indispensible* for the realisation of the stated purposes, in the sense that no less drastic alternative is available; they must merely be of the opinion that the regulations they make are 'expedient' — ie useful or desirable.[2]

The purposes for which the State President and the Minister may make regulations are stated in the broadest possible language. The objectives of 'providing for the safety of the public' and 'maintenance of public order' may to some extent narrow the range of subject-matter with which their regulations may lawfully deal,[3] as does that of providing for the termination of public disturbance, etc. But the State President and the Minister are not merely empowered to formulate measures directed at combating or terminating physically observable states of affairs. Their regulations may also be directed at dealing with 'circumstances' which may exist only in their own minds! [4]

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1 Quoted in *Momoniat & Naidoo v Minister of Law and Order and others* 1986 (2) SA 264 (W) at 273B-C.

2 The adjective 'necessary' is defined in the *Shorter Oxford English Dictionary* as: 'Indispensible, requisite, needful; that cannot be done without'. Rare usage is 'commodious or convenient'. 'Expedient' is defined as 'advantageous, fit, proper or suitable to the circumstances of the case; useful, politic as opposed to just and right'. The words ' necessary and expedient' also occurred in s 146(1) of the Criminal Procedure Act 31 of 1917 and received attention in *Kake v A-G and another* 1958 (1) SA 300 (W) at 303A-F. See also *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A), in particular the judgment of Nestadt JA at 43E-I. The significance which the courts have attached to the word 'necessary' is further discussed at 6.2.3 below.

3 This was acknowledged by Rabie CJ in *State President v Tsenoli* 1986 (4) SA 1150 (A) at 1180C.

4 Cf. the words 'circumstances which *in his opinion* have arisen' etc in ss 3(1)(a) and 5A(4).

Parliament has, moreover, gone to considerable lengths expressly to exclude some of the limitations which might otherwise be read into sections 3(1)(a) and 5A(4) in terms of the common law. The State President may make regulations which apply outside the area over which an emergency has been declared,[1] thus eliminating the requirement of validity *ratione loci*.[2] The operation of the maxim *delegatus delegare non potest*[3] is also weakened by express authorisation to both the State President and the Minister to empower 'persons or bodies' specified by them to make regulations or orders for the purposes for which the former may legislate.[4] Parliament has also expressly excluded the presumption that it does not intend authorising officials to whom it has delegated legislative authority to make laws which are partial or unequal in their operation,[5] or of restrospective effect.[6]

Even before the inclusion of the direct ouster clause,[7] parliament had therefore given the clearest indication of its intention to minimise the possibility of judicial control of the emergency legislative powers of the State President. He and, since the inclusion of s 5A, the Minister are given the widest possible discretion to choose how state power is to deployed to combat whatever crisis has occasioned the proclamation of a state of emergency or an 'unrest area'. Does this mean, then, that these officials are entirely above the law, and hence beyond judicial

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1 Section 3(1)(b), which requires the State President to deem such extra-territorial operation 'necessary' to deal with the emergency. He may modify regulations for purposes of their extra-territorial application.

2 On which see Wiechers *Aministrative Law* at 187-90.

3 On which see 2.4.1 above.

4 Sections 2(2)(a)(i) and 5A(6)(a)(i).

5 Sections 3(2)(c) and 5A(6)(b), which state that different regulations may be made for different classes of people and for different areas. On the presumption see 2.4.8 above

6 Section 3(2)(b) which empowers the State President to make regulations with retrospective operation from the date on which the emergency was declared, provided that he does not punish restrospectively.

7 Section 5B, discussed at 3.2 above.

control, when it comes to the making of emergency regulations? The present chapter addresses this question.

5.2 Judicial interpretations of s 3(1)(a)

5.2.1 The 1940s

Judgments dealing with the wartime precursers to the Public Safety Act[1] unanimously emphasised the breadth of the discretionary authority which reposed in those charged with the power to make regulations during time of war, their discretion being variously described as 'final', 'ultimate', 'complete',[2] 'untrammelled',[3] and 'of the widest possible character'.[4]

The first of these cases, *R v McGregor*,[5] turned on the validity of a regulation made under s 4(1) of the Southern Rhodesian Emergency Powers (Defence) Act of 1939.[6] On the justiciability of regulations issued under this Act, the court pointed out that the English courts, in interpreting the similarly-worded provisions of the British Emergency Powers (Defence) Act of 1939, had accepted that the mere fact that a regulation was made was sufficient proof of its necessity and expediency.[7] It was, accordingly, 'not open to His Majesty's courts to investigate

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1 The Public Safety Act is closely modelled on a decree issued during World War II (Proc 201 of 1939), which was approved retrospectively by parliament (Act 13 of 1940) and placed on the statute book the following year (by the War Measures Act Act 32 of 1940). A contemporary observer described this development as 'a modern tendency in the development of martial law powers'(Conradie 'Krygswet' (1941) 5 *THRHR* 183 at 192). Section 1 of the War Measures Act was subsequently incorporated verbatim into the current Defence Act 44 of 1957 (s 103), which bears a close resemblance to s 3(1)(a) of the Public Safety Act, except that it is tailored for the effective prosecution of a war in which the Republic is or may become engaged. The Public Safety Act is its peacetime counterpart.

2 *R v Comptroller-General of Patents; ex parte Bayer Products Ltd* [1941] All ER 677 at 682.

3 *R v McGregor* 1941 AD 493 at 499.

4 *R v Beyers* 1943 AD 404 at 409; *R v Scheepers* 1942 TPD 122; *R v Simkiss* 1943 NPD 32 at 36.

5 1941 AD 493.

6 Which authorised the Governor 'to make such Defence Regulations as appear to him to be necessary for securing the public safety, the defence of the Colony, the maintenance of public order and the efficient prosecution of any war in which His Majesty may become engaged.'

7 The court referred to *R v Comptroller of Patents, Ex Parte Bayer Products Ltd* [1941] All ER 677, in which Scott LJ had remarked that the effect of the words 'as appear to be necessary and expedient' was 'to give His Majesty in Council, as the authority for passing delegated legislation, *a complete discretion* entrusted to him by Parliament to decide what regulations are necessary for the purposes named in the sub-section' (at 621, emphasis added).

the question as to whether or not it was in fact necessary or expedient for the purposes to make the regulations which were made'.

In *R v Beyers*,[1] the Appellate Division displayed an equally diffident approach to regulations made under the War Measures Act,[2] referring to the lawmaking powers conferred thereby as 'of the widest possible character'.[3] The court considered it unnecessary to refer to any authority because of the 'plain language' of the empowering provision, but referred in any event to the *Bayer Products* case *supra*. Similarly, in *R v Scheepers*,[4] the court commented that the breadth of the language of the empowering provision of the War Measures Act 'could hardly be exceeded', and added:

> 'The position...is that in time of war the executive of the country is charged with the protection of those interests which are referred to [in the Act] and that it has full powers to do those things which are necessary to protect those interests....The idea of the Legislature was that the executive should retain full and complete power to do all the things which are necessary to provide for the defence of the Union, the safety of the public, the maintenance of public order, and the effective prosecution of the war; and I see no reason to suppose that those wide powers were intended to be limited in a way which does not appear in the legislation itself....'[5]

The message that emerges from the wartime cases is clear. The legislation in question was regarded as an attempt to give statutory recognition to the wide powers which in any event reposed in the executive under the common law to prosecute war effectively. It was not for the courts to frustrate the task of the executive by imposing limitations on its freedom of action other than those which parliament had chosen expressly to declare. With the exception of *mala fides*, the grounds for judicial review of administrative action which could be invoked in peacetime were suspended during time of war as completely as they would have been if the executive were acting under martial law.

5.2.2 The 1960s

The question before the courts when the Public Safety Act first fell to be interpreted during the emergency of 1960 was whether the discretion conferred by s 3(1)(a) was as complete as that

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1 1943 AD 404.
2 Act 13 of 1940.
3 At 409.
4 19942 TPD 122.
5 At 126.

which the courts had decided existed under its wartime ancestors. Cases arising from challenges to regulations made by the Governor-General during South Africa's first state of emergency yielded an affirmative answer.

In the earliest, *Stanton v Minister of Justice*,[1] the court refused to entertain the argument that s 3(1)(a) should be restrictively interpreted.[2] The words 'such regulations as appear to him to be necessary or expedient', said the court, gave 'a complete discretion to decide what regulations are necessary for the purposes named in the sub-section'. It was, accordingly, 'not open to the courts to investigate the question as to whether or not it was in fact necessary for the purposes named to make the regulations which were made'.[3] In *Brink and others v Commissioner of Police*,[4] the court revealed as eloquently the influence of the principles laid down in the martial law cases on its approach to s 3(1)(a) of the Public Safety Act. Galgut J observed:

> 'It seems to me that it may well be that circumstances may arise in times of war or internal revolt or similar emergency where, because of the extraordinary circumstances, the State assumes extraordinary powers and the courts will feel impelled to condone serious invasions on the liberty of the subject.'[5]

The scope of the Governor-General's powers under the section were to be determined not according to the conventional principles of statutory interpretation applicable in normal times, but in terms of the doctrine *salus reipublicae supreme lex*. Thus,

> 'if a court were faced with a situation in which the safety of the State was in danger, that court would not necessarilly act in terms only of the regulations *but would support any action taken by the authorities where such acts are bona fide*.'[6]

It is hard to imagine a more categorical admonition of judicial restraint.

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1 1960 (3) SA 353 (T).

2 The court was clearly influenced by the view on which the wartime cases had been decided, and which received its most eloquent expression in the words of Viscount Maugham in *Liversidge v Anderson* [1941] 3 All ER 388 (HL), namely, that the rule that legislation affecting the liberty of the subject should as far as possible be interpreted in favour of the liberty of the subject and against the state was 'of no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State was involved' (at 359F-H).

3 At 359G-H.

4 1960 (3) SA 65 (T).

5 At 68A.

6 At 69A, relying on *Trumpelman v Minister for Justice Minister and Minister for Defence* 1940 TPD 242. Emphasisis added.

The Natal court chose another way of expressing the breadth of emergency legislative powers, and hence their non-justiciability, by equating them with the sovereign legislative authority of parliament itself. Milne J, as he then was, put it this way in *R v Maphumolo and others*:[1]

> 'It appears to me...that it was the intention of the legislature to provide in respect of an area in which a state of emergency has been declared that the Governor-General has a complete discretion to make regulations having the force of law as effectively as could Parliament itself subject only to the exceptions set out in s 3 (3) of the Act.'[2]

A close reading of *Maphumolo*, which was understandably heavily relied on by counsel for the State President in cases involving challenges to emergency regulations after 1985, makes it plain, however, that the court did not mean the comparison between the Governor-General's emergency lawmaking power and that of parliament to be taken literally. Milne J indicated, for one, that the Governor-General could not ignore such express limitations on his power as were contained in the Act.[3] The learned judge affirmed, secondly, that emergency regulations could be struck down on proof of want of *bona fides*,[4] and proceeded to examine the validity of the one at issue on the basis that it could be struck down as *ultra vires* if it 'could not "possibly" or could not "conceivably" aid in securing any of the objects set out', or that it was 'unreasonable'.[5]

Little guidance as to the scope of the State President's powers under s 3(1)(a) can therefore be drawn from the few reported provincial division decisions arising from challenges to the regulations during the emergency of 1960. It is, however, apparent that the courts were at that stage overawed by its sweeping terms and wartime origins, both of which they accepted as calling for extreme judicial restraint, if not total abstinence, when it came to the scrutiny of the exercise of emergency legislative powers. The fleeting recognition in *Maphumolo* that emergency regulations could *in principle* be struck down on the grounds of *mala fides* or improper purpose was more than offset by the court's insistance on the unrestricted ambit of the powers conferred. It is hardly surprising, therefore, that no successful challenge to the Governor-General's emergency regulations appears in the law reports of that period.

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1 1960 (3) SA 793 (N).
2 At 798A-C. See also 798G-H and 799A-B.
3 At 798E-F.
4 At 799B.
5 Relying on *Sinovitch v Hercules Municipal Council* 1946 AD 783.

5.2.3 The 1980s: Provincial Divisions

After the declaration of the 1985 state of emergency, the provincial divisions of the Supreme Court indicated that they were prepared to read some limitations into s 3(1)(a). They uniformly emphasised that the powers conferred by that section, though wide, were nevertheless subordinate, and hence that emergency regulations were amenable to judicial review. Thus:

> 'The powers conferred on the State President by Parliament are very wide indeed but they are nevertheless subordinate delegated powers which may only be exercised subject to the contraints expressly or impliedly imposed by the enabling Act. There is thus room for judicial scrutiny.' [1]

In *Momoniat & Naidoo v Minister of Law and Order*,[2] Goldstone J pointed out that the State President's legislative powers, though broad, were nevertheless delegated powers which had to be exercised *bona fide*, and that the wide language of the Public Safety Act did not relieve the courts of their responsibility to test for 'any unlawful abuse of such powers.[3] In the case of legislative powers of the kind conferred by s 3(1)(a), said the court, the test was not merely whether a particular regulation disclosed evidence of *mala fides* in the strict sense,[4] but also whether it was of such a nature as to warrant the inference that parliament 'could never have contemplated that such a measure be countenanced'.[5] The court cautioned, however, that the onus to be discharged by any person seeking to challenge an emergency regulation was 'a formidable one'.[6]

In *Fani v Minister of Law and Order and others*,[7] the court formulated the test in slightly different terms. Stating that it was for the State President, and not the court, to decide whether regulations appeared to be necessary for the purposes stated in the Act, Zietsman J added:

> 'However, if it could be said that no reasonable person could have considered that the regulations he [the State President] has made are necessary for the said purposes, and that the only conclusion one can reach is that he did not act *bona fide* in making those

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1 *Natal Newspapers and others v State President and others* 1986 (4) SA 1109 (N) at 1113J-1114A. See also the earlier case of *Metal and Allied Workers Union v State President* 1986 (4) SA 358 (D).

2 1986 (2) SA 264 (W).

3 At 270J.

4 For an explanation of the distinction between the use of the expression *mala fides* in the strict and wide senses see 2.4.6 above.

5 At 273E, following *R v Pretoria Timbers Co Pty Ltd and another* 1950 (3) SA 163 (A).

6 At 273F.

7 ECD 4 December 1985 Case No 1840/85, unreported, the relevant extracts from which are quoted with approval in *Momoniat supra* at 272J-273C.

> regulations, this could be ground for declaring the regulations to be *ultra vires* and therefore void.'

In *Momoniat* and *Fani*, therefore, the courts were prepared to subject the State President's regulations to the test of reasonableness, which was to be gauged against one of two legal standards: the intention of parliament itself or the viewpoint of the 'reasonable person'. These judgments did not, however, address the question: by what rules or standards where the courts to measure whether regulations made by the State President disclosed *mala fides* in the wide sense in which that term was used?

The Natal courts found the answer in the common law rules governing the principles of legality. In *Metal and Allied Workers Union v State President and others*,[1] the court formulated the test to be applied in determining whether the State President had strayed beyond his powers in terms which are applicable to any form of delegated legislation:

> 'Firstly, has the State President stayed within the four corners of the matters on which he was authorised by the statute to make regulations? Has he stuck to that appearing to him to be necessary or expedient for providing for the safety of the public or the maintenance of the public order, for terminating the emergency, and for dealing with circumstances arising or likely to arise from it? If he has not, he has gone beyond his powers.'[2]

The court acknowledged that 'unreasonableness' was another recognised ground of review of subordinate legislation, but did not discuss it further as it had not been raised by counsel for the applicant. Didcott J pointed out, however, that for practical purposes the 'very substantial powers' enjoyed by the State President under the Act 'would have made such an attack a difficult one to press home'.[3]

The applicability of the ordinary principles of judicial review to emergency regulations was thoroughly considered in *Natal Newspapers v State President*,[4] in which the Full Bench of the Natal Provincial Division accepted that such regulations could be challenged on the ground of improper purpose,[5] uncertainty or vagueness [6] and 'unreasonableness' in the sense in which

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1 1986 (4) SA 358 (D).
2 At 365H-I.
3 At 365F-G.
4 1986 (4) SA 1109 (N).
5 At 1115C-F and 1117D.
6 At 1115F-1116B.

that word was used in *Kruse v Johnson.*[1] To these grounds of review the court later added the rule against unauthorised delegation by means of subordinate legislation of 'unfettered authority to commit acts which affect the ordinary common law rights of the citizen'.[2]

In the first round of cases after the declaration of the state of emergency in 1985 and its extension to the entire country in mid-1986, several judgments handed down in the various provincial divisions showed that the courts were prepared to invoke these rules in order to check at least the more intolerable excesses of the developing emergency regime. Thus holes were picked in certain regulations applying to the media of mass communications in *Metal and Allied Worker's Union v State President*[3] and *Natal Newspapers v State President,*[4] and their amended successors were left in tatters after *United Democratic Front v State President.*[5] The 1986 regulation authorising detention without trial was struck down in *Tsenoli v State President,*[6] and provisions denying detainees a right of access to legal advisers were declared void on the ground of improper purpose.[7]

These judgments, modest as their effects may have been in practical terms, were a clear signal that the courts were not prepared to stand back supinely while the government constructed its emergency regime.[8] In several other cases, however, the provincial divisions of the Supreme Court gave notice that they were not prepared to interfere too robustly with emergency regulations. Thus in *Kerchhoff v Minister of Law and Order*[9] the Natal Provincial Division ruled

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1 [1898] 2 QB at 99-100, discussed at 2.4.8 above.

2 *United Democratic Front v State President* 1987 (3) SA 315 (N).

3 1986 (4) SA 358 (D).

4 1986 (4) SA1109 (N).

5 1987 (3) SA 315 (N).

6 Durban & Coastal Local Division 11 August 1986 Case No 4988/86, unreported.

7 *Metal and Allied Workers Union v State President* 1986 (4) SA 358 (D).

8 The decisions mentioned in the previous paragraph gave rise to several predictions from practicing lawyers and academics that the courts would henceforward follow an approach less deferential to the executive than that which they had adopted in the 1960s (see eg Etienne Mureinik 'Administrative Law in South Africa' (1986) 103 *SALJ* 615 at 618; Nicholas Haysom and Steven Kahanovitz 'Courts and the State of Emergency' (1987) 4 *South African Review* 188; Dion Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South Africa Courts' (1987) 3 *SAJHR* 28. At the time these predictions were uttered, however, there were signs that they might be premature (Mureinik was to concede that his earlier optimism was misplaced: see his 'Pursuing Principle': The Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60 at 61).

9 NPD 14 August 1986 Case No 1912/86, unreported.

against the finding of the full bench of its local division that the detention provisions of the 1986 regulations were *ultra vires*. The Eastern Cape Division chose to follow the Natal Provincial Division's judgment..[1] In *Omar v Minister of Law and Order* [2] and *Fani v Minister of Law and Order*,[3] challenges to the validity of a regulation which excluded detainees' right to a hearing [4] were dismissed, while attacks on regulations and orders which blocked detainee's access to lawyers suffered the same fate in *Bloem v State President*.[5]

In spite of these conflicting responses to the legal challenges posed by the emergency regulations, however, the courts were during the early stages of the emergencies of the 1980s in general agreement that their review jurisidiction was not ousted under emergency rule, and that regulations purportedly promulgated under s 3(1)(a) of the Public Safety Act could still be tested and where necessary struck down in terms of the ordinary principles of judicial review.

5.2.4 The 1980s: Appellate Division

After signs of incipient activism from the provincial divisions, it is understandable that anxious attention was focussed on the highest court when it was first confronted with cases involving challenges to the validity of emergency regulations. In the first, *State President and others v Tsenoli/Kerchhoff v Minister of Law and Order and others*,[6] decided in September 1986, the highest court was called upon to settle the difference between the Natal Provincial Division and the Durban & Coastal Local Division over the legality of the 1986 detention provision.[7] Although the Appellate Division [8] overruled the activist *Tsenoli* decision, the case turned on a

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1 *Nqumba and another v State President* 1987 (1) SA 456 (E).
2 1986 (3) SA 306 (C).
3 ECD 4 December 1985 Case No 1840/85, unreported.
4 Which right had been affirmed in *Nkwinti v Minister of Law and Order* 1986 (2) SA 421 (E) prior to its exclusion by regulation.
5 1986 (4) SA 1064 (O).
6 1986 (4) SA 1150 (A).
7 This conflict is discussed at 5.3 below.
8 *Per* Rabie CJ, Jansen, Corbett, Joubert and Viljoen JJA concurring.

narrow point of interpretation and was accordingly not generally seen as constituting a major set-back to the interventionist trend foreshadowed by some provincial judgments.

In *Tsenoli*, the court was not called upon for purposes of its ruling to investigate the jurisprudential problems raised by the review of emergency regulations. Rabie ACJ did, however, pointedly cite *Rossouw v Sachs*,[1] in which the courts were advised [2] 'to accord preference neither to [to a] "strict construction" in favour of the individual...nor [a] "strained construction" in favour of the executive', but to determine the meaning of empowering legislation which encroached on the liberty of the subject 'in the light of the circumstances whereunder it was enacted and its general policy and object'.[3] In *Tsenoli*, the court also signalled its unwillingness to read meaningful limitations into the words of s 3(1)(a) by citing the interpretation placed on the phrase 'as appear to [the State President] to be necessary or expedient' in wartime cases,[4] adding:

> 'The State President can, it is clearly stated in s 3(1)(a), make such regulations as appear to him to be necessary or expedient for the purposes mentioned in the section. He can, in regulations made by him, prescribe the methods and means to be employed for the achievement of the purposes stated in the section.'[5]

The answer to the 'ultimate inquiry' which the court posed to itself — namely, 'what powers the enabling Act confers?' — is apparent from this stark literalism. The court refrained, however, from venturing further, simply holding that the State President's powers were ample enough to entitle him to confer authority on security officials to detain persons at their own subjective discretion.[6] Rabie ACJ did, however, acknowledge that it was *in principle* open to a court to strike down a regulation as *ultra vires* the State President's powers on the basis of unauthorised delegation.[7]

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1 1964 (2) SA 551 (A).
2 At 563-4.
3 This dictum, while on the face of it enjoining impartiality, takes on a different hue when the 'circumstances' referred to constitute in the eyes of the court a mortal threat to the security of the state. At least one puisne judge who was shortly therafter elavated to the Appellate Division, M T Steyn J, clearly painted such a picture in *Bloem v State President* 1986 (4) SA 1064 (O) at 1067F-1068D, cited at 4.3 above.
4 In particular *R v McGregor* 1941 AD 493; *R v Beyers* 1943 AD 404, and the English case of *R v Comptroller-General of Patents, Ex Parte Bayer Products Ltd* [1941] 2 All ER 677 (CA), discussed at 5.2.1 above.
5 At 1182D-E.
6 At 1181B-F.
7 At 1184F.

The question as to what limits, if any, it was prepared to impose on the State President's law-making powers was one which the Appellate Division was unwilling to answer comprehensively in one judgment. The answer could therefore only emerge incrementally as challenges to different regulations came before it for consideration. The senior court's approach to particular regulations on the validity of which it has been called to give judgment will be considered in detail later in this chapter. For present purposes, it need merely be pointed that, while the Appellate Division has not at the time of writing struck down any of the State President's regulations, it has in all cases adhered to the view that emergency regulations were subordinate legislation subject to review.

The first was *Omar v Minister of Law and Order, Fani v Minister of Law and Order, State President v Bill*,[1] in which the court, while repeatedly stressing the wide and subjective nature of the State President's powers under s 3(1)(a) [2] and that the Public Safety Act was an emergency measure,[3] declared that there was nevertheless room for judicial control. 'It need hardly be said,' Rabie ACJ observed, ' that in making emergency regulations the State President 'must apply his mind to whatever matter may be in issue, that he must act *bona fide* and that he must exercise the powers conferred on him by s 3(1)(a) for the purposes mentioned in the section.'[4] With this reiteration of the well-known grounds for the review of wide discretionary powers, [5] the court affirmed that it was in principle open to the courts to treat emergency regulations on the same basis as any other form of subordinate legislation.

The same view was adopted by the Appellate Division in the next case in which the scope of the State President's legislative powers came before it for consideration: *Staatspresident v United Democratic Front*.[6] Possibly fortified by the conservative tenor of the *Omar* judgment, counsel for the State President attempted to revive the argument that s 3(1)(a) of the Public Safety Act conferred 'plenary' or 'original' legislative powers on the State President, akin to those of a provincial council or of parliament itself, and hence not amenable to judicial review.[7] Noting that this argument had not before been pressed in the Appellate Division,

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1 1987 (3) SA 859 (A).
2 At 892B-G.
3 At 891J; 893C-D & F-G.
4 At 892G-H.
5 First laid down in the landmark decision of *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642, the relevant passage of which is cited at 3.3 above.
6 1988 (4) SA 830 (A).
7 At 848E. Counsel conceded in argument, however, that the regulations could be impugned on the ground of *mala fides* (see 850E).

Rabie ACJ declared again that the exercise by the State President of his powers under s 3(1)(a) were not unassailable ('nie onaanvegbaar nie').[1] His lordship referred with approval to a number of cases in which the provincial courts had expressed the same view, and observed:

> 'Ek meen dus dat bevind moet word dat die uitoefening deur die Staatspresident van die bevoegdheid wat deur art (3)(1)(*a*) van die Wet aan hom verleen word, aangeveg kan word op gronde wat in *Shidiack v Union Government (Minister of the Interior)* ... genoem word as gronde waarop die uitoefening van subjektiewe diskresie aangeval kan word. Die vaagheid van 'n maatreel word nie in daardie saak genoem nie, maar dit skyn my onvermydelik te wees dat dit ook as 'n grond erken moet word.'

In the light of these *dicta* it is plain that the State President's emergency legislative powers are subordinate and hence subject to what limitations appear expressly or impliedly from the enabling Act. The express limitations have already been outlined,[2] and have to the time of writing not been the subject of litigation. What must now be examined is the extent to which the courts have been prepared to read 'implied limitations' into s 3(1)(a) of the Public Safety Act by invoking the common law principles governing the review of subordinate legislation. It is to these which we now turn.

5.3 Unauthorised purpose

It is trite law that an absolute requirement for the validity of a regulation made under s 3(1)(a) is that it be related to the purposes set out in that section, namely, that it be directed towards protecting the safety of the public or the maintenance of public order or the termination of the emergency. This requirement is, however, easier to state than apply.

The first obstacle to a plea of unauthorised purpose in an attack on the validity of an emergency regulation is that the purposes set out in s 3(1)(a) are linked to the subjective assessment of the State President or, in the case of s 5A(4), the Minister of Law and Order. The test is not therefore whether the regulations are *in fact* related to those purposes, but whether they *appear* to the State President or the Minister to be 'necessary or expedient' for achieving those purposes. According to the prevailing view, this expression means that a court may not substitute its assessment of what is necessary or expedient to achieve the purposes specified in the

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1 At 851G.
2 At 5.1 above.

provisions for the judgment of those to whom the discretion had been entrusted. Thus in *Omar/Fani v Minister of Law and Order, State President v Bill* [1] it was said:

> 'It is clear from the terms of the section that the State President is required to make such regulations for the purposes mentioned in the section as appear to him — ie in his subjective judgment — to be necessary or expedient. It follows from this that it is not open to a court, when considering a regulation, to substitute its assessment of what would be necessary or expedient to achieve the purposes mentioned in the section for that of the State President and to hold that the regulation is invalid because the State President could have dealt with the matter in another...way.'[2]

At first glance, this dictum appears to endorse the 'subjective jurisdictional fact' doctrine which renders the purposive aspect of the authorising legislation entirely dependent on the autistic assessment of the law-making authority.[3] But on closer scrutiny it is apparent that the court stopped somewhat short of holding that an emergency regulation may *never* be declared invalid if it cannot be said to be capable of achieving one of the purposes specified in s 3(1)(a). To say that the the State President 'is required to make such regulations for the purposes mentioned in the section as appear to him...to be necessary or expedient' for attaining the specified purposes is not the same as saying that the State President 'is empowered to make such regulations as in his opinion serve the specified purposes'. The difference may seem subtle. But it is important. For the the above-quoted passage can be interpreted as authority for the proposition that the question whether a regulation can be related to the purposes set out in the act remains objectively determinable. Thus elsewhere in the *Omar/Fani* judgment Rabie ACJ declared unequivocally that the State President 'must exercise the powers conferred on him by s 3(1)(a) of the Act for the purposes mentioned in the section'.[4]

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1 1987 (3) SA 859 (A).
2 At 892F.
3 For a discussion of this approach see 3.3 above.
4 At 892H.

According to *Omar*, the discretion conferred on the State President is 'subjective' to the extent that he can decide for himself on 'the means and methods [which should be] adopted to achieve the said purposes'.[1] A court may not intervene merely because it dislikes the methods chosen by the State President to achieve the stated purposes; however, on the test enunciated in *Omar*, it may do so do so where it finds as a matter of fact that the regulation at issue is not related to one of those purposes.[2] This view is fortified by a dictum in *State President and others v Tsenoli*,[3] in which the court rejected as 'ill-founded' the proposition that unless s 3(1)(a) were given the construction adopted in the court *a quo*, the State President could use his legislative powers to authorise the arrest and detention of persons for conduct in no way related to the existence or continuance of a state of emergency. The learned Chief Justice, as he then was, said:

> 'The power which s 3(1)(a) confers on the State President is to make regulations for providing for the safety of the public or the maintenance of the public order during the existence of the state of emergency. It is not a power which includes the power to control (or curtail) the movement of persons, such as common criminals, whose conduct is not related to the existence or continuance of a state of emergency.'[4]

If, therefore, the State President were to use his powers to authorise the police to arrest and detain people indefinitely on suspicion of having committed, say, traffic offences, a court could quite properly declare the regulation invalid. But would it be doing so because the State President had used his powers for an unauthorised purpose, or because he had chosen the wrong means of for realising those purposes? Given the generous terms in which the purposes are stated in s 3(1)(a), the distinction is a fine one. It would become finer still if a court were to be confronted with a regulation of the kind mentioned by in *R v Pretoria Timber Co (Pty) Ltd*,[5] (ie

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1 At 892I

2 The distinction drawn by Rabie ACJ between 'purposes' and the 'means and methods' chosen to achieve purposes does, however, complicate the task of assessing the validity of subordinate legislation on the ground presently under discussion. The purposes for which the Public Safety Act authorises the State President to make regulations are, it will be recalled, the protection of the safety of the public, the maintenance of law and order or the making of adequate provision for the termination of the state of emergency. The State President is given the power to attain these objectives *by means of* regulations. Any regulation can therefore be seen as specifying the means chosen for the ostensible realisation of the purposes stipulated in the Act. Regulations, like all laws, are means to the attainment of ends. To seek to distinguish the means and ends of laws is therefore artificial. An inquiry into whether a regulation serves a particular purpose must inevitably entail an examination of its content, and *a fortiori* an assessment of the 'means and methods' chosen by its framer.

3 1986 (4) SA 1150 (A) at 1180A-C.

4 At 1180B-C.

5 1950 (3) SA 163 (A).

authorising any person to shoot in sight a black man who failed to lift his hat to a white in the street). Surely if a court were to strike down such a regulation as *ultra vires* , as it surely should, it would be doing so because the means chosen were unacceptable.

This leads to the second hurdle which confronts a party seeking to persuade a court to set aside an emergency regulation on the ground of unauthorised purpose. This arises from the extremely wide terms in which the purposes for which the State President is authorised to make regulations are couched. Almost any regulation, whether it deals with traffic matters or health, may be deemed by some stretch of the imagination to be related to the maintenance of the safety of the public.[1] Still more vague is the authorisation to make regulations which appear to the State President to be 'necessary or expedient...for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency'. This phrase, it will be noted, interposes a second subjective judgment; the State President must not only deem emergency regulations necessary or expedient for serving the specified objectives, but must also deem them necessary or expedient to deal with circumstances which exist only in his subjective opinion! The same terminology is used in s 5A(4).

Once the courts accepted that emergency regulations can be struck down on the ground of unauthorised purpose, however, they were bound to formulate some test for establishing when a particular regulation could be said to be linked to the purposes set out in s 3(1)(a). In *Natal Newspapers v State President*[2] the court said:

> 'If the subject-matter of the regulation, on a fair interpretation of both the empowering section and the regulation, is capable of being related to those powers...the regulation will stand.'[3]

But how direct must that relationship be? Counsel for the State President had argued *in casu* that if *any* relationship could be discerned the regulation could not be invalid merely because its language was wide enough to cover, in addition, some hypothetical instances that would plainly

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1 This was conceded in *United Democratic Front v State President* 1987 (3) SA 296 (N) when, refusing to strike down a regulation prohibiting the incitement or encouragement of boycotts, the court held that parliament could well have intended that emergency powers may be directed at preventing boycotts motivated by religious or health considerations. But see the dissenting judgment of Van Heerden JA in the cross-appeal against this judgment (1988 (4) SA 830 (A) at 856F-G).

2 1986 (4) SA 1109 (N).

3 At 1120F-G.

fall outside the stated purposes.[1] The court held, however, that while a regulation was necessarily invalid if incapable of being related to the defined purposes, it was not necessarily valid if it *was* capable of being so related. The regulation might still be too wide. The court observed:

> 'It is perfectly true that any subsequent act, peformed in apparent pursuance of the regulation, can be attacked and struck down independently of any attack launched on the regulation itself. But that is a far cry from saying that a disputed regulation must be held good simply because its *sequelae* can be held to be bad.'[2]

The court pointed out that many of the regulations struck down by the Full Bench of the Durban & Coastal Local Division in *Metal and Allied Workers Union v State President* [3] on the ground of not having been related to the purposes laid down in the act were in fact capable, without any particular stretching of the imagination, of being deemed to be so related. With respect, however, the court in *Natal Newspapers* seems to have been unaware that the test for improper purpose raises different considerations when it is applied to penal and enabling provisions. It is only in the case of the latter that one can speculate about how the power may be used. Where the enabling statute is phrased so broadly that the powers which it confers may be abused for purposes not contemplated by the parent statute, the proper ground of attack is that it violated the maxim *delegatus delegare non potest.*[4] It is only where an enabling regulation confers a specific power which cannot be related to the purposes specified in s 3(1)(a) that unauthorised purpose properly may be utilised as a ground of attack.

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1 At 1120J-1121A.
2 At 112B-C.
3 1986 (4) SA 358 (D).
4 On which see 5.4 below.

All the regulations struck down in the *Metal & Allied Workers Union* case *supra* on the ground of unauthorised purpose were in fact penal provisions. To take but two examples. One of the 1986 media regulations made it an offence to make or publish a statement which would encourage or incite people to 'resist or oppose' the government or its officials 'in connection with any measure adopted in terms of these Regulations or in connection with any other measure relating to the safety of the public or the maintenance of public order or in connection with the administration of justice.' The court held that by adding the words 'or in connection with the administration of justice' the State President had strayed beyond the confines of s 3(1)(a). Didcott J said:

> '[T]he State President has no power whatsoever under this Act to make regulations that effect the administration of justice in general.'[1]

The part of the definition having the effect of forbidding statements likely to have the effect of

> 'engendering or aggravating feelings of hostility in the public or any section of the public or any person or category of persons towards any section of the public or person or category of persons....'

was likewise struck down because it went 'way beyond the State President's powers'.[2]

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1 At 371H. The learned judge gave the following examples to illustrate the point: 'There are...three examples of which we have thought quite carefully, which are by no means far-fetched, and all of which would be apparently hit if the words "in connection with the administration of justice" were to stand. My examples will go much further than opposition. I concentrate on incitement to resist any member of the force or any other official of the Republic "in connection with the administration of justice". I say to somebody, "Don't obey a subpoena to attend this civil trial". No doubt that is reprehensible, and it is probably illegal. But the idea that I have made a "subversive statement" is only to be stated for its absurdity to be apparent. And yet am I not inciting the person whom I encourage to disobey the subpoena to resist the official serving it, or perhaps the official issuing it, in connection with the administration of justice? After all, that official has ordered the person concerned to attend court. Or, when my wife is driving and when we have a motor accident, and some policeman tells us to stay at the scene while he takes measurements I say to her "drive off". It is unquestionably something I should not do, but it hardly amounts to a "subversive statement". And yet I have incited her to resist a member of the force in connection with the administration of justice. And if a policeman comes to my house without a search warrant to look for the gavine I may have in my cellar, and I say to my wife, "don't let him in without a search warrant", I am inciting her to resist that policeman in connection with the administration of justice. But I am hardly making a "subversive statement". The words "in connection with the administration of justice" are severable, both grammatically and notionally, from the rest of para (c). In my view they must go...'(at 371H-72C).

2 At 372D-E: 'He [the State President] has no power to punish people for engendering feelings of hostility by A towards B, in relation to purely private or domestic or commercial matters.'

The prohibition in the 1986 media regulations [1] forbidding the making of statements intended or calculated to encourage or incite members of the public to attend or take part in any 'restricted gathering' [2] and the publication of any news or comment in connection with any such gathering 'insofar as such news or comment discloses at any time before the gathering takes place the time, date, place and purpose of such gathering'[3] was also held to travel beyond the powers conferred by the Public Safety Act in *United Democratic Front v State President.*[4] Noting that 'restricted gatherings' were defined in the regulations in such a way as to include gatherings which people could lawfully attend, provided that they did so in accordance with any conditions that may have been imposed, the court held that there was

> 'no conceivable object related to the purposes set forth in s 3(1)(a) of the Act which could be served by prohibiting the incitement or encouragement of people to attend or to take part in gatherings which they may lawfully attend or in which they may lawfully take part.'[5]

The court dismissed as 'fanciful' the argument that to encourage people to attend such gatherings might lead them to breach the conditions imposed. It was also clearly troubled by the logic of a provision which made it unlawful to encourage people to do a thing which, in terms of the regulations, they had been expressly authorised to do.

In the appeal against this judgment,[6], however, Rabie ACJ took a much wider view of the matter. There was, he said, nothing in the Public Safety Act, with the exception of the express limitations, which prevented the State President from making regulations which infringed existing laws. The court *a quo* had therefore erred in thinking that because a magistrate or the Commissioner of Police [7] had authorised a meeting subject to certain conditions, the State President was prevented from imposing further restrictions. Rabie ACJ found it easy to appreciate why the State President had found such a regulation necessary or expedient. This was quite simply because, in his lordship's opinion, the chances of unrest increased in proportion to the size of the crowd. Furthermore, the learned Acting Chief Justice observed, it was notorious that certain kinds of gatherings, such as funerals of victims of unrest, generated emotions which frequently fuelled further unrest and violence. There was therefore nothing illogical about expressly

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1 Proc R224 of 1986.
2 Reg 5 read with para a(vi) of the definition of 'subversive statement'.
3 Reg 3(1)(c).
4 1987 (3) SA 296 (N).
5 At 325H-I.
6 *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).
7 Both of whom were authorised to impose restrictions on gatherings: see reg 7 of Proc R 224.

preventing written or printed advertising of such gatherings in media which could be more widely disseminated than the spoken word.

It is interesting to note that the court *a quo* in the *United Democratic Front* case did not accept the contention by applicants that another of the media regulations, which prohibited the incitement of people to take part in boycotts of firms, products and educational institutions or stayaways from work,[1] was *ultra vires* because, so it had been argued, such boycotts etc could be for reasons manifestly unrelated to the state of emergency, such as those mounted for religious or health reasons.[2] The court found, however, that it was

> 'clear that Parliament could well have intended that boycotts such as the so-called religious or health boycotts be included in a provision such as reg 3(1)(d).'[3]

In the light of the court's earlier statements on unauthorised purpose, this dictum is, with respect, surprising. How, it may be asked, could a prohibition on the incitement of people to boycott tobacco shops as part of an anti-smoking campaign conceivably be related to the maintenance of law and order or the public safety? That the above-quoted words should have been uttered in response to the contention that the regulation in question was void for vagueness shows how easy it is for a court to lose sight of the requirements of one ground of review when investigating those of another.

In the appeal and cross-appeal against the Natal court's judgment in the *United Democratic Front* case,[4] Van Heerden JA viewed the absurd lengths to which the prohibition on boycotts could be taken as evidence that the State President had used his emergency legislative powers for an unauthorised purpose. His lordship pointed out that the regulation in question was so widely phrased that it could potentially hit boycott actions not related in any way to the state of emergency.[5] To illustrate this point, Van Heerden JA observed that the regulation could apply to a decision by students to boycott classes because of the poor performance of a particular lecturer. Such a widely- formulated regulation indicated to his lordship not only that the State President had used his powers improperly, but that he had not properly applied his mind to its formulation.[6]

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1 Reg 5 read with paras (a)(iii)(*aa*) - (*cc*) of the definition of 'subversive statement' in Proc R 224 of 1986.
2 At 333B-C.
3 At 333D.
4 1988 (4) SA 830 (A).
5 At 865F-G.
6 At 865I-J. The requirement of 'proper application of the mind' is discussed further at 5.7 below.

The divergent approaches adopted by Rabie ACJ and Van Heerden JA in *Staatspresident v United Democratic Front* indicates that there is considerable scope for disagreement on whether a regulation is related to such wide-ranging purposes as are set forth in s 3(1)(a) of the Public Safety Act. How sharply drawn these differences may be is apparent, by way of further illustration, from the court's handling of regulations preventing access to detainees.

Regulation 3(10) of the 1986 emergency regulations stated:

> 'No person, other than the Minister or a person acting by virtue of his office in the service of the State —
>
> (a) shall have access to any person detained in terms of the provisions of this regulation, except with the consent of and subject to such conditions as may be determined by the Minister or a person authorised thereto by him....'

A rule isssued in terms of this regulation by the Minister of Justice further stipulated that

> '[n]o person detained under the regulations shall during his detention be visited by any person, except with the permission of the person in command of the prison in question, acting with the concurrence of the Commissioner of Police or any person acting on his authority.'

In *Metal and Allied Workers Union v State President,*[1] the court had no hesitation in deciding that so wide-ranging a prohibition on unauthorised access to detainees by any persons, including lawyers, could not conceivably be regarded as related to the purposes stated in s 3(1)(a). A situation could well arise, the court said, where it became imperative for a detainee to consult a lawyer about matters totally unrelated to the emergency, for example about a bond over his property or his children's welfare. The court observed that such visits could take place at times when they could not possibly impede any purpose which the detention was intended to serve, such as the interrogation of the detainee. There was, moreover, no need to render so fundamental a right as that of access to a legal representative [2] dependent on official approval. Asking itself the following rhetorical question:

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1 1986 (4) SA 358 (D).

2 For Appellate Division recognition of this right as 'fundamental' see *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 957: 'The right of access to one's legal adviser, as a corrollary of the right of access to the courts, is a basic or fundamental common law right....On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration.'

> 'Is the State President really empowered under this enabling section to say that you may not see your lawyer over something which has nothing to do with the purpose of your detention or with anything else within the State President's power and at a time which has nothing to do with either?'[1]

the court replied

> 'The answer, of course, might no doubt be that permission in such a case could be obtained. Perhaps it would often be obtained. But that is not an answer. The question is whether such a visit should be subject to anybody's permission at all. And the answer, in my view, is that it is [*sc*: should] not, because the State President had no power whatsoever to go beyond the scope, wide as it is, of the enabling section.'[2]

This reasoning was followed in *Bill v State President and others*:[3]

> 'My immediate reaction before reading the judgment of Didcott J [in the *Metal and Allied Workers Union* case] was that surely the legislation could not preclude the right of a detainee who had become terminally ill from enjoying the services of an attorney for the purpose of drawing a will. Nor could it prevent him from seeing an attorney with a view to preparing a power of attorney in favour of another so that that other could enter into contracts on behalf of his minor children, arrange for their being sent to university or to undergo surgery, and so forth. But when that right is dependent on the will of the Minister or the Commissioner it is the same as if the detainee has no right at all.'[4]

Leverson J also noted that a state of emergency, and hence a person's detention, could be extended indefinitely.

> 'A detention of a detainee would [*sc*:could] be renewed with each successive declaration of a state of emergency and the detainee could be held for 20 years. And for the whole of that time his right to see an attorney would depend on the will of the Minister or Commissioner.'[5]

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1 At 375B.
2 At 375B- C.
3 1987 (1) SA 275 (W).
4 At 273E-G. The final observation in this passage is supported by the judgment of Hefer JA in *Castell NO v Metal and Allied Workers Union* 1987 (4) SA 795 (A), in which the court ruled that a general prohibition on gatherings subject to magisterial authorisation had the effect of depriving people of the right of assembly. Following the reasoning in *Castell* (on which see 6.5 below), the effect of the regulation and the order now under discussion was to turn the right of access to a legal adviser into a privilege conferred at the discretion of state officials.
5 At 273G-H; see also the court's observations at 275B-I.

In *Omar and others v Minister of Law and Order and others*,[1] on the other hand, Vivier J, as he then was, found himself unable to be persuaded that a limitation of the right of access to legal representatives went beyond the purposes laid down by s 3(1)(a). Although this aspect of the judgment turned on the question of unreasonableness, it appears from the following passage that the court was measuring unreasonableness against the purposes laid down in the enabling provision:

> 'Within the framework of the state of emergency, in particular the requirements and considerations set out in s 3(1)(a) of the Act, I find it quite impossible...to say that the restriction is so unreasonable that interference by the court is justified.'[2]

In *Bloem and another v State President*,[3] the court agreed with the finding in *Omar's* case that the words 'no person' in reg 3(10) included lawyers, and took this interpretation to its logical conclusion by refusing to interfere with the repeated refusal by the police to grant the detainees in question access to their legal representatives.[4]

Given these divided opinions on the validity and meaning of the regulation in question, it is not suprising that this matter was the first substantive question relating to the interpretation and application of an emergency measure to arrive before the Appellate Division. In *Omar/Fani v Minister of Law and others, State President v Bill*,[5] the majority of the five-member bench [6] gave short shrift to the argument that reg 3(1) and rule 5(1) could not reasonably be related to the purposes mentioned in s 3(1)(a).[7] That the regulation was on the face of it so broadly framed as to allow the Minister or the Commissioner of Police to use it for reasons unrelated to the emergency was in the court's view not enough to render it *ultra vires*. Although Rabie ACJ acknowledged that it was possible for the regulation to be abused, he added that 'it is not to be supposed that the Minister or the Commissioner of Police may, or will, refuse leave for the necessary access on just any ground whatsoever.'[8] It had to be taken as implied that leave could

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1 1986 (4) SA 306 (C).
2 At 317I-J and, generally, 316H-318B.
3 1986 (4) SA 1064 (O).
4 See at 1092H-1094H.
5 1987 (3) SA 859 (A).
6 *Per* Rabie ACJ (Joubert, Viljoen JJA, and Boshoff AJA concurring).
7 All Rabie ACJ said on the point (at 895C) was: 'It cannot in my opinion be said that the regulation is not related to the purposes mentioned in the section, and I do not agree with the submission [to the contrary].'
8 At 896I.

only be refused on grounds which were related to the emergency. If it were refused for other reasons, the refusal itself could be attacked as a misuse of power for ulterior purposes.[1]

Hoexter JA, however, dissented from the view of the majority on this point, though for reasons somewhat narrower than those advanced in the *Metal and Allied Worker's* case. His lordship pointed out that reg 3(1) (the regulation authorising the arrest and initial detention of persons by members of the security forces) authorised the detention of persons not only for the reasons set out in s 3(1)(a) of the Public Safety Act, but also for the safety of the detainee himself. As far as detainees who had been arrested for the purposes of maintaining the safety of the public or law and order were concerned, Hoexter JA did not find it difficult to imagine reasons for refusal of access to lawyers which were related to the emergency. One such reason was the belief that the lawyer might serve as a channel for communication between the detainee and persons outside the place of detention.[2] But a limitation or denial of access by lawyers to detainees held for their own safety was another matter. As far as they were concerned, said Hoexter JA, 'reg 3(10) and rule 5(1) enjoins something to be done which cannot in any reasonable way advance or be related to the purposes mentioned in reg 3(1)'.[3]

Since neither the regulation nor the rule in any way differentiated between detainees held for purposes of protecting the safety of the public etc and those being held for their own safety, the provisions relating to each had to stand or fall together — they were 'totally obnoxious and void in regard to all detainees'.[4] There was, in short, 'no possible room', or even 'the remotest possible justification' for a belief that the denial of access by a lawyer to a detainee held for his own safety could imperil public order or the public safety.[5] This, said Hoexter JA, was confirmed *in casu* by the State President's own affidavit, in which he sought to justify rule 5(1) by saying that the question whether a particular detainee should be given access to persons from outside the place of detention could only be properly decided by taking into consideration information concerning the detainee's participation in rioting and violence ('oproer en geweld') that had occurred or could be expected.[6]

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1 See also *State President v Tsenoli supra* at 1183A-B, where the same reasoning was adopted in regard to the regulation conferring on the Minister the power to extend detentions.
2 See at 908H.
3 At 909F-G.
4 At 909H-J.
5 At 909A-C.
6 At 908J.

It was, therefore, the fact that Hoexter JA could find not even a remote justification for authorising an encroachment on the basic right of certain detainees to see a lawyer which led him to conclude that parliament could not have intended the power conferred by s 3(1)(a) to be used for such an end. Hoexter JA's criticism did not therefore conflict in principle with the judgment of the majority. It was not directed at the means which the State President had chosen to pursue the ends authorised by the statute. His lordship held, rather, that the regulation and the rule were of such a nature that, at least in the case of certain detainees, the power conferred would *inevitably* be used for ends not contemplated or authorised by parliament.

Three approaches to the review of regulations for unauthorised purposes appear to emerge from the foregoing survey of the case law. The first and least deferential to the executive is that suggested in the *Metal and Allied Workers Union* [1] and *Natal Newspapers* [2] cases and by the court *a quo* in *United Democratic Front v State President.*[3] The view adopted in these cases was that, while a regulation was *ultra vires* if it was not capable of being related to the purposes stated in the enabling legislation, it was not necessarilly *intra vires* if it was capable of being so related. It could, the courts said, still be too wide in the sense of affecting conduct not related to the emergency. On this test, a court may take into account hypothetical examples (provided, of course, that they are not fanciful) to demonstrate how the regulation in question could, if a penal provision, hit conduct not related to the state of emergency, or, if an enabling provision, be used for purposes not authorised by the empowering act.

In his dissent in *Omar*, Hoexter JA framed the test more stringently. His judgment shows that he was prepared to strike down the regulation and rule in question not because they *might* have been misused, but because he could think of *no possible instance* in which the power conferred by them could, if used in relation to a category of detainees, be related to the purposes stated in s 3(1)(a). By this test, some of the regulations struck down by the provincial courts in the *Metal and Allied Workers Union*, *Natal Newspapers* and *United Democratic Front* cases would clearly have survived.

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1 1986 (4) SA 396 (D).
2 1986 (4) SA 1109 (N).
3 1987 (3) SA 296 (N).

While Rabie ACJ did not go further in *Omar* than merely to acknowledge the requirement of proper purpose,[1] his lordship's interpretation of s 3(1)(a) was such as effectively to deprive the requirement of all practical application. This was achieved by his stress on the fact that the Public Safety Act was designed to cope with emergencies,[2] on the breadth and subjective nature of the discretion conferred on the State President,[3] and on the distinction between the 'means and methods' chosen by the State President (on which a court could not pronounce judgment) and the ends themselves (which a court was entitled to use as a gauge for the legality of the regulations).[4] These considerations led the majorities in the *Omar* and *Staatspresident v United Democratic Front* to conclude without much persuasion that the regulations at issue in those cases *could* be related to the purposes stated in s 3(1)(a). That they potentially went much further, or could be used for ends which had nothing to do with the purposes prescribed by the legislature, was of no consequence. What mattered was that they *could conceivably* be so related — and, perhaps more important, that the State President conceived them to be so related. On this approach, it is hard to imagine what kind of regulation would fail the test for of unauthorised purpose.

Two regulations, one from the emergency of 1960, the second from that of 1988/9, can, however be cited as examples of regulations which unquestionably fail to meet the requirement of authorised purpose. The first [5] made provision for the consignment to jail as ordinary prisoners of emergency detainees who were found on inquiry by a magistrate to have been not in possession of a reference book [6] at the time of their arrest, or to have been unlawfully in the area in which they were arrested, or to have had 'no sufficient and honest means of livelihood' within any such area at the time of their arrest. This extraordinary provision meant that any African [7]

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1 At 892H: 'He [the State President] must exercise the powers conferred on him by s 3(1)(a) of the Act for the purposes mentioned in the section.'

2 At 892H: 'Parliament contemplated that the need to ensure the safety of the public or to maintain public order might necessitate the taking of extraordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by subjects.'

3 At 892B-H.

4 At 892H-I.

5 Reg 4 *bis* of Proc 91 of 1960.

6 Which at that time all Africans were required to possess in terms of the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

7 It could only apply to Africans as only they were required to have 'passes' and were subject to limitations as to the time in which they could lawfully remain in urban areas without proper authority.

detained in terms of the emergency regulations could be sent to jail indefinitely without trial for minor technical offences or for the misfortune of being without employment.

This regulation was the subject of attack in *R v Maphumolo and others*.[1] Maphumolo was one 43 detainees who had been sent to prison as ordinary prisoners, and refused to work as such. The prison authorities, being entitled to treat them as ordinary prisoners, then tried them and sentenced them to whippings, solitary confinement and/or spare diet. Counsel for the applicants sought to persuade the reviewing court to set aside these sentences by attacking the validity of the regulation in terms of which they had purportedly been turned into ordinary sentenced prisoners. He argued that the regulation was not only unreasonable and oppressive, but could not reasonably be related to the purposes stipulated by s 3(1)(a).[2] The court rejected the first contention on the basis that it made specific provision for an inquiry by a magistrate before a committal to prison was ordered. That the inquiry was not public could not be regarded as unreasonable during a state of emergency.[3] In any event, the court added, the question of 'unreasonableness' did not apply as the Public Safety Act conferred on the Governor-General legislative powers 'equal to that of Parliament',[4] and a 'complete discretion' as to how those powers should be used.[5] As to the claim that such a regulation was *ultra vires* because it could not reasonably serve the purposes set out in s 3(1)(a) the court observed:

> 'As regards the claim that the requirement that persons in respect of whom a magistrate has given a direction under reg. 4 *bis* (2), can be made to work under the Prisons Regulations, cannot conceivably operate in aid of the maintenance of the public order, or that it constitutes such an oppressive or gratuitous interference with the rights of persons affected as could find no justification in the minds of reasonable men, it seems to me that we simply have no material upon which to uphold such a claim. We do not know, e.g., what proportion the number of persons falling within the categories referred to in reg. 4 *bis* (1) bears to the total number of persons detained under reg. 4, and it is, in any event, manifestly impossible for a Court of law to say that there cannot be good reasons, known to the executive power, why it should not consider the relative provisions to be necessary or expedient in the interests of public safety or the maintenance of public order.'

This passage constitutes an act of judicial self-abnegation at least as complete as the more celebrated equation by the court of emergency regulations with acts of parliament.[6] Why the

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1 1960 (3) SA 793 (N).
2 At 794B-F.
3 The court failed to point out, however, that the regulation made it obligatory for the inquiring magistrate to commit detainees to prison once he had established that they fell within one of the stipulated categories.
4 At 798C & G-H.
5 At 798B.
6 On which see 5.2.2 above.

court should have considered it necessary to know what proportion category reg 4 *bis* (1) detainees made up of the total number of persons detained under the emergency regulations is uncertain. What is certain, however, is that as far as the test for unauthorised purpose is concerned, such information is quite irrelevant. The question is surely not whether the executive *might* have had reasons for considering such a regulation to be necessary or expedient for achieving those purposes, but whether, as an objective fact, the committal of a person to jail as a convicted prisoner because he was unemployed or had committed a minor statutory offence could possibly be said to serve the safety of the public, the maintenance of public order or the termination of the emergency. Or, to put it another way, was the government authorised to use the Public Safety Act as an instrument for implementing influx control with martial law-type efficiency? The question need only be asked for the negative answer to be apparent. [1]

The second example of a regulation which, it is submitted, cannot conceivably be related to the purposes set out in s 3(1)(a) is the prohibition in the current media emergency regulations on the making or publishing of statements calculated to incite or encourage people to boycott municipal elections.[2] That this regulation was not challenged before the nationwide municipal elections in September of 1988 probably indicates the dampening effect that the Appellate Division decision in *Omar* had on potential litigants. But it is hard to imagine that even the most executive-minded court could possibly regard such a prohibition as related to the purposes mentioned in s 3(1)(a) of the Public Safety Act. One could draw attention to the innocuous activities to which the prohibition applied in order to show that this regulation fails to meet the standard set in the *Natal Newspapers* case. But this would be unnecessary, for the prohibition fails even to meet the the test enunciated by Hoexter JA and tacitly approved by Rabie ACJ in *Omar*. A call to boycott an election, no matter how many persons it reaches or who are persuaded by it, cannot in any but the most bizzare sense of the expressions be taken as a threat to the public safety or the maintenance of law and order. The rationale behind the prohibition was clearly a desire by the government to legitimise an aspect of its own policy. Such an attempt to thwart peaceful opposition to the policy of the government of the day cannot have been among

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1 *Mawo v Pepler NO* 1961 (4) SA 806 (C) serves as another example of judicial self-denial. In that case, two youths languishing in Pollsmoor Prison applied for their release on the ground that they had done nothing to warrant their original detention, and that in any event, the magistrate had no ground for committing them to prison under reg 4 *bis* (1). The court found that since it could not gainsay the arresting officer's averment that he had good reason to consider their detention necessary (no facts were placed before the court) it could not undo the magistrate's order.

2 See reg 5 read with para (x) of the definition of 'subversive statement' in Procs R 99 of 1988 and R 88 of 1989. This provision was clearly included in the regulations of 1988 to prevent calls for stay-aways from the municipal elections of that year, the first in which all races voted for their respective local representatives on the same day; its inclusion in the regulations of 1989 was probably an oversight.

the objects which the legislature had in mind when arming the executive with emergency powers.

The regulations just cited illustrate an obvious danger created by empowering legislation which frames the purposes to which the *delegatus* is ostensibly confined in terms as sweeping and nebulous as those used in s 3(1)(a). Such provisions not only encourage a propensity for legislative 'overkill', but also inevitably tempt politically-appointed officials to use their powers to render the implementation of unpopular policies more efficient. That parliament has made this possible by conferring such sweeping powers on the executive is not the fault of the courts. But this does not lessen their responsibility of surveillance. As the above survey indicates, the courts have not used the ground of review considered in this section with sufficient vigour to ensure that emergency powers are confined strictly to the suppression of an emergency.

Apart from listing the various purposes which the State President must deem his regulations necessary or expedient to serve, the enabling provision imposes another possible retraint. On one possible construction, s 3(1)(a) can be taken as enjoining the State President to be of the opinion that his regulations serve not merely one or other of the stated purposes, but one of those purposes *together with* the purpose of 'making adequate provision for the termination of the state of emergency'. Such, at any rate, was the construction placed upon s 3(1)(a) by Friedman J in *Tsenoli v State President and others*.[1] That case turned on the validity of the arrest and detention clause of the 1986 emergency regulations, which read:

> '3(1) A member of the Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.'

In *Tsenoli's* case, the court *a quo* held that the above regulation was *ultra vires* because it did not serve the purposes set out in s 3(1)(a). The basis of the courts reasoning was as follows: the section spelling out the purposes for which the State President's legislative power may be exercised (the 'purposes section') was capable of two constructions. On the first, the power could be exercised for the achievement of any one of the stated purposes — ie for providing for the safety of the public, for providing for the maintenance of public order, for making adequate

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1 D & CLD 8 August 1986 Case No 4988/86, unreported.

provision for terminating the state of emergency, *or* for dealing with any circumstances which in his opinion have arisen as a result of the state of emergency. On the second possible construction, however, the purpose of 'making adequate provision for terminating the state of emergency' was not an independent objective, but constituted a qualification of the two purposes named before it. On this reading, the State President was only entitled to make regulations intended to provide for the safety of the public *and* the termination of the state of emergency or for the maintenance of public order *and* the termination of the state of emergency but not, as he had done in reg 3(1), for the safety of the public or the maintenance of public order or the termination of the state of emergency as independent purposes. In *Tsenoli's* case the court *a quo* preferred the second construction because, in its opinion, it best conveyed the ordinary grammatical sense of s 3(1)(a),[1] and accorded with the reasons for the declaration of a state of emergency envisaged by s 2(1) of the Public Safety Act.

This may seem a mere exercise in semantics. But the court indicated that it was really concerned with a matter far more fundamental than grammar. It did so by contending that the construction which it placed on the enabling provision best accorded with what the legislature 'no doubt had in mind' at the time of its enactment. Sub-sections 3 (4) and 3 (4) *bis*, in the court's

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1 Friedman J reasoned as follows: 'It seems to me, in the first place, that by far the most important single factor in seeking to ascertain which of the two meanings the section bears, is the use of the word "and" before the words "for making adequate provision". Immediately prior to the word the section lists two of the purposes of the regulation to be "for providing for the safety of the public" and "for providing for the maintenance of public order". These two purposes are linked by the use of the word "or". The word "or" has clearly been used not to suggest that the first respondent can make regulations for alternative purposes, and if he does it for the one purpose it excludes the other, but rather to suggest that he can make regulations for either or both of these purposes. Thus the word "or" is used by the Legislature before the phrase "the maintenance of public order" so as to indicate that an additional power or purpose to that of "providing for the safety of the public" is being specified by it. The word "or" is also used in precisely the same manner in the latter part of the section in order to add an additional purpose for which regulations can be made, namely, "for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency". That being so, if the words "for making adequate provision for terminating such emergency" were intended by the Legislature simply to add yet a further purpose for which the first respondent may make regulations, one would have expected it once again to have used the word "or" to introduce the phrase. The use of the word "and" would therefore tend to suggest that the Legislature intended to link or connect the phrase following that word, to the phrase which preceeded it. The use of the commas to which I have referred, tend (*sic*) to suggest that the phrase was being linked to both and not simply one of the preceeding purposes which, as I have said, is indicated by the positioning of the comma in the English version. This object would be reached by giving the section the second, and not the first, meaning.' (Cited in *State President and others v Tsenoli/Kerchoff v Minister of Law and Order* 1986 (4) SA 1150 (A) at 1177D-H.)

view, indicated that parliament was aware that the State President would make provision during states of emergencies for the summary arrest and detention of persons. If the State President were empowered to make regulations providing for the arrest and detention of persons believed to be a threat to the safety of the public or the maintenance of law and order, a detention might be effected even if it was in no way connected with, or thought to be connected with, the termination of the state of emergency. The court therefore considered it logical to suppose that the words 'and for making adequate provision for the termination of the state of emergency' had been intended as an additional requirement.[1]

In *Kerchhoff v Minister of Law and Order and others*,[2] decided a few days after *Tsenoli*, the full bench of the Natal Provincial Division held reg 3(1) to be *intra vires*. That court found that s 3(1)(a) contained two distinct sets of purposes which were joined by the word 'and': the first envisaging regulations which appeared to the State President to be necessary or expedient for providing for the safety of the public or the maintenance of law and order; the second envisaging regulations which appeared to be necessary or expedient for making adequate provision for terminating the state of emergency or for dealing with circumstances which had arisen or were likely to arise from it.[3]

In *Nqumba and another v State President and others*,[4] which was being heard when the *Kerchhoff* judgment was handed down, a full bench of the Eastern Cape Division declined to follow *Tsenoli*. The court found that the interpretation adopted in that case would 'defeat the clear intention of the Act',[5] the preamble of which did not suggest to Kannemeyer J the limitation suggested in *Tsenoli*. His lordship observed:

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1 The court continued: 'To look at the matter somewhat differently, if the first meaning of s 3(1)(a) is the correct meaning, persons whose activities, actual or potential, were in no way related to either the existence or continuance of the state of emergency, might be subject not only to arrest but also to summary detention for as long as the state of emergency exists. Thus, for example, every common criminal, at any rate those with a propensity for violence, might be considered a threat to the safety of the public and liable as such to be detained summarily for the duration of the state of emergency, a result which does not seem to accord with the object of the Act insofar as the declaration of the state of emergency is concerned.' (Cited in the appeal judgment,*Tsenoli's* case *supra* at 1178E-F.)

2 NPD 14 August 1986 Case No 1912/86, unreported.

3 This conflict between two full benches within the same division created an unprecendented situation. It meant that all detainees being held within the area of jurisdiction of the local division were unlawfully held, whereas the detention of those incarcerated in all other areas of the province was lawful (see J R Midgley, 'Stare Decisis and Conflicting Full Bench Decisions' (1987) 104 *SALJ* 35).

4 1987 (1) SA 456 (E).

5 Which, given the fact that the court in *Tsenoli* justified its construction by a similar appeal to the intention of the legislature shows how elusive a concept that fiction can be!

> 'To suggest that every regulation made to provide for public safety or the maintenance of public order must also have the ingredient of making adequate provision for terminating the emergency would not enable the State President to protect the public safety or provide for the maintenance of public order in a manner not designed also to lead to the ending of the emergency notwithstanding the fact that the ordinary law of the land is inadequate to achieve any such object. To adopt such an interpretation would defeat the clear intention of the Act....'[1]

With respect, however, this passage begs the very question which the court was trying to address in *Tsenoli*. That court was taking the Public Safety Act at face value. It correctly categorised the Act as an emergency measure designed to enable the government to assume extraordinary powers to cope with a crisis. In order to serve this objective, therefore, all the extraordinary powers which the government assumed must therefore be aimed at the termination of the emergency. If they were not so aimed, they were contrary to the intention underlying the Public Safety Act. Simply to dismiss the requirement that all regulations must, in addition to providing for the safety of the public and the maintenance of law and order, also be aimed at terminating the emergency, as the court did in *Nqumba*, is not enough to gainsay the view adopted in *Tsenoli*.[2]

In the appeals against *Kerchhoff* and *Tsenoli*, heard together in *State President and others v Tsenoli/Kerchhoff v Minister of Law and Order*,[3] Rabie CJ, as he then was, found the interpretation of s 3(1)(a) of the Public Safety Act which was adopted in *Tsenoli* 'forced and strained'. Referring to the Afrikaans version of the act, the senior court found itself unable to construe the words 'en om voldoende voorsiening to maak vir die beëindiging van so 'n noodtoestand' constituted a limitation or a qualification of the other purposes mentioned in the section.[4] The court also rejected the contention that the interpretation followed by the court in

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1 At 464B.

2 As Professor Mureinik has put it, the court in *Tsenoli* 'was holding the government to the ostensible temporariness of the state of emergency which it had declared. The argument of substance is that a government which seeks emergency powers to suppress an immediate danger may take those powers only to suppress that danger, and that its emergency measures must all be directed at the suppression of that danger; which is to say, at termination of the emergency and divesture of the emergency powers. And if the empowering statute must be interpreted accordingly, as the one here so easily could have been, then so it should have been.' (Mureinik, 'Pursuing Principle: The Appellate Division and Review Under the State of Emergency' (1989) 5 *SAJHR* 60 at 66). For Mureinik, 'the essence of the argument is that the court should do all it can to ensure that the powers actually assumed by the authorities match their claim to be about the business of supressing an immediate but transient threat.'(*Idem*).

3 1986 (4) SA 1150 (A).

4 At 1178I-J.

Kerchhoff and *Nqumba* would enable the State President to use his powers for purposes unconnected with the termination of the state of emergency.[1]

5.4 Unauthorised delegation

A further requirement which may be read into statutes conferring discretionary powers is that the discretion must be exercised by the designated official (the repository) and nobody else. The repository may not abdicate his discretion to another: *delagatus delegare non potest.*[2] Where the repository resorts to such delegation as is permissible, he must generally give sufficient guidance to the official upon whom the secondary discretion devolves (the sub-*delegatus*) as to how, and under what circumstances, the latter should exercise it. Where the repository fails to provide adequate guidelines, the regulation or directive by which the discretion is delegated is *ultra vires* for one of three reasons: first, the repository of the power is abdicating to another the responsibility conferred on him by parliament; second, he is purporting to confer on another or others authority to use the power for purposes which may not be contemplated by the enabling act; third, he may be granting to another greater power than he himself possesses.

The officials to whom parliament has entrusted the awesome responsibility of deciding what regulations are necessary or expedient for dealing with an emergency are, in the case of a state of emergency, the State President and, in declared 'unrest areas', the Minister of Law and Order. The Public Safety Act expressly authorises these officials to delegate their legislative powers. The relevant sections [3] are phrased identically. They read:

> 'Without prejudice to the generality of the powers conferred by this section —
>
> (a) such regulations may provide for
>
> (i) the empowering of such persons or bodies as may be specified therein to make orders, rules and by-laws for any of the purposes for which the State President [or the Minister] may make regulations, and to provide penalties for any contravention of or failure to comply with the provisions of such orders, rules or by-laws....'

These sections confer on the State President and the Minister authority to delegate *legislative* powers only. What authority they possess to delegate discretion to perform *administrative* acts, such as deciding when to detain, seize, confiscate, ban and so on, as well as the general discre-

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1 At 1180B-C.
2 See 2.4.1 above and references there cited.
3 Sections 3(2)(a) and 5A(1).

tion to decide when to exercise other powers conferred by regulation, must be inferred from the Public Safety Act as a whole, including its nature, scope and purpose.

The State President has made extensive use of his powers of delegation. In terms of various regulations passed during states of emergency, the security authorities have been granted a relatively independent discretion as to when to exercise various emergency powers. The Commissioner of Police has been given a general power to make orders for a wide range of purposes. Various Ministers have also been vested with authority to decide when to order the extension of detention, restrict individuals, curtail gatherings, and to warn, suspend or ban publications. [1]

All this is understandable since, as already observed,[2] one of the characteristics of emergency rule is to extend the scope of discretionary powers through all levels of the administrative hierarchy. Even in the emergency context, however, the courts have indicated their sensitivity to the dangers of uncontrolled abdication of the vast discretionary powers which vest in the State President. Their problem, however, has been to establish the dividing line between lawful delegation and unlawful abdication.

Natal Newspapers v State President[3] serves as a logical starting point for an examination of how the courts have sought to establish this dividing line. The court accepted as a general principle that a subordinate legislative authority may not confer an unfettered discretion on a public officer in a manner which affects the ordinary common law rights of the citizen.[4] Leon, Kumleben and Nienaber JJ acknowledged, however, that there were exceptions to the rule against unauthorised delegation. Whether the rule applied depended on the terms of the enabling legis-

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1 These delegated powers are discussed in Chapter 6 below.
2 At 1.3 above.
3 1986 (4) SA 1109 (N).
4 At 1118J-1119B.

lation, the nature of the decision required and the circumstances in which it had to be taken. Of particular importance was whether the matter decided upon called for great urgency.[1]

Natal Newspapers was concerned with the emergency regulations of June 1986 [2], regs 7(1)(a) to (c) of which conferred on the Commissioner of Police the power to issue orders 'not inconsistent with these regulations' controlling entry into or movement within areas, or news in relation to the conduct of the security forces. He was also authorised to issue orders relating to

> 'any other matter the regulation, control or prohibition of which in his [the Commissioner's] opinion is necessary or expedient with a view to the safety of any member or members of the public or the maintenance of the public order, or in order to terminate the state of emergency, the generality of the powers conferred by this paragraph not being restricted by the provisions of the preceding paragraphs.'

The court found that the delegation to the Commissioner of powers to control movement and information was related to the objects of the Public Safety Act, since the powers which had been delegated were 'pre-eminently the sort of precautionary measures that may well have been adopted during any state of emergency'.[3] The subject-matter of the orders was

> 'so obviously a matter of delegation, in circumstances where the *delegatus* is enjoined to act on the exigencies of the moment, that such discretion ...is necessarily implied.[4]

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1 These exceptions are lucidly expressed in *Farah v Johannesburg Municipality* 1928 TPD 169 at 174: 'By-laws which confer discretionary powers on officials are not for that reason alone necessarily to be held unreasonable and therefore invalid. The nature of the particular decision which is required, and the conditions under which it has to be given, have been held to justify the granting of discretionary authority to officials to make that decision in two classes of cases: in cases in which the regulation dealt with in *Lewis v Rex* 1910 TS 413, affords and example, where the authority is given to a skilled official who is required to bring a trained judgment to bear on all the factors of a complicated situation, such as cannot adequately be covered by rigid rules made in advance; and (2) in cases, of which the by-law considered in *Smith v Germiston Municipality* 1908 TS 240, conferring a discretion on the superintendent of a Native location to order a person to leave the location, is an example, where authority is given to the official on the spot to decide, in the light of the actual circumstances of the moment, a particular question which may fairly be regarded as requiring immediate decision.' It is of interest to note that Feetham J regarded unauthorised delegation as a species of unreasonableness.

2 Proc R 109 of 1986.

3 At 1125G. The court added: 'Plain common sense dictates that the State President is not acting *ultra vires* the enabling provision if he invests the Commissioner with the power to deal with this sort of matter, which is directly related to at least some of the purposes of the enabling section.'

4 At 1126F.

The absence of clear guidelines as to how the Commissioner should exercise his discretion did not therefore render the delegation *ultra vires*. Thus, as far as the powers to control movement and news were concerned, the court was prepared to place practical necessity above principle. It took the view, however, that the State President had gone too far by empowering the Commissioner to make orders relating to 'any other matter' the regulation of which was 'in his opinion' necessary or expedient for effecting the said purposes. This delegation, said the court, was fatally defective in two respects. First, the Commissioner was not in any way confined as to the subject-matter on which he could issue orders, nor as to the form which the orders might take.[1] Second, the regulation conferring the power was framed in terms so wide that the Commissioner was made an independent arbiter of what was necessary or expedient for attaining the purposes outlined in s 3(1)(a).[2] What brought about this state of affairs, said the court, was the use of the phrase 'in his opinion' in the regulation in question. It found that these words were not severable and therefore struck down the entire sub-regulation.[3]

In *Natal Newspapers*, the court found even more objectionable the terms in which powers to seize and ban publications were delegated. These powers were conferred by regs 11 and 12 of Proc R 109 of 1986. The first read:

> '11. The Minister or a member of a Force who serves as a commissioned officer in that Force may by order under his hand authorise the seizure of one or more or all copies of any publication specified in the order which in his opinion contains a subversive statement or any other information which is or may be detrimental to the safety of the public, the maintenance of the public order or the termination of the state of emergency....'

The second regulation granted additional powers of seizure to the Minister, as well as authority to ban publications. It read:

> '12 (1). If the Minister is satisfied, on examination of any publication published by any person, that any matter is published in the said publication which is, in his opinion, of a subversive nature, he may by notice in the *Gazette* declare that the provisions of this

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1 At 1127B.
2 At 1127H.
3 This appears, with respect, to be incorrect. The deletion of the words 'in his opinion', while leaving the substance of the sub-regulation intact, would merely render it objectively justiciable in the sense that the courts would be free to determine whether the Commissioner's actions were in fact necessary for the purposes stipulated in s 3(1)(a) of the Public Safety Act. The words 'any other matter' are in reality the fatal flaw in the sub-regulation.

> regulation shall apply, for the period mentioned in the notice, to that particular publication or to any publication or to all publications produced by that person.'

The provisions mentioned made it an offence to make, write, print, circulate or possess the publication concerned.[1]

Again, the court found that the powers were conferred without any objective yardstick to guide the sub-*delegati* in their exercise. As far as reg 11 was concerned, the power to seize publications depended on the opinion of any commissioned officer of the security forces, 'whether or not he had the ability or experience to form an informed one'. And when forming his opinion, the court pointed out, the security official concerned did not even have to form the opinion that the publication was in fact detrimental to the safety of the public. It was sufficient if he was of the opinion that the publication *might* constitute such a threat.[2] The court accepted that it might be necessary to take prompt action to avoid the publication of subversive matter. But to empower 'a second lieutenant in the railway police or a young man who has been commissioned at the end of his first year of National Service' [3] to authorise the seizure of all copies of an issue of a national newspaper simply went too far. Apart from being unreasonable and vague, the regulation offended against the maxim *delegatus delegare non potest.*[4]

This reasoning, said the court, applied with equal force to reg 12, even though that provision confined the exercise of the power conferred to a Cabinet Minister. What was found to be offensive in this provision was that the publications which the Minister could select for banning were not restricted to those containing 'subversive matter', as defined in the regulations, but extended to those containing matter which *in his opinion* was of a subversive nature.[5] Not even the necessity to take prompt action to prevent the distribution of subversive material could, in the court's view, justify the delegation of such a drastic a power in terms so unrestrained.[6]

The consequence of the *Natal Newspapers* judgment was the repeal of the offending regulations in Proc R 109 and their replacement by a special and more comprehensive set of media

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1 Reg 12(2).
2 At 1132D-E.
3 The definition of 'security force' was sufficiently wide to include both railway police and national servicemen.
4 At 1132F-H.
5 On the evolution of the definition of 'subversive statement' see 7.2 below.
6 At 1133H-1134C.

regulations.[1] The draftsmen's response to the court's criticism of regs 11 and 12 of the earlier regulations was drastically to reduce the subjective element of the seizure and banning provisions, and to confine their exercise to the Minister and the Commissioner of Police. The new seizure clause, reg 6(1), rendered action against a publication dependent on a contravention of one of the prohibitions contained in the regulations — an objectively verifiable criterion. The commission of an offence by the publication thus became a condition precedent to the exercise of the power. The Minister's banning power was likewise limited to periodicals which were previously produced, imported or published in contravention of the regulations. The delegation consisted, therefore, not in an abdication of the State President's discretion, but simply in a request by him to apply the power conferred under objectively identifiable circumstances.[2]

As far as the requirement relating to delegated authority was concerned, this was on the face of it a decided improvement. A person challenging a banning or seizure could at least seek to prove that no offence had been committed, and it would be for the court, rather than the responsible official alone, to determine whether this was so.[3] Apparently having realised the nature of the limitations now imposed on the power to seize publications, however, the draftsmen slipped a new and far-reaching discretionary licence into the regulation prohibiting 'subversive statements'. This term was now so defined as to include, in addition to statements calculated to have several specified effects, the making or publication of statements intended or calculated to encourage members of the public

> 'to commit any other act or omission identified by the Commissioner by notice in the *Gazette* as an act or omission which has the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency.' [4]

As the court pointed out in *United Democratic Front v State President*,[5] once the Commissioner had 'identified' an act or omission, the effect of reg 5 was to criminalise the making of

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1 Proc R 224 of 11 December 1986.

2 It should be pointed out, however, that the offences were couched in extremely vague language (see 7.1 & 2 below). This does not, however, affect the principle enunciated here: it was still open to court to decide whether the publisher of the seized publication had committed an offence.

3 The new regulations were upheld in *United Democratic Front v State President* 1987 (3) SA 315 (N) (see at 339G-340D). That the seizure clause was 'objectively' justiciable in the sense here outlined was confirmed in *WM Publications v Commissioner of the South African Police* WLD 8 August 1988 Case No 14074/88, unreported, discussed at 6.8 and 6.9.3 below.

4 Para (a) (ix) of the definition of subversive statement in reg 1 of Proc R 224 of 1986.

5 1987 (3) SA 315 (N).

any statement inciting or encouraging it. By giving the Commissioner this power, the State President had licensed him to extend *ad infinitum* the list of criminal prohibitions created by the State President in Proc 224.[1] What the court did not remark on, however, was the effect of an 'identification' on administrative powers conferred by the regulations. One of these was the power of the Minister of Home Affairs to ban a publication which contained, *inter alia*, a 'subversive statement'. By granting the Commissioner authority to extend the list of 'subversive statements', the State President had effectively authorised him to prescribe to the Minister the grounds on which the latter could ban a publication!

Even without relying on this additional anomaly, however, the court in the *United Democratic Front* case struck down the sub-regulation authorising the Commissioner to 'identify' additional forms of subversive statements as an impermissible delegation of discretion. Its approach was based not on the common law rule against unauthorised delegation, but on what it saw as a violation of the express provisions of the Public Safety Act. By conferring power on the Commissioner in such wide terms, the State President had authorised him to 'identify' matters which might have nothing to do with the purposes stated in s 3(1)(a). And even if he did not use the power for unauthorised purposes, the Commissioner could still make orders regulating matters which did not appear to the State President to be necessary or expedient for the stated purposes. In the court's view, the State President's power to delegate was limited by s 3(2)(a)(i) to the extent that he was authorised to delegate only such powers as were to be used for the purposes for which *the State President himself* was authorised by s 3(1)(a) to make regulations. This indicated, said the court, that parliament did not intend the State President to delegate powers which exceeded those which he himself possessed, or to authorise others to make orders regulating matters which did not appear to the State President to be necessary or expedient for the purposes stated in the latter section.[2] The mere repetition in the regulation of the wording of s 3(2)(a)(i), although apparently intended to give the appearance that it fell within the limits of the enabling statute, in reality went beyond its terms. The regulation did nothing to fetter the

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1 As the court pointed out at 328G: '[T]he Commissioner is virtually given *carte blanche* to amend the regulations to include fresh acts or omissions as he sees fit.'

2 At 326H-J.

Commissioner's discretion. Whether the matter in question should be visited with the consequences of being 'identified' or not still rested ultimately with him.[1] More seriously, said the court, the sub-regulation not only failed to afford any guidance to the Commissioner on when to use the power conferred, but also none on how the discretion should be used once he had decided that the occasion was suitable.[2]

The correctness of this finding depends on whether s 3(2)(a)(i) of the Public Safety Act can indeed be construed as imposing a limitation or qualification on the powers conferred on the State President by s 3(1)(a). The Appellate Division pointed out in *Tsenoli/Kerchhoff*[3] that the State President has an 'unlimited' discretion to choose the means by which the objectives stated in that section were to be achieved.[4] Delegation of unfettered administrative powers might well be among them. Sec 3(2)(a)(i) is therefore arguably aimed merely at regulating the State President's authority to delegate *legislative* powers, and does not in any way limit his authority to delegate administrative powers.

This was the approach adopted by Rabie ACJ in the appeal against the *United Democratic Front* judgment.[5] His lordship could find no reason to conclude that in delegating power to the Commissioner the State President had acted under s 3(2)(1)(a). The Commissioner's powers were in Rabie ACJ's view 'purely administrative', as they consisted merely in identifying acts or omissions which had the results specified in the regulation.[6] In any event, said his lordship, even if the regulation was made under s 3(2)(a)(i), there was nothing in that section which required sub- *delegati* to establish in advance whether such rules, by-laws or orders as they chose to issue were in agreement with what the State President considered necessary or expedient. It was conceivable that orders, rules or by-laws could conflict with what the State President considered necessary or expedient. But if this were the case, said Rabie ACJ, it was for the State

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1 At 327G.

2 At 327H-I. The court further noted: 'It might well be...that an act or omission which has to some degree the effects referred to in the paragraph, represents so small a threat, relatively speaking, that it would not be necessary or expedient to "identify" it, particularly if the prohibition of statements instigating or encouraging it would involve such a gross inroad into the common law rights of the citizen as not to warrant such a course. In deciding whether or not this is so, the Commissioner has no means of establishing whether his view coincides with that of the State President. Nor is he obliged to do so. He has been accorded an unfettered discretion.'(At 327I-328B.)

3 *State President and others v Tsenoli/Kerchhoff v Minister of Law and Order and others* 1986 (4) SA 1150 (A).

4 At 1182D-E.

5 *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).

6 At 845B.

President (and *a fortiori* not the courts) to revoke the offending instrument.[1] The State President could well have himself undertaken the task of identifying such acts or omissions as threatened the public safety, etc, but instead he had chosen to allow the Commissioner to do so. This, said Rabie ACJ, was entirely understandable, as the Commissioner was better equipped than anyone else in the land to determine what kind of acts or omissions would have the effects specified in the regulation.[2] The mere fact that the Commissioner could in principle identify matters which the State President might not think were threats to the maintenance of law and order, the public safety or necessary for the termination of the state of emergency was not enough to render the delegation invalid. In such an event, the State President could overrule the Commissioner or withdraw or restrict the delegation.[3] To Rabie ACJ, the repetition in the regulation of the words of s 3(1)(a) constituted sufficient guidelines for the Commissioner.

The judgment of Rabie ACJ in the *United Democatic Front* appeal raises two questions. The first is whether it is correct to say that a power such as that conferred by the regulation at issue was not legislative. Assuming that the answer to this is in the negative, the second question is whether s 3(1)(a) is indeed so wide as to relieve the State President of the duty to conform with at least the basic principles of the rule relating to the delegation of discretionary powers.

On the first question, two of the five members of the court disagreed with Rabie ACJ. Van Heerden and Grosskopf JJA were of the view that the power conferred on the Commissioner by reg 1(a)(ix) was indeed of a legislative nature and thus fell within the terms of s 3(2)(a)(i).[4] Their lordships' view is, with respect, to be preferred. If the regulation is viewed as a whole, it can be seen that the State President listed eight specific forms of conduct which in his opinion constituted 'subversive statements'. The publication of such statements, in turn, was visited with criminal consequences or exposed the publication in which they appeared to the possibility of administrative action. Sub-regulation 1(a)(ix), insofar as it authorised the Commissioner to 'identify' acts or omissions additional to those specifically identified by the State President, undoubtedly granted to the former the power to extend the regulations themselves.

Notwithstanding their agreement on this point, however, Van Heerden and Grosskopf JJA came to opposite conclusions. Van Heerden JA was of the opinion that the delegation of legis-

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1 At 845G.
2 At 846A-B.
3 At 846E.
4 At 862A-F (Van Heerden JA) and 873G (Grosskopf JA).

lative powers by the State President in terms of s 3(2)(a)(i) created a hierarchy of subordinate legislation, with that of the State President at the top, and orders, rules and by-laws issued by sub-*delegati* falling below. S 3(2)(a)(i) did not alter the fact that parliament had entrusted certain discretionary powers to the State President alone. That he was permitted to delegate did not mean that sub- *delegati* could move into the terrain that had been entrusted to the State President. Conversely, the State President did not have the power to authorise any other person to decide on matters which were entrusted to him. And this, according to Van Heerden JA, was precisely what the State President had done by promulgating reg 1(a)(ix).[1]

Grosskopf JA, on the other hand, found nothing in the Public Safety Act to suggest that, in delegating legislative powers, the State President was required to provide any further guidelines than he had in fact spelled out in the regulation. The Commissioner had, in his lordship's view, been told merely to identify such acts or omissions as had the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency. The Commissioner's only task was to identify such acts or omissions and it was

> 'geen deel van sy plig of bevoegdheid om te besluit of die aanstigting tot of aanmoediging van sulke handelinge of versuime inderdaad ondermynend is of beperk te word nie. Daaroor het die Staatspresident reeds besluit.' [2]

Grosskopf JA could thus not agree that the regulation conferred on the Commissioner power to invade the territory of the State President. However, his lordship's interpretation of the regulation turned, with respect, on an exceedingly fine point. While it is true that the Commissioner was not given the power to 'identify' subversive statements, but only acts or omissions which *in themselves* constituted a threat to the safety of the public etc, the practical effect of such an 'identification' was undoubtedly to extend the range of conduct which people were prohibited from inciting or encouraging. It is simply not possible to say that the State President had 'already decided' that the incitement or encouragement of such conduct was 'subversive'. How could he have done so if he was unaware — as he must have been at the time the regulation was promulgated — of what kind of matters the Commissioner might subsequently choose to identify?

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1 At 863G-864B.
2 At 874I-J.

The provisions authorising arrest and detention without trial in the 1986 emergency regulations[1] were attacked on the basis of alleged unauthorised delegation in *State President v Tsenoli/Kerchhoff v Minister of Law and Order and others*.[2] The power to arrest and detain for a limited period was conferred by reg 3(1), which read:

> 'A member of a force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.'

The Minister was, in turn, given the power under subregulation 3 (3), 'without notice to any person and without hearing any person' to

> 'order that any person arrested and detained in terms of subreg (1), be further detained in that prison for the period mentioned in the notice, or for as long as these regulations remain in force.'

While it goes without saying that the arrest and detention of individuals must be decided upon and carried out by subordinate officials, it is hard to imagine a more sweeping conferment of such powers. Counsel for the detainees in *Tsenoli* took the point, *inter alia*, that reg 3(1) constituted an unlawful delegation in that the arresting officer had to form an opinion on matters in regard to which the responsibility for forming an opinion had been entrusted by parliament to the State President alone.[3] There was, they pointed out, nothing to limit the exercise by a member of a force of the power of arrest to purposes which the State President was required to deem 'necessary or expedient'. The person responsible for issuing the original detention order was, moreover, not required to hold or form a view in regard to any matter at all. Nor had any attempt been made by the State President to provide guidelines or standards for the exercise by the Minister of his power to extend the detention for as long as he pleased; he could, therefore, conceivably order the detention of persons for purposes other than those sanctioned by the Public Safety Act.[4] The regulations, in short, did not in any way attempt to describe or cir-

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1 Regs 3(1) and (3) of Proc R109 of 1986.
2 1986 (4) SA 1150 (A).
3 See 1161J, 1165D.
4 At 1161D-E.

cumscribe the kind of conduct against which the power could be directed.[1] The result was, so counsel contended, the creation of 'a multiplicity of legislators each applying different criteria with a resulting inconsistency of decisions'.[2]

Rabie ACJ dismissed this argument in the following curt passage:

> 'As to the fact that reg 3(1) entrusts the decision as to whether someone should be detained to the subjective judgment of members of the Forces, it may be pointed out that in ordinary — ie non-emergency legislation — the fact that a decision is left to the subjective judgment of an official is not *per se* sufficient to invalidate the regulation permitting the delegation. A complaint of lack of guidance, it has been held, is valid only if such lack of guidance offends against the enabling statute....The ultimate inquiry is, therefore, what powers the enabling Act confers.'[3]

The court provided the following answer to the 'ultimate inquiry' postulated by Rabie CJ:

> 'The State President can...make such regulations as appear to him to be necessary or expedient for the purposes mentioned in the section. He can, in regulations made by him, prescribe the methods and means to be employed for the achievement of the purposes stated in the section.'[4]

Furthermore, according to the court, it was incorrect to say that no guidelines had been laid down for the direction of members of the forces. On the contrary, it was 'clear that a member may arrest a person only if he has formed the opinion that the detention of that person is necessary for one or more of the purposes mentioned in reg 3(1)'.[5] As to the argument that reg 3(3) empowered the Minister to authorise the extension of a person's detention for purposes unconnected with those contemplated by the Act, it was held to be necessarily implied from the regulation as a whole that the Minister could only order the continued detention of a person detained under reg 3(1) if he was of the opinion that such further detention was necessary for the purposes stated in the latter section.

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1 At 1181 A-B.

2 At 1162E-F. The term 'legislators' in this context is clearly incorrect. A detention order is plainly an administrative act.

3 At 1182H-J.

4 At 1182D.

5 It may, however, respectfully be asked what kind of 'guideline' is afforded by a regulation which confers a discretion in words that have in other cases been categorised as leaving the exercise of the power concerned 'entirely to the discretion of the repository'? (See eg *Sacks v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 at 37-8; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 579B.)

The question at issue in the cases considered in the previous paragraphs concerned the limits of the State President's authority to delegate powers to subordinate officials of his choosing. As has been seen, the Appellate Division has adopted a generous attitude to the exercise of this power. There is, however, one express limitation which can be read into s 3(2)(a)(i) of the Public Safety Act. This is that regulations issued by the State President may, insofar as they confer legislative powers, do so only to 'such persons or bodies *as may be specified*' in the regulation concerned. The State President may not therefore depute legislative powers to others in such terms as to enable them to delegate to *yet others* the authority to perform the legislative acts contemplated by s 3(2)(a)(i). Put another way, a person or body upon whom legislative powers have been conferred by the State President may not sub-delegate such powers to others.

Regs 7 and 11 of the 1986 emergency regulations were challenged on this basis in *United Democratic Front v Staatspresident en andere.*[1] The former regulation empowered the Commissioner of Police 'or any other person authorised thereto by him' to issue orders on a wide range of matters. Regulation 11 in like terms authorised the Minister 'or any other person authorised thereto by him' to order the seizure of certain publications. Respondent's contention was that such power to delegate as was expressly conferred on the State President by s 3(2)(a)(i) should be taken as impliedly extended to those persons whom the latter had expressly named as delegated legislative authorities.[2] The court held that because of the breadth of the powers conferred on the State President by s 3(1)(a) of the Public Safety Act, the section authorising delegation had to be restrictively interpreted. The reason, according to Coetzee AJP, was that

> '[d]ie Wetgewer kon onmoontlik bedoel het...om hierdie magte 'of the widest possible character', aan enigiemand as die Staatspresident oor te dra by wyse van delegasie deur laasgenoemde behalwe in die mate waarvoor daar spesefiek voorsiening gemaak word in die wetgewing self nie.'[3]

The court added, however, that such limitation on the State President's powers as could be read into s 3(2)(a)(i) applied only to the delegation of legislative powers. The power to delegate other forms of administrative authority was, on the other hand, to be inferred from the wide terms of s 3(1)(a), which left little room for the operation of the *delegatus* rule. The question, then, was whether the regulations at issue conferred legislative or 'purely administrative'

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1 1987 (4) SA 649 (W).
2 At 655D.
3 At 654H.

powers. With regard to reg 7, the court had little doubt that it conferred legislative powers of the kind contemplated in s 3(2)(a)(i). The order which had been placed before the court contained, for example, wide-ranging prohibitions on gatherings by certain organisations. Insofar as it purported to give the named sub- *delegatus* a free hand to re-delegate such powers, therefore, reg 7 violated the express terms of s 3(2)(a)(i) of the Public Safety Act. As the words 'or any other person authorised thereto by him' were severable, however, only they were excised. But the order which had purportedly been issued under the regulation[1] was declared wholly invalid.

The court ruled, however, that the same could not be said of reg 11 which, unlike reg 7, conferred power only to take *ad hoc* administrative action.[2] Such 'pure and simple' administrative action could be clearly distinguished from legislative authority. In distinguishing between the two regulations, the court stressed that reg 7 empowered the repositories to make orders which were of general application and effect, while reg 11 required them to act in specific circumstances and against particular parties. In addition, the State President had given the *delegati* a specific description of the kind of publications which they could act against. Whether these attributes were described in subjective or objective terms mattered not.[3] Section 3(1)(a) of the Public Safety Act, said Coetzee AJP, conferred on the State President not merely executive or administrative powers, but also legislative power of a kind so wide-ranging as to enable him to create the kind of authority conferred by reg 11. In terms of s 3(1)(a), the State President was free to confer authority to perform *ad hoc* administrative action, whether by way of 'free' or 'bound' delegation, and irrespective of whether such powers were exercised by a *delegatus* or sub-*delegatus*.[4]

This line of reasoning, though perhaps logically sound, leads to a practical difficulty. While in the court's view legislative powers were to be exercised only be persons specifically named by the State President, administrative powers of kinds potentially involving drastic incursions on fundamental rights could be performed by any person by whom the sub- *delegati* chose to re-delagate those powers.[5] In the context of emergency rule, especially, it must be recalled that

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1 See *GG* 10354 of 10 July 1988.
2 At 657I.
3 At 658D-E.
4 At 658H-I.
5 It may be pointed out, in addition, that the distinction drawn by the court between legislative and 'plain' administrative powers, while defensible in theory, is by no means always easy to draw in practice (see Beatson and Mathews *Administrative Law: Cases and Materials* at 493-6).

people are expected to rely as much, if not more, on patterns of past executive action as on standing regulations to guide their future conduct. The seizure of one publication, for example, will serve as a guide to others as to the limits beyond which they can expect to suffer executive action. The more the officials entrusted with such powers, the more inconsistent resulting decisions are likely to be. The situation is rendered intolerable where, as in reg 11, the subject has no means of establishing to whom the power has been entrusted.

It was presumably in response to the decision of Coetzee AJP that less than a week after his judgment was handed down the government removed the offending words 'or a person authorised thereto by him' from reg 7 of Proc R 109.[1] The effect of this amendment was to limit the power to make orders of the kind mentioned in reg 7 to the Commissioner and Divisional Commissioners. For reasons not immediately apparent, however, the government chose also to amend reg 11 by substituting for the phrase 'or any other person authorised thereto by him' the words 'or a member of a Force who serves as a commissioned officer in that Force'.[2]

When the amended regulation came before the full bench of the Natal Provincial Division in *Natal Newspapers v State President*,[3] however, the court declined to follow the approach of Coetzee AJP. It did not warrant worthy of mention the fact that the regulation conferred an administrative power. What mattered to it was the far-reaching nature of the potential *consequences* of the power for those against whom it might be exercised.[4] Moreover, the substitution of the phrase 'or a member of a Force who serves as a commissioned officer in that Force' for the words 'any other person authorised thereto by him' was still too wide a delegation.[5] Thus even though the State President had in the amended delegation himself designated the *delegati*, he had done so in terms too sweeping.

In *Natal Newspapers*, the court also took a less charitable view of the guidelines which had been laid down in the regulation than that adopted by Coetzee AJP in the *United Democratic Front* case. While the latter had found these to be 'objective',[6] the Natal court found them to be

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1 See Proc R140 of 1986.
2 In the light of judgment of Coetzee AJP, this amendment was not, of course, necessary.
3 1986 (4) SA 1109 (N).
4 See 1131I-1132H.
5 At 1132C-D. The court pointed out by way of example that 'a second-lieutenant in the railway police or a young man who has been commissioned at the end of his first year of National Service can "under his hand" authorise the seizure of all copies of an issue of a national Sunday newspaper'.
6 At 658E.

entirely 'subjective'. The court in *Natal Newspapers* pointed out that the opinion of the repository sufficed, and that in forming it he had to decide, not whether the publication *was* detrimental to the public safety, but whether it *might* be so. In addition, while the State President might have provided a definition of the term 'subversive statement' for the guidance, *inter alia*, of those empowered to seize publications, the regulation also authorised the repositories to form their opinion on the basis of 'any other information' which was (in their opinion) detrimental to the safety of the public.[1]

The view of Coetzee AJP that s 3(1)(a) of the Public Safety Act conferred absolute authority on the State President to delegate administrative powers was endorsed by the Witwatersrand Local Division in *Catholic Bishops' Publishing Co v The State President and others.*[2] In that case, applicant sought to impugn one of the regulations authorising the banning of publications [3] on the ground, *inter alia*, that it vested the Minister with greater powers than the State President himself enjoyed under the Public Safety Act.[4] The court held that the fact that the State President had left the determination of the vague matters specified in that provision [5] to the subjective judgment of the Minister did not make the regulation legally objectionable.[6] It was likewise of no legal consequence, said Curlewis J, that the persons against whom action might be taken had no means of predicting how, when and for what reasons the Minister might decide to take action.[7] Whether so wide a discretion should be granted was for parliament, not a court to decide.[8] Any regulation which conferred powers to be taken on political grounds must be inherently uncertain. As Curlewis J put it:

> '[B]ecause of the nature of the country and the heterogeneous nature of the population and other relevant considerations...what may be considered inflammatory in one town or by certain people, would not be considered so by other people.' [9]

This, said the court, was exactly where the problem lay with respect to regulations conferring the discretion to act on grounds which entailed an essentially political judgment:

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1 At 1132D-F.
2 WLD 8 March 1988 Case No 00421/88, unreported.
3 Reg 7A(1() of Proc R 98 of 1989.
4 See at 6 of the typed judgment.
5 On which see 6.9.3 below.
6 At 7.
7 At 16.
8 At 20.
9 At 19.

> 'It is obvious that where there are opinions to be formed about matters of this nature the opinion that is formed will be dependent, in the first place, [on] where the person stands in [*sc*: on] the political spectrum, and whether he is black or white.' [1]

In the case of the propriety of actions by journalists, said Curlewis J, many articles would be considered legitimate matters of public debate. The Minister might, however, have a different perspective and different priorities. But this was 'not something which arises out of any ambiguity or vagueness as to the object of the opinion'. It arose, rather, from the nature of censorship and the political considerations on which it was based.[2] Curlewis J then pointedly asked: 'How can there be certainty where the opinion of a politician is involved?' [3]

The question is justified. But viewed in the context of a judgment concerning the limits of discretionary powers, it takes on a different hue. It may be notorious that politicians tend to be fickle and partisan. But what Curlewis J appears, with respect, to have lost sight of is the fact that in his capacity as monitor of the press under the emergency, the Minister was acting in an *administrative* capacity, subject to the control of law. The mere fact that the officials upon whom the State President confers emergency powers happen to be politicians surely cannot lessen the responsibility of the State President to frame his regulations in a manner sufficiently clear to ensure that the powers he confers are not used for any reason that may happen to commend themselves to his political subordinates.

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1 At 19. Curlewis J appears to have overlooked the fact that ideas held *within* the two racial groups between which he distinguishes may also vary along the political spectrum.

2 At 20.

3 At 20 *in fine*.

The preceeding survey indicates that the common law rule against unauthorised delegation has been drastically attenuated in the emergency context by the courts' interpretation of s 3(1)(a). As far as the delegation of administrative or quasi-judicial powers is concerned, it would seem that the State President is at liberty to delegate powers in the most sweeping terms without risk of judicial interference. The only limitation imposed by s 3(2)(a)(i) is that any legislative powers conferred by the State President must be exercised by the named sub-*delegatus*.

5.5 Vagueness

Another cardinal principle of administrative law is that subordinate legislation, in order to be valid, must be comprehensible to those bound by it.[1] How the rule against vagueness is applied depends, however, on the terms of the statute which authorises the making of the subordinate legislation in question. The courts accept that the clarity required of a subordinate lawmaker depends on the precision with which the subject-matter of the legislation is capable of being described.[2] Our concern here is, of course, with the standard of clarity which the courts have seen fit to impose on the State President's emergency regulations.

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1 See Verskin 'Vagueness in South African Subordinate Legislation: A Survey of the Case Law' (1976) 93 *SALJ* 303; Taitz 'Vagueness and Uncertainty in Subordinate Legislation as a Ground for Invalidity' (1979) 42 *THRHR* 412; Steyn *Uitleg* 229-31; Van der Vyver 'Regsekerheid' (1981) 44 *THRHR* 269. The rule against vagueness or uncertainty is generally considered to flow from the presumption that parliament did not intend to authorise the making of incomprehensible rules (see *R v Shapiro and another* 1935 NPD 155 at 159 : 'Statutes do not empower the authorities to make regulations so uncertain that people will not know how to comply with them or whether they are subject to them or not. So if a regulation is found to be void for uncertainty, that is one way of arriving at the conclusion that it is *ultra vires*' But see judgments of Rabie ACJ and Hefer JA in *Staatspresident v United Democratic Front* (discussed at 3.2 above).) An acceptable measure of clarity is therefore seen as a condition implicit in the enabling statute which authorises the making of the subordinate legislation in question (*S v Meer and another* 1981 (1) SA 739 (N); reversed on appeal on the facts: see *S v Meer en 'n ander* 1981 (4) SA 604 (A)). Although there are compelling grounds for treating vagueness as a form of unreasonableness (a view favoured by Baxter: see his *Administrative Law* at 529 n 269), the courts seem in practice to treat it as an independent ground of review (see eg *R v Jopp* 1949 (4) SA 11 (N)). Wiechers supports this view, arguing that vagueness renders an administrative act invalid because of a defect in its *content*, unreasonableness because of its *effects* (see his *Administrative Law* at 230).

2 For a general discussion of vagueness as a ground of review, see 2.4.7 above.

In the opening challenges to regulations made under s 3(1)(a) of the Public Safety Act during the current succession of emergencies, vagueness proved a relatively fruitful ground of attack on regulations of a penal character. Regulations were struck down on this ground in *Metal and Allied Workers Union v State President*,[1] *Natal Newspapers v State President*,[2] and *United Democratic Front v State President*.[3]. In all these cases it was accepted that the rule against vagueness applied to the legislative authority conferred on the State President by s 3(1)(a). In the *Metal and Allied Workers Union* case, the court was at pains to emphasise that vagueness, which it accepted as a general ground of invalidity, was nevertheless one falling 'jurisprudentially within the same category' as those entailing violation of the express provisions of the statute.[4] The rationale for the court's power to set aside vague and uncertain subordinate legislation was to be found in the presumed intention of the legislature [5] or in an excess of the limitations impliedly imposed by the enabling statute.[6]

This stress on the jurisprudential relationship between the requirement of vagueness and the violation of the express or implied provisions of the Public Safety Act was the courts' answer to the argument urged in all three cases on behalf of respondents that the nature of the State President's emergency legislative powers was such as to preclude review on the so-called 'wider' grounds which did not relate to excess of powers *simpliciter*. As we have seen,[7] the Appellate Division later accepted the view that the ouster clause, s 5B, precludes judicial interference in emergency regulations promulgated by the State President on the ground of vagueness.[8] Given this ruling, the parts of the cases just mentioned dealing with vagueness as a ground of review become of mere academic interest. It is, however, instructive to refer to them,

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1 1986 (4) SA 358 (D).
2 1986 (4) SA 1109 (N).
3 1987 (3) SA 296 (N).
4 At 365 I.
5 At 365J-366A: 'The rationale for the court's interference in such a situation is that the enabling statute does not authorise the person concerned to make such regulations, and that therefore...he has acted *ultra vires*.'
6 *Natal Newspapers v State President* 1986 (4) SA 1109 (N) 1105F-G: 'The Statute does not *empower* the State President to make regulations so uncertain that people will not know how to comply with them or whether they are subject to them or not.' (Emphasis added.)
7 At 3.2 above.
8 See *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A), discussed at 3.2 above.

as they indicate to some extent the degree to which the jurisdiction of the courts was narrowed by the Appellate Division's decision to deprive them of this ground of review.

While insisting on their right to review on the ground of uncertainty, the provincial courts were careful to emphasise that they would not do so lightly. For them, the problem was not whether vagueness was a ground for invalidity, but lay rather in determining at what point a regulation became so vague that it failed to meet the standard implicit in Public Safety Act. The question was one of degree.[1] Whether a regulation was unacceptably vague depended on a number of factors, one of which was its subject-matter.[2] It was also accepted that mere ambiguity was not necessarilly sufficient to render a regulation void, and that in such cases the courts should, where possible, adopt the meaning which rendered the provision valid.[3] A provision which clearly specified what it prohibited was also not invalid merely because it did not describe the manner in which the subject should ascertain whether he fell within the prohibition or not.[4] Yet another consideration of relevance to the application of the test for vagueness was the need to guard against possible evasions of the legislation concerned.[5] If part of an enactment which was void for vagueness could be excised without rendering the remainder absurd or inoperative, that part should be excised, except where its deletion would alter the character of the provision.[6] A court should also not assume that the legislation in question was to be interpreted by foolish or capricious people.[7]

The following approach to the test for uncertainty was suggested in the *Metal and Allied Workers Union* case:

> 'The Court must first and foremost try to construe the wording, using the ordinary methods of interpretation, when appropriate, for instance, construing wide language in

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1 *Metal and Allied Workers Union v State President* 1986 (4) SA 358 (D) at 366G: 'Now, of course, whether the particular wording in subordinate legislation is void for uncertainty is a matter of degree, and it is a matter of degree for the simple reason that uncertainty itself is a matter of degree.' See also *Natal Newspapers v State President* 1986 (4) SA 1109 (N) at 1115J.

2 *United Democratic Front v State President supra* at 313E.: '[C]learly the degree of clarity required must be influenced by the amount of precision with which the subject-matter is capable of being described' (following *R v Pretoria Timber Co (Pty) Ltd* 1550 (3) SA 163 (A)).

3 See *United Democratic Front* case *supra* at 313B-C, reliance being placed on the words of Lord Denning in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503 (HL) at 516-17.

4 *United Democratic Front* case *supra* at 313C-D.

5 At 313F, following *McEldowny v Forde*[1969] 2 All ER 1039 (CA) 1058 at 1067.

6 *Natal Newspapers supra* at 1122J-1123B.

7 At 1115J-1116A.

> a narrow way or, when appropriate, construing narrow language in a wide way. It must deal with the language as it would deal with any other document which it is required to construe, giving a sensible construction to it whenever possible. If it cannot do that, if the language defies the effort and one is left with a real doubt which cannot be resolved, then one has an insufficient degree of certainty for invalidity.'[1]

In the *United Democratic Front* case, however, the court rejected the proposition that subordinate legislation should not be held void for vagueness if it was clear that certain conduct fell within its ambit, simply because it was unclear whether or not other conduct was also covered.[2] The point was whether a person to whom the legislation might apply was 'able to ascertain its limits and to know with reasonable certainty what he must refrain from doing and what sort of prejudice he must avoid'.[3]

These disclaimers plainly indicate that the courts were not prepared lightly to set aside emergency regulations on the ground of vagueness. But that they nevertheless did so in some cases demonstrates their awareness of the intolerable position that could result if the executive were permitted to depart from reasonable standards of clarity in the creation of its emergency legislative regime. The preservation of such standards is indeed essential if the dividing line between legality and illegality is not to become so blurred as to induce paralysis in legal subjects.[4] On the other hand, the courts were plainly aware that too strict an insistence on clarity could frustrate the efficacy of emergency decrees. Many of the forms of conduct which the government wished to curtail did not lend themselves to exact definition. How, for example, does the framer of legislation aimed at preventing subversive propaganda do so in precise and detailed terms without creating loopholes through which the ingenious can find a way of slipping?

These problems fall away when it is realised that in applying the test for vagueness the courts are not attempting to limit the *scope* of subordinate legislation, but merely insisting that its scope be described with reasonable clarity. Nobody can sensibly allege that, by insisting on

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1 At 366H-I.
2 At 314A-I.
3 At 314 H-I.
4 The media regulations produced during the states of emergency of the 1980s provide an apt illustration of the consequences which can ensue if this is allowed to happen. The object of these regulations was information control (see 6.9 below), which they achieved not by the crass and costly method of placing an official censor in every newspaper office in the land (although provision was ultimately made for this: see reg(2)(i) of the 1988 Media Emergency Regulations (Proc R 99 of 1988 and 6.9.3 below)),but by creating a climate of uncertainty in which journalists and their legal advisers, confronted with seemingly boundless prohibitions and the unpredictable threat of administrative action, understandably erred on the side of caution. The result, with some notable and self-sacrificial exceptions, was self- censorship.

their right to set aside subordinate legislation which fails to meet reasonable standards of clarity, the courts are invading the terrain of the executive. From a practical point of view, there is nothing to prevent the draftsmen from rectifying obscure legislation by the relatively speedy process of amendment.

We turn now to the cases in which emergency regulations were struck down on this ground while it remained available to the courts. The first was *Metal and Allied Workers Union v State President.*[1] In that case, several aspects of the definition of 'subversive statement' in the 1985 emergency regulations were attacked as being void for vagueness. Statements were rendered 'subversive' if they were intended or calculated to have certain effects, including 'promoting any object of any organisation which has under any law been declared to be an unlawful organisation'. The court found this aspect of the definition 'hopelessly uncertain'. In its view the subject had no means of establishing what was to be considered an 'object' of an unlawful organisation.

> 'Is it an object as defined by its constitution? Is it an object discerned from some resolution adopted at some or other congress, conference, meeting, or other kind of gathering? Are statements made by the organisation's leaders, by reason of such, its objects? Or by its spokesmen? Or by a person claiming to be one? Does one infer the organisation's objects from its actual activities, although they may have never been expressed, and if so from whom does one infer them in that event?' [2]

Didcott J found himself unable to answer these questions. He professed himself equally mystified by the prohibition on statements intended or likely to encourage 'foreign action against the Republic':

> 'I do not know what "foreign action against the Republic" is. I do not know what "action" is. I do not know what "foreign" means, whether that means something done by a foreigner or something emanating from abroad. And...even if I could understand what "foreign action" was I would not understand when it was directed against the Republic and when it was directed not against the Republic itself but against some entity within the geography of the Republic.'[3]

Both aspects of the definition were accordingly ruled void for obscurity.

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1 1986 (4) SA 358 (D).
2 At 369B-D.
3 At 372J-73B.

By far the most devastating attack on a set of emergency regulations on the ground of vagueness was in the *United Democratic Front v State President*,[1] which had to do with the first comprehensive set of media regulations to be promulgated under the Public Safety Act.[2] One of the objects of those regulations was to prevent public access to news or comment relating to popular resistance to government authority or state attempts to curb such resistance.[3] The State President sought to achieve this by prohibiting the presence of journalists at, news or comment on, and photographs depicting, 'unrest' and 'security action', each of which terms were comprehensively defined. The key to the regulations was the definition of 'unrest'. 'Security action', in turn, was defined *inter alia* as action taken to terminate 'unrest' as defined. While the court accepted that control of the events contemplated fell within the policy of the Public Safety Act, it pointed out that the onus was on the State President to devise a formula for describing such events with sufficient clarity to enable those affected by the regulations to know what they might or might not publish.[4] The formula devised in Proc R 224 to describe 'unrest' read as follows:

> '"Unrest" means any activity or conduct which to a reasonable bystander would appear to be any one or more of the following activities or forms of conduct, namely —
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> (a) a gathering in contravention of an order under reg 7 of the security regulations or of a provision of any other law or of any prohibition, direction or other requirement under any such provision;
>
> (b) any physical attack on a security force or on a member of a security force or on a member of a local authority or on the house or family of a member of a security force or local authority by a group of persons; or
>
> (c) any conduct which constitutes riot, public violence or a contravention of s1(1)(a) of the Intimidation Act 72 of 1982.'

The effect of this definition was to compel journalists, not to appraise the conduct specified in an objective sense, but to view them through the eyes of 'a reasonable bystander'. This created the anomalous position that a journalist with special knowledge at his disposal might well know that events he was observing fell within the range of conduct mentioned in sub- paras (a) to (c) and yet could be allowed to say that publication of news relating to it was not prohibited be-

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1 1987 (3) SA 296 (N).
2 Proc R 224 of 1986.
3 See further 6.9 below.
4 At 319I-20A.

cause 'a reasonable bystander' could not have been aware that he was in fact observing the activities described![1] The principal problem, however, was to determine what sort of person the lawgiver had in mind when he made the reaction of the 'reasonable bystander' the test for the existence of the events in question. The court observed that the 'reasonable bystander' could not be equated with the *diligens paterfamilias* of the law of delict, because when the latter was used in the test for negligence, his reaction was assessed by reference to the concrete situation in which the defendant had found himself.[2] The unsuitability of the 'reasonable man' criterion for emergency legislation had already been noted by the Rhodesian courts in *R v Nkomo (1).*[3] The problem pointed out in that case, namely of deciding on the standard of 'reasonableness' in a 'diverse multi-racial community' with vastly differing educational and social standards,[4] was not solved by equating the reasonable 'bystander' with the 'average person' or the 'average journalist'.[5] In the context of emergency rule, the problem was compounded by the complexity of the laws with which one was expected to be conversant before being able to identify an event as 'unrest' in its technical definition. The court asked:

> 'Is the 'reasonable bystander', for instance, a person fully *au fait* with all the laws relevant to the situation which he is observing and all the facts which may render them applicable to it? An order made under reg 7 of the security regulations, for example, can be promulgated by publication in the *Government Gazette* or a newspaper, broadcasting, distribution in writing or oral announcement. Is the 'reasonable bystander' a person whom every such promulgation has effectively reached? Is his factual knowledge similarly encyclopaedic? Is his experience such that he can recognise the hallmarks of the activities described in the definition although they might not be apparent to less qualified persons?' [6]

In view of these considerations, the court decided that the definitions of 'unrest' and 'security action' were void for vagueness,[7] and that they fatally infected all the substantive provisions in

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1 See 321F-G.
2 At 320E-H.
3 1964 (3) SA 128 (SR).
4 At 131E-132B.
5 *United Democratic Front* case *supra* at 321E.
6 At 321I-22A.
7 The latter because 'security action' was defined as actions aimed *inter alia* at suppressing 'unrest' as defined.

which the terms occurred. This meant that virtually all the prohibitions on access to events, or publication of news and comment, became inoperative.[1]

Although appeal was immediately noted against the *United Democratic Front* judgment, the definition of 'unrest' appeared in the next set of media regulations [2] without the words 'which to a reasonable bystander appear to be'. While removing the difficulties noted by the court, it is questionable whether this excision put those bound by the new regulations in an easier position. Journalists were still left with the invidious task of identifying the dividing line between civil disturbance of a nature which they could lawfully observe and write about and that which fell within the prohibitions on access and publication. A full-blown riot may have left little room for doubt. But the courts have themselves noted the difficulty of identifying at exactly what point civil disturbance ends and public violence begins.[3] The problem of identifying when one is observing a contravention of s 1(1)(a) of the Intimidation Act[4] is even more intractible.

Many regulations which had not at the time of writing been subjected to judicial challenge can be cited as examples of the heights of incomprehensibility achieved by the draftsmen of emergency laws. One deserving of special mention is the prohibition in the 1989 media emergency regulations on the publication of

> 'any speech, statement or remark of a person in respect of whom steps under a provision of Chapter 3 of the Internal Security Act, 1982 (Act 74 of 1982), or regulation 3(8)(b) or 8 of the Security Emergency Regulations, 1988, are in force or of a person intimating or of whom it is commonly known that he is an office-bearer or a spokesman of an organisation which is an unlawful organisation in terms of the said Act or in respect of which an order under regulation 7(1)(a) of the said Security Emergency Regulations is in force, insofar as any such speech, statement or remark has the effect or is calculated to have the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency.'[5]

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1 The court was, however, unresponsive to the argument that the definition of 'subversive statement', as amended after the *Metal and Allied Workers Union* judgment, was so vague as to be void. The definition of that term made it an offence to publish a statement '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 perform a number of acts, including participation in the acts mentioned in the definition of 'unrest'. The court held that the acts themselves, without the importation of a reference as to how they would appear to the 'reasonable bystander', were sufficiently clear (at 324I).

2 Proc R 97 of 1987.

3 See eg *R v Salie* 1938 TPD 136 at 137-8. Also Burchell and Hunt *Criminal Law and Procedure* vol II at 77 n 94 and cases there cited; also Snyman *Criminal Law* at 268 *et seq*.

4 Act 72 of 1982.

5 Reg 3(1)(f) of Proc R 88 of 1989.

Does the phrase 'speech, statement or remark' include written words, or are the latter two words to be read *eiusdem generis* with 'speech'? The Security Emergency Regulations of 1989 [1] provided that any order issued against an individual need only be published to him alone.[2] It is quite conceivable, therefore, that a journalist might interview a person in respect of whom 'steps' under the regulations had been taken without being aware of that fact. Even more difficult is the requirement of establishing when a person is 'commonly known' to be a 'spokesman' of an unlawful organisation. Once again, a journalist might personally know that a person is in fact such a 'spokesman', but might plead that he is not covered by the prohibition because this fact is not 'commonly known'. What, in any event, is the meaning of 'commonly known'? Is a matter 'commonly known' when it is notorious in the community as a whole, or in a particular section thereof? If the latter, how large must the section be? Even if these questions could be answered, the problems created by the regulation would not end. The regulation requires a journalist to determine *in advance* whether the words of the person concerned are likely to have particular results. It may in principle be possible to hazard an informed guess as to whether published words are likely to threaten the safety of the public or the maintenance of public order. But how is one to determine whether they have the effect of 'delaying the termination of the state of emergency' when responsibility for determining the suitability of its continuation rests solely with the State President?[3]

The *Metal and Allied Workers*, *Natal Newspapers* and *United Democratic Front* judgments had paved the way by showing that the courts were not prepared to accept that the State President had authority to make regulations which those subject to or empowered to act by them

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1 Proc R 86 of 1988.

2 See reg 11(e).

3 Another example of an intolerably vague regulation which might be mentioned is that prohibiting statements which 'discredit or undermine the system of compulsory military service' (the current prohibition is reg 5, read together with para (b) of the definition of 'subversive statement' in Proc R88 of 1989). As Mailer points out, the effect of a statement depends on the predisposition of the listener, and not of the person who makes the statement (see Mailer 'The Media Regulations and the Ultra Vires Doctrine' in Haysom and Mangan (eds) *Emergency Law* 126 at 134).

could not understand. Or so it seemed until the appeal against the *United Democratic Front* judgment.[1] One result of the majority decision in that case, however, was that the State President could with impunity henceforth make emergency regulations which nobody but (or including?) he and his functionaries could understand.[2] The explanation for this startling development is to be found in the separate but concurring judgments of Rabie ACJ[3] and Hefer JA.[4]

After reaffirming his statement in *Omar v Minister of Law and Order*[5] that the State President's regulations were impeachable on the grounds mentioned in *Shidiack v Union Government (Minister of the Interior)*,[6] Rabie ACJ correctly observed that, although vagueness was not mentioned as a ground for invalidity in *Shidiack*, it had unquestionably become recognised as a ground of review in our law.[7] This said, however, his lordship noted that, apart from the extraordinarily wide and subjective nature of the State President's discretionary powers, to which attention had already been drawn in *Omar*,[8] there was one significant difference between regulations made by the State President under the Public Safety Act and most subordinate legislation. This was that parliament had chosen explicitly to exclude the courts' power to inquire into the validity of the former with an ouster clause, the new s 5B.[9]

The effect of this privative provision, said Rabie ACJ, was that the courts had no right to inquire into the vagueness of regulations made under s 3(1)(a) of the Public Safety Act, although Section 5B did not displace the courts' power to set aside the State President's regulations on

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1 *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).
2 That the State President may not at times comprehend the implications of his regulations was illustrated by the hasty withdrawal days after its proclamation of the regulation requiring registration of 'news agency businesses' (Reg 11 of Proc R 99 of 1988) after it was pointed out to him that it would hit persons and institutions going far beyond those at which it was aimed.
3 With whom Hefer, Grosskopf and Vivier JJA concurred.
4 With whom Grosskopf and Viviers JJA concurred.
5 1987 (3) SA 859 (A).
6 1912 AD 642 at 651-2, cited at 3.3 above.
7 At 851J.
8 At 89E-H.
9 Inserted by s 4 of Act 67 of 1986, discussed at 3.2 above.

one or other of the grounds of review enumerated in *Shidiack*, accepted in *Tsenoli*[1] and affirmed in *Omar*. These and these alone were evidence that a regulation had not been 'made under' s 3(1)(a). The court *a quo* had therefore erred in treating all the grounds of review as examples of excess of statutory power *simpliciter*, which, according to Rabie ACJ, alone demonstrated that an administrative act was *ultra vires*. Even if it were so that some of the regulations were, as the court *a quo* had found, so vague that they could be regarded as invalid ('so vaag is dat dit as ongeldig beskou moet word'), they were nevertheless regulations which the State President had made under the enabling provision.[2] The most that one could say was that the State President had in the exercise of his discretion neglected to make some of his regulations as comprehensible as the law required of him, or that some of the regulations were 'ineffective'.[3] This did not mean that he had acted *ultra vires*. The wider grounds of review such as vagueness had to be seen as independent, and hence were distinguishable from those which indicated that the regulation had not been 'made under' the enabling provision [4]. Thus:

> 'Om to kan kwalifiseer as 'n regulasie wat kragtens art. 3(1)(a) van die Wet uitgevaardig is en wat derhalwe deur art. 5B van die Wet teen ongeldigverklaring beskerm is, hoef 'n regulasie na my mening dus nie aan alle geldigheidsvereistes te voldoen nie.'[5]

This conclusion is, with respect, open to criticism. Taken literally, the above-quoted passage means that the courts may strike down some invalid regulations but not others. This paradox arises from Rabie ACJ's observation that, because of s 5B, emergency regulations 'hoef...nie aan alle geldigheidsvereistes te voldoen nie'. But why then talk of 'geldigheidvereistes'? If words have any meaning, a 'geldigheidsvereiste' (requirement for validity) is surely just that — a requirement setting a standard short of which an administrative act (*in casu* a regulation) is invalid. If failure to comply with the standards laid down in *Shidiack* indicates that a regulation is not 'made under' the empowering provision, why, then, should failure to meet the standards set by the other accepted grounds of invalidity not lead to the same conclusion? In the sense in

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1 *State President v Tsenoli/Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A).

2 At 853C-D.

3 At 853D-E. Rabie ACJ did not explain what he meant when he said that a regulation could be 'ineffective' because of its vagueness. One must assume, however, that his lordship meant that a court could not convict any person for infringing it. But were such a point to be raised as a defence to a criminal prosecution, the court declining to convict because of the regulation's vagueness would in effect be pronouncing on its validity. A court would also be so doing if, in the case of an enabling regulation, it refused to recognise the validity of an administrative act performed pursuant to an incomprehensible regulation.

4 At 856G-H.

5 At 853F-G.

which the learned Acting Chief Justice used the word, invalidity is surely synonymous with illegality. To accept that some grounds of invalidity indicate an excess of statutory power, but not others, is to depart from the idea of legality on which the so-called *ultra vires* doctrine is based.[1] To be lawful, an administrative act must comply with *all* the requirements of validity. The administrative act which does not comply with any one, be it part of the 'narrow' or 'wide' grounds of review, is illegal.[2] To say, therefore, that the effect of the ouster clause is to exempt the State President from the duty of conforming with some of the requirements of validity is tantamount to saying that parliament has licensed him to act in some respects unlawfully. And this conclusion is patently irreconcilable with long-established principles on which the statutory conferment of discretionary powers is based. An ouster clause may be a far-reaching instrument for limiting the jurisdiction of the courts. But it still presupposes that the *delegatus* is to conduct himself according to the requirements of the law.

Some of the difficulties to which the judgment of Rabie ACJ gives rise appears to have prompted the concurring judgment of Hefer JA. His lordship indicated that the separation between 'narrow' and 'wide' grounds of judicial review had been rejected by the courts in England, where, to borrow Professor Wade's phrase, *ultra vires* has developed into a 'Procrustean bed' into which all the forms of improper administrative action have been forced.[3] In Hefer JA's view, however, this approach has not been followed by the South African courts, which he said preferred to follow the distinction between excess of power proper and the so-called wider grounds of review.[4] Vagueness in particular, his lordship observed, was an independent ground of review which had nothing to do with the *ultra vires* principle.[5] To incorporate vagueness under the heading of *ultra vires* was therefore to purport to read into the statute concerned an implied limitation which was not to be found there, but in non- statutory law. Hefer JA found that the court *a quo* had therefore erred in finding that the enabling statute did not authorise the State President to make vague regulations. This limitation could not be taken to be implicit in the statute.[6] A contrary conclusion could only be reached by elevating the presumption that the legislator did not intend to sanction the making of vague subordinate legislation into something which it was not. The so-called presumptions of interpretation, from

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1 On which see 2.3 above.
2 Wiechers *Administrative Law* at 176-8.
3 See Wade *Administrative Law* at 40.
4 See at 868-69.
5 At 876A-B & 868G-H.
6 At 866H-J.

which grounds of review such as unreasonableness and vagueness flowed, were not in fact guides to the unexpressed intention of the legislature, as they were frequently described in both the South African and English courts, but

> 'niks anders...nie as die vergestalting van *die howe* se beskouing van die manier waarop 'n diskretionêre bevoegdheid uitgeoefen moet word, maar wat ingeklee is as die onuitgedrukte bedoeling en versweë aanwysings van die wetgewer'.[1]

This 'almost timid' ('bykans bevange') call on the intention of the legislature, observed Hefer JA, might be understandable in the English courts. But in South Africa it was not.[2] His lordship's real objection to the elevation of the presumptions of interpretation to the status of guides to the implied intention of the legislature appears, however, in the following sentence. There was no reason, he stated,

> 'waarom die *ultra vires* beginsel telkens bygehaal moet word ten einde legaliteit to verleen aan die inmenging deur 'n Suid- Afrikaanse hof met die uitoefening van 'n statuêre bevoegdheid nie'.[3]

His lordship hastened to stress, however, that he was not recommending that the courts should not apply the 'tacit indicators' ('versweë aanwysings') enumerated by Steyn.[4] His only objection was

> 'teen die toepassing daarvan onder die waan dat dit voorskrifte van die wetgewer is, wat tot gevolg het dat die nie-nakoming daarvan tot 'n bevinding van *ultra vires* lei in gevalle (soos die onderhawig) [ie vagueness and unauthorised delegation] waar 'n bepaalde versuim niks te maak het met die *vires* van die funksionaris nie'.[5]

The learned judge concluded:

> 'Ek is bereid om te aanvaar dat die wetgewer van die veronderstelling uitgaan dat 'n verleende bevoegdheid binne die perke van die [common law] reëls uitgeoefen sal word; maar ek vind die verheffing van so 'n veronderstelling tot 'n daadwerklike voorskrif...onaanvaarbaar.'[6]

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1 At 869E-F. Emphasis in original.
2 At 870H-I.
3 At 870I.
4 Steyn *Uitleg* at 219 *et seq.*
5 At 872F-G.
6 At 872F-H.

Having thus satisfied himself that a vague regulation could not be regarded as *ultra vires* for failure to meet the requirements of a 'tacit indicator' of legislative intent, Hefer JA acknowledged that the question remained whether the statute itself permitted the making of vague regulations. But he did not consider it necessary to pursue this problem, as the judgment of Rabie ACJ had, in his opinion, satisfactorily disposed of it.[1]

Hefer JA was, with respect, correct when he called the presumptions a set of judge-made rules. But to infer that because they are creations of the courts the presumptions are no more than a guise for giving the appearance of legality to judicial interference with the exercise of statutory discretionary powers, is seriously to undermine the foundation on which the principles of judicial review have been constructed. The presumptions may be 'judge-made', but the fact remains that parliament legislates, or should be presumed to legislate, with full knowledge of their existence.[2] Approached in this way, the presumptions are in fact aids to the process of divining 'the intention of the legislature', however much of a fiction that concept may be. 'The intention of the legislature' is, after all, merely another way of saying 'the meaning of the statute'. Whatever their origins or basis, the so- called 'tacit indicators' postulate the intention of an *ideal* legislature. And the courts are entitled — indeed bound — to assume, unless expressly or impliedly directed to the contrary, that this ideal legislature intends those to whom it delegates power to act rationally. The judge-made rules relating to the control of delegated powers — the rule against vagueness prominent among them — may be seen as nothing more than common-sense prescripts of rational administration, against the background of which enabling statutes are read. They are nevertheless *legal* rules [3] which apply unless expressly or impliedly excluded by statute.

If I have understood it correctly, Hefer JA's judgment does not explain why the presumption that the legislature intended subordinate legislation to be comprehensible (which his lordship acknowledged as a valid assumption[4]) should be excluded by the ouster clause. His view is that vagueness is a valid ground of review only where the statute itself indicates that parliament did not wish to confer authority to make vague regulations. But is it valid to assume that the presence of an ouster clause necessarily indicates such an intention? Surely it can be assumed

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1 See 872H-I.
2 Cowen 'The Interpretation of Statutes and the Concept of "The Intention of the Legislature"' (1980) 43 *THRHR* 391 and L M Du Plessis *The Interpretation of Statutes* at 52-54.
3 Wiechers *Administrative Law* at 41-4.
4 See at 866I-J.

that parliament could never have had such an absurd intention? Confronted with this problem, Hefer JA merely refers the reader back to the judgment of Rabie ACJ.[1]

That parliament intends the authority to whom it delegates legislative power to make regulations which are comprehensible to those to be bound by it is a well-established principle of South African law.[2] Hefer JA may be right in saying that vagueness is an independent ground of review. But it can equally be regarded in another light — namely, as an indication that the responsible authority has failed to comply with some requirement directly related to his *vires*. The rule against vague subordinate legislation flows from several considerations. One is that vague legislation is unreasonable.[3] Another is that it is ineffective, and parliament is presumed not to sanction the making of legislation which is purposeless or with which people cannot reasonably comply.[4] Yet another, notionally similar to the aforementioned, is that where parliament stipulates the purposes for which delegated legislation must be made, it intends the legislation to be made for those purposes and no other. Delegated legislation which serves no purpose, or purposes which cannot be ascertained, falls as far short of the purposes stipulated in an enabling provision as that which serves some ulterior or improper purpose. These reasons link vagueness inextricably to the grounds which, in Rose Innes's phrase, 'go to the jurisdiction' of a functionary's powers [5] and are thus not excluded by an ouster clause.

The only member of the bench in the *United Democratic Front* appeal who was prepared to give any weight to considerations such as these was Van Heerden JA, whose lone dissent, it is respectfully submitted, shows a correct understanding of the relationship between the canons of interpetation and the doctrine of *ultra vires*. His lordship pointed out that vague subordinate legislation was not valid in law because the *delegatus* was not *empowered* to make it.[6] As such, it fell within the same category as administrative acts in which the repository had proved deficient in respect of other recognised grounds, such as *mala fides*, failure to apply his mind, and

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1 At 872H-I.

2 Baxter *Administrative Law* at 529; Wiechers *Administrative Law at 203 et seq*; J D Van der Vyver 'Regsekerheid' (1981) 44 *THRHR* 269; Milton Verskin 'Vagueness in South African Subordinate Legislation: A Survey of the Case Law' (1976) 93 *SALJ* 303; Jerold Taitz 'Vagueness and Uncertainty in Subordinate Legislation as a Ground of Invalidity' (1979) 42 *THRHR* 412; Steyn, *Uitleg*, 229-31. The latter writer states that vagueness remains a ground of review even in the face of an express ouster clause: see *op cit* at 288.

3 See eg *R v Shapiro* 1935 NPD 155 at 159.

4 See eg *S v Myers* 1967 (3) SA 618 (T).

5 See Rose- Innes *Judicial Review* at 92.

6 At 857G-858D; relying on *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A) at 159.

non- compliance with jurisdictional requirements.[1] If the State President made vague regulations, he exceeded his powers and therefore did not act 'under' s 3(1)(a). It was unacceptable to assume, observed Van Heerden JA, that by incorporating the ouster clause the legislature had intended to confer on the State President authority to make incomprehensible regulations. The contrary view would be to impute to the legislature the nonsensical ('onsinnige') intention of authorising the State President to issue pointless regulations.[2] The issuing of vague regulations, moreover, indicated that the State President had not properly applied his mind before exercising his powers under s 3(1)(a).

Given the wide scope for judicial choice in the interpretation of statutes like the Public Safety Act, it may not be possible to say conclusively whether Van Heerden JA is right and the majority wrong. There can be little doubt, however, that the judgment of the former is more compatible with modern ideas of judicial review and the anxious role the courts *should* be playing to ensure that the awesome powers assumed by the executive under emergency rule are used in conformity with the basic precepts of rationality. By contrast, the majority judgments in *Staatspresident v United Democratic Front* seriously diminished the courts' power to exercise that role.

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1 See 858H-J.
2 At 859F-G.

5.6 Manifest injustice and gratuitous interference with rights

That our courts may interfere with subordinate legislation if its actual or potential effects are sufficiently outrageous, oppressive and unjust is a well-established principle of South African law.[1] When striking down subordinate legislation for want of compliance with the criteria of justice, the courts normally invoke the concept of 'reasonableness'.[2] It has been argued[3] that a doctrine of 'substantive unreasonableness' is necessary if the courts are to be able to ensure that subordinate legislation issued by a law-making body upon which wide discretionary powers have been conferred does not exceed the fundamental dictates of justice. Otherwise, mere conformity with the technical requirements of the empowering statute could render the most outrageous laws immune from judicial scrutiny. This was clearly appreciated by Van den Heever JA in *R v Pretoria Timber Co (Pty) Ltd*,[4] when he observed:

> 'A point may arise where a regulation made pursuant to such powers is so unreasonable that the Courts will say that Parliament could, although it used the widest language, never have contemplated that such a measure be countenanced.'[5]

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1 See 2.4.8 above and, generally, Steyn *Uitleg* at 101-119 & 238-279, especially 266. Also Mureinik 'Fundamental Rights and Delegated Legislation' 1985 (1) *SAJHR* 111.

2 Historically, this concept entered the English law as a result of attempts by the courts of that country to control excess of authority by independent statutory bodies. As Lord Russell of Killowen pointed out in the celebrated judgment of *Kruse v Johnson* [1898] 2 QB 91, however, the term could easily become an excuse for judicial law-making. A by-law, he pointed out was not unreasonable merely because a particular judge thought it went further than was necessary or prudent or convenient, or because it lacked some qualification or exception. What was needed was a standard by which unreasonableness could be tested. To this end, Lord Killowen suggested that a court should strike down by-laws only when they were 'partial and unequal in their operation as between different classes', 'manifestly unjust', disclosed bad faith, or involved 'such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men' (at 99-100).

3 See eg Wiechers *Administrative Law* at 174-79.

4 1950 (3) SA 163 (A).

5 At 181J-182B. His lordship gave the following illustration of a regulation which would in his opinion undoubtedly call for judicial intervention: '[I]f purporting to act under the powers conferred upon him, the Governor-General were to issue a regulation providing that any native, who does not raise his hat to any European whom he encounters in the street, may be shot, I should have no hesitation in holding such regulation to be *ultra vires*.'

But how, in the case of enabling statutes which confer general legislative powers on subordinate authorities, does a court establish when such a point has been passed? A challenge to subordinate legislation on the basis of unreasonableness in the *Kruse* sense confronts a court with a two-fold inquiry: first, into whether the regulation is in fact unreasonable, and if so, into whether such unreasonableness was authorised by the enabling statute.[1] The *Kruse* formula affords guidance only in respect of the first inquiry. The second entails reference to and interpretation of the empowering legislation. It is thus quite possible for a court to conclude that a piece of subordinate legislation is highly oppressive, and yet to rule that the degree to which it interfered with basic rights was expressly or impliedly authorised by parliament. We turn briefly to an examination of these two stages of the inquiry.

When inquiring into whether a regulation is unjust or oppressive the courts adopt as their principal point of reference the nature of the liberty infringed. The more 'fundamental' the liberty, the more likely it is that infringements thereof will be adjudged unjust.[2] Thus our courts have indicated their determination to protect, where possible, the right to entrance to one's own property,[3] the 'liberty of indulging in social activities',[4] freedom of speech and of the press, [5] contractual freedom [6] and 'alledaagse en gebruiklike menslike verrigtinge'.[7] To this list one

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1 See dissenting judgment of Schreiner JA in *Sinovitch v Hercules Municipal Council* 1946 AD 783 at 802: ' In investigating an issue of unreasonableness one would...ask oneself at the outset whether in the light of the proved facts the by-law is unreasonable in the sense of being manifestly unjust or highly oppressive, and then, if this question were answered in the affirmative, one would consider in the next place how far such 'unreasonableness' could be said to be authorised by the enabling provision.' See also Andre Rabie 'Failure of the Brakes of Justice: *Omar v Minister of Law and Order* 1987 (3) SA 859 (A)' 1987 (3) *SAJHR* 300 at 305; C M Plasket and P L Firman 'Subordinate Legislation and Unreasonableness: the Application of the *Kruse v Johnson* ([1886] 2 QB 91) Formula by the South African Courts' 1984 (47) *THRHR* 416 at 419.

2 Or, to put it another way, the stronger the presumption that parliament did not intend to authorise infringement thereof (see Hahlo and Kahn *Legal System* at 208 and Steyn *Uitleg* at 105).

3 *Maree v Raad van Kuratore in Nasionale Parke* 1964 (3) SA 727 (O) at 730.

4 *S v Weinberg* 1979 (3) SA 89 (A) at 105.

5 *S v Sparks* 1980 (3) SA 952 (T) at 957.

6 *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 314 (A) at 325.

7 *Lifina Ngomozulu v R* 1944 OPD 157 at 160.

might add the subject's right to fair treatment (including being afforded an opportunity to make representations on the basis of stated reasons) before any infringement of vested rights takes place,[1] the right to consult a lawyer and, of course, to seek the assistance of the courts.[2]

When the courts classify a right as 'fundamental' they are not suggesting that it enjoys absolute protection under the law. On the contrary, it is recognised that parliament is free to limit or remove such rights whenever it deems fit. It may also depute to others the power to do so. Where it wishes to limit or remove a fundamental right, however, it must do so 'in the clearest and most unambiguous words'.[3] By this and similar expressions, the courts mean that the right to encroach on a fundamental right must be specifically conferred, which is to say that a subordinate legislature which has encroached on a 'fundamental right' cannot rely on a general authorisation to make laws, no matter how widely phrased that authorisation may be, but must be able to show that the encroachment upon the liberty concerned is specifically authorised by the enabling statute, whether expressly or by necessary implication.[4]

The question whether violations of fundamental rights are 'unreasonable' cannot, however, be answered *in vacuo*. Having determined that a regulation is fundamentally unjust, the courts must then interpret the empowering provision in order to ascertain whether such injustice was authorised. The legislature may have done so expressly or by necessary implication. Where departures from the norms of justice are authorised in express words, the courts cannot interfere. While some earlier South African cases tended to require express authorisation to violate

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1 *R v Ngwevela* 1954 (1) SA 123 (A).

2 *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 959H.

3 *R v Slabbert* 1956 (4) SA 18 (T) at 21H.

4 Thus in *R v Slabbert supra* the empowering statute concerned (The Native Administration Act 38 of 1927, s 27) authorised the Governor-General to make regulations 'for such...purposes as he considers necessary for the protection, control, improvement and welfare of the natives, and in furtherance of peace, order and good government'. Purporting to act under this general authorisation, the Governor-General passed a regulation making it an offence to receive money for assisting a 'native' with certain matters. One effect of this regulation was to prohibit lawyers from giving paid advice in connection with those matters. Rumpff J, although accepting (at 22B) that the regulation might have been made for a purpose which the Governor-General might have thought necessary for the protection of Africans, nevertheless held that a law violating the fundamental right of people to legal advice required specific authorisation. From *Slabbert's* case it can be seen that a court may be prepared to set aside subordinate legislation on the ground that it violates a fundamental right, even though such violation may literally fall within the terms of the enabling statute. It does so by resorting to the fiction that parliament did not intend to authorise the infringement of such rights unless it expressly or impliedly indicated to the contrary. See also *R v Abdurahmin* 1950 (3) SA 136 (A) at 149B-C and, generally, Mureinik 'Fundamental Rights and Delegated Legislation' 1985 (1) *SAJHR* 111 at 113.

fundamental rights, [1] it can now be accepted that such power may be impliedly authorised.[2] Whether such a power is in fact impliedly conferred is a question of interpretation. A doctrine of 'fundamental rights' derives its importance from the fact that, when such rights are violated by administrative action, a court will (or should) be slow to conclude that parliament intended such action. In other words, the process of interpretation is posited on the assumption that parliament generally intends such rights to be protected.

The status of human rights becomes precarious under emergency rule. An essential aim of such a temporary regime is, after all, to empower the executive to make inroads into individual rights and liberties which it could not make under the 'ordinary law'. But the question remains: are there any rights so fundamental that their restriction or removal can be held not to be authorised by the sweeping terms of s 3(1)(a) of the Public Safety Act?

There are indications that the courts have been prepared to accept that a point exists beyond which a regulation could be said to involve such oppressive and unnecessary an invasion of the rights of the subject as to warrant the conclusion that it 'could never have been contemplated by parliament'. Courts which have been seized of challenges to emergency regulations on the basis of unreasonableness have, however, been careful to stress that the onus resting on the applicant is a 'formidable one'.[3] How formidable emerges from the following analysis of the case law.

To begin with, it must be stated that the courts are not prepared to regard the mere fact that a regulation restricts a 'fundamental freedom' as in itself sufficient ground to render an emergency regulation unlawful. Thus violations of freedom of speech and of the press, of association and assembly, of movement and of liberty, and even of the right to bury the dead in the manner of one's choosing, have not been accepted as sufficient to warrant the inference of unreasonableness of the kind envisaged in *Kruse*. It has been accepted, for example, that limitations on freedom to publish information, even information of vital public importance, and by implication to be informed of it, fell 'squarely within the policy of the Act'.[4] So, too, has a

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1 See eg *Moses v Boksburg Municipality* 1912 TPD 659 at 661-2; *Williams and Adendorff v Johannesburg Municipality* 1915 TPD 106 at 126; *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 at 173.

2 *R v Abdurahman* 1950 (3) SA 136 (A) at 149B-C.

3 *Momoniat and Naidoo v Minister of Law and Order* 1986 (2) SA 264 (W) at 278B-C; see also *Metal and Allied Workers Union v State President* 1986 (4) SA 358 (D) at 365E-F.

4 *United Democratic Front v State President* 1987 (3) SA 296 (N) at 319J-320A.

regulation prohibiting the incitement of people to attend restricted gatherings, even though people were entitled to attend such gatherings if they complied with the restrictions imposed.[1]

It is, nevertheless, still possible to argue that the State President has taken such restrictions beyond the point referred to by Van den Heever JA in *Pretoria Timbers*. In several emergency cases, it was accepted that he had. Thus in *Natal Newspapers v State President*[2] regulations authorising the seizure of publications were ruled *ultra vires* because their provisions were 'so far-reaching and [their] consequences so drastic...that the Legislature could never have contemplated that such a measure be countenanced'.[3] As proof of the unreasonableness of the seizure provisions, the court cited evidence of the financial loss and other prejudice a publisher would suffer if a single edition of a major newspaper were seized,[4] the fact that such power could be exercised by inexperienced persons,[5] that a publisher had no certain means of knowing how to avoid the 'harsh consequences of non-compliance',[6] and that that the regulation provided for confiscation of the seized material in addition to a heavy fine and/or imprisonment.[7]

Generally, however, the courts have been reluctant to infer that parliament did not intend to confer on the authorities the power to encroach upon freedoms which have, in other contexts, been regarded by the courts as fundamental in the sense that interference by them requires special authorisation. Thus a regulation [8] authorising the Commissioner of Police, without giving reasons and without hearing any person, to close off areas, control traffic, prohibit persons from

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1 *Staatspresident v United Democratic Front* 1988(4) SA 830 (A); this aspect of the judgment is discussed at 5.3 above.
2 1986 (4) SA 1109 (N).
3 At 1132H-I. The court noted that the regulation could also be voided on at least two other grounds, namely, vagueness and unauthorised delegation. This aspect of the judgment is discussed at 5.4 above.
4 At 1131J.
5 At 1132C.
6 At 1132G-H.
7 At 1134D.
8 Regulation 7 of Proc R 109 of 1986.

leaving their own residential areas or entering others, and to forbid the transmission of news was held to confer the power to take measures which were 'pre-eminently the sort...that may well have to be adopted during any state of emergency'.[1] Similarly, a prohibition which effectively deprived the public of all information on civil disturbances and security action was held to be in principle justifiable because the court considered itself

> 'entitled to take judicial cognisance of the fact that the reporting, recording and dissemination through the media of news of and comments on [such matters] could have the effect of increasing the apprehension of the public as to its safety or of causing the public to doubt the existence of public order or the ability of the authorities to maintain it.' [2]

Cases in which the problem of deciding the limits of the State President's emergency law-making arose most pertinently were those dealing with the rights of detainees. Detention without trial is a drastic violation of the most fundamental of all liberties. However, the Public Safety Act is silent on the extent to which the State President may encroach on what remains of a detainee's 'fundamental rights' during his incarceration. It is generally accepted in every civilised legal system that a person who is lawfully detained retains at least the basic right not to be assaulted or subjected to third-degree methods of interrogation. And it may safely be assumed that the courts would interfere were the State President to purport to use his powers under s 3(1)(a) to authorise such treatment.[3] No court would ever impute to parliament the intention that powers which it had delegated be put to purposes so grossly repugnant to civilised values.

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1 *Natal Newspaper v State President* 1986 (4) SA 1109 at 1125G. No mention was made by the court of the fact that the exercise of such powers could have consequences at least as drastic to those concerned as seizure of a publication would have for its owners.

2 *United Democratic Front v State President* 1987 (3) SA 296 (N) at 319I-320A. It could well have been argued that members of the public have a right, which can be considered 'fundamental', to information which enables them to appraise their own position, or to form doubts about the existence of public order when it might in fact have collapsed. It is submitted further that, even if the speculative consequences of which the the court took judicial cognisance are correct (they are certainly at least open to debate), it might have considered whether regulations aimed at creating an artificial sense of confidence among the public in fact fell within the ambit of s 3(1)(a), which empowers the State President to make regulations for the purposes of maintaining the safety of the public and the maintenance of law and order. Public apprehensions about their safety or doubts as to the existence of public order are a different matter.

3 See *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A), especially judgment of Rumpff JA at 612H-613A.

But what of other rights no less fundamental to the mental and possibly physical well-being of those incarcerated without trial, such as the right to approach the court for relief, to seek legal advice, and failing that, to make representations to the detaining authorities? The State President has had no compunction in using his legislative powers to override or limit these rights. How the courts have treated attempts to curtail access to lawyers and the courts has already been discussed.[1] We now consider their reaction to the elimination of another right — that to make representations to and receive a hearing from the detaining authorities.

Emergency detention is a two-stage process. A person arrested by a member of the security forces can be held for a limited period,[2] after which detention can be lawfully extended only on ministerial authority.[3] The emergency regulations of 1985 did not expressly exempt the Minister from granting detainees the right to a hearing before their detentions were extended beyond the 14 days for which they could lawfully be held by the police.[4] The courts were quick to point out that failure to grant such a hearing rendered the subsequent detention fatally defective. In *Nkwinti v Commissioner of Police*,[5] Kannemeyer J, after noting that a detainee might be held for an indefinite period should the current state of emergency be reproclaimed, and that people could be detained in terms of the regulation for their own safety, found himself unable to accept that parliament or the State President could have intended that

> 'the detainee against whom no charge had been brought and who has been given no opportunity, when detained, to advance reasons to establish, or to attempt to establish that his detention is unnecessary, should be deprived of his right to advance such reasons before his further detention is ordered.' [6]

The learned judge added:

> 'One's sense of justice is offended by any such suggestion and only express words or a clear inference would lead one to accept that this was the intention of those responsible for the legislation and the regulations.' [7]

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1 At 3.5 above.
2 Fourteen days during the emergencies of 1985 and 1986, later extended to 30 days.
3 On the detention provisions generally, see 6.2.1 below.
4 Reg 3(3) of Proc R109 of 1985.
5 1986 (2) SA 421 (E).
6 At 438.
7 At 438J-439A.

There is a measure of irony to Kannemeyer J's refusal to attribute to those responsible for the regulations an intention to bring about a result so offensive to the fundamental principles of justice. Days before the *Nkwinti* judgment was delivered, and patently with a view to frustrating applicant's argument on this point, the State President had in fact issued an amending regulation expressly relieving the Minister of the duty to give detainees a hearing prior to extending their incarceration. This result was achieved by the insertion into the regulation of the words 'without notice to any person and without hearing any person'.[1] This phrase was repeated in all subsequent regulations conferring on the Minister the power to extend the period of detention. The intention of the State President having thus been made plain, the question to be considered after the amendment was whether he could lawfully eliminate detainees' right to a hearing before their incarceration was extended indefinitely by ministerial order.

Before the matter was settled by the Appellate Division, the cases in which the amended version of the detention clause were attacked revealed a remarkable degree of judicial uncertainty over the place to be afforded fundamental common law rights in the context of emergency rule.

In *Nkwinti's* case, Kannemeyer J suggested *obiter* that the legality of the regulation denying detainees their common law right to a hearing was questionable.[2] But in *Fani v Minister of Law and Order* [3], the full bench of the Eastern Cape Division dismissed a challenge to the validity of the amended reg 3(3) on the basis that the Public Safety Act impliedly vested the in the State President authority to exclude the operation of the *audi alteram partem* rule. The court held that 'practical considerations' might have made it impossible for the Minister to observe the rule, given the large number of detainees involved. It is, however, debatable whether a court should place administrative convenience above the requirements of procedural justice in a matter involving the fundamental rights of thousands of people. As counsel for Fani pointed out in argu-

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1 Proc R 207 of 1985. The regulation now read: 'The Minister may, without notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison, order that the person arrested and detained in terms of subreg (1), be further detained in that prison for the period in the notice, or for as long as these regulations remain in force.' What is more, the amendment was made retrospective to a date soon after the proclamation of the emergency. The court did not consider it necessary to inquire into the dubious legality of the retrospective dimension of the amendment as it accepted that a retrospective provision could not in any event affect rights which existed at the time of *litis contestatio* (at 440E-441C).

2 At 438D-E.

3 ECD 4 December 1985 Case No 1840/1985, unreported.

ment on appeal,[1] it was precisely when large numbers of people were detained that the strictest of safeguards were needed.[2]

In *Omar v Minister of Law and Order*[3] the majority of the full bench of the Cape Provincial Division regarded s 2(1)(c) of the Public Safety Act, which empowers the State President to declare a state of emergency when he is of the opinion that the 'ordinary law of the land' is inadequate,[4] as an indication that it was clearly invisaged by the legislature that the State President could 'make regulations which override the ordinary law, whether statutory or otherwise, or introduce other laws resulting in infringements of people's ordinary rights'.[5] Once this was conceded, it was not open to a court to substitute its opinion for that of the State President where the latter, acting under s 3(1)(a), had decided that it was necessary or expedient to exclude the operation of the *audi alteram partem* maxim, or any other ordinary right.[6] Friedman J, however, refused to adopt the view that the State President was impliedly authorised to disregard fundamental rights at will. Had parliament wished to confer on the State President the power to authorise the eradication of the *audi alteram partem* rule, the learned judge observed, it could easily have done so in express terms. This it had not done. The only question, therefore, was whether such a power should be implied. To this question, his lordship responded:

> 'Having regard to the basic and fundamental nature of the procedural right embodied in the *audi alteram partem rule*, the wide discretion conferred upon the State President by the Public Safety Act to make regulations dealing with an emergency does not...imply a grant to him or [*sc*: of] power to continue to detain persons beyond such period as is reasonably necessary, without affording them an opportunity of establishing a claim for their release.'[7]

Friedman J also refused to accept the contention advanced by counsel for the respondent that the regulation did not in fact eliminate the *audi alteram partem* rule because, so the argument went, there was nothing to prevent the detainee from making representations at any time before or after the detention was extended. To this, Friedman J replied that the regulation expressly relieved the Minister of the duty of hearing not only the detainee, but also the person who had

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1 1987 (3) SA 859 at 876J-877A.
2 At 877B-C.
3 1986 (3) SA 306 (C).
4 See 4.2 & 4.5 above.
5 At 314H-I.
6 At 315 B-C.
7 At 322I-323A.

affected the original arrest. A 'right' to make representations to an official who was under no duty to consider them could hardly be regarded as coming near to satisfying the requirements of the *audi alteram partem* rule.[1] Nor, in the learned judge's view, could could any weight be attached to the argument that it might not be possible for the Minister to afford a hearing to each and every detainee within 14 days of the original detention. His lordship pointed out that the State President could have chosen a longer period. The important point was that, whatever period was chosen, a detained person should within a reasonable time be afforded a hearing.[2]

In *Momoniat & Naidoo v Minister of Law and Order*,[3] however, the court J disagreed with the reasoning of Friedman J. Goldstone J pointed out that the State President, in his desire to limit the period in which a person might be held at the behest of the police alone, had stipulated a relatively short period before the Minister was bound to give a decision as to whether the detention should be extended. This attempt to expedite Ministerial intervention had, however, created the practical difficulty that it might not always be possible for the Minister to observe the *audi alteram partem* rule before taking his decision. The learned judge thus concluded that the regulation excluding the right to notice and to be heard *prior* to the Minister's decision could not be said to be 'so grossly unreasonable that it must have been made by the State President otherwise than *bona fide* or that Parliament could not have countenanced it'.[4] In Goldstone J's opinion, reg 3(3) could not be interpreted as excluding the right of a detainee to make representations to the Minister *after* the latter had ordered his continued detention.[5] Goldstone J therefore based his finding that reg 3(3) was *intra vires* not on extent of the powers conferred by the Public Safety Act, but on a strict interpretation of the regulation.

In *Momoniat*, therefore, the court was not called on to deal with the question whether the State President could lawfully eliminate the *audi alteram partem* rule even *after* the Minister had

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1 At 327H-I.
2 At 328B-H.
3 1986 (2) SA 264 (W).
4 At 275E-G.
5 At 275J.

given his decision. Goldstone J made it plain, however, that he would not have been prepared to hold the regulation *intra vires* had it not been amenable to the strict construction he saw fit to impose on it. He said:

> 'The right to make written representations even after the decision or order is not merely a matter of form. The absence thereof would entitle the head of the prison...to deny a detainee the opportunity to make representations. He could lawfully refuse the very pen and paper necessary for such purpose. He and the police could lawfully refuse to have such written communications conveyed to the Minister. The Minister could lawfully refuse to receive or consider such representations.'[1]

Momoniat, which was subsequently approved and followed by Leverson J in *Bill v State President,*[2] therefore conceded to the State President the power only to limit the operation of the principles of natural justice, not to eliminate them entirely. The court therefore found a *via media* between the decision of the majority of the court below in *Omar* and the view adopted in that case by Friedman J.

After the cases just outlined, the position regarding the applicability of the principles of natural justice to those detained under emergency regulations appears to have been as follows. A detainee had no right to make representations to the arresting officer before his arrest or before his committal to custody pending the Minister's decision.[3] The authorities were not compelled to allow him to make representations, written or oral, to the Minister before the decision was taken to detain him indefinitely. Regulation 3(3) was held, however, to have no effect on the

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1 At 276E-F. That the court would have regarded a regulation which eliminated detainees' right to a hearing during the entire period of detention as *ultra vires* appears plainly from the separate but concurring judgment of Coetzee J, who observed that the fact that the *audi alteram partem* rule could be limited for practical reasons did not mean 'dat 'n aangehoudende sy reg ontneem mag word om, na die verdere aanhoudingsbevel gemaak is, vertoë te rig aan die betrokke Minister nie. Hy mag byvoorbeeld bloot 'n nuuskierige toeskouer gewees het in die omgewing van 'n klipgooiery. Om hom nou boonop sy reg te ontneem om op enige stadium hieroor 'n verlegging te maak aan die Minister vir sy oorweging, is so onredelik dat dit grens aan onmenslikheid indien dit nie werklik is nie. Dit is ondenkbaar dat enige regsinnige mens so 'n inkorting moontlik nodig kan vind.'(At 278I-279A.)

2 1987 (1) SA 265 (W).

3 Indeed, it was never argued that the arresting officer should give a hearing to the person whom he intended to arrest; to bind him to do so would clearly frustrate the object of the regulation. It was held in *Nqumba v State President* 1987 (1) SA 456 (E) at 465 (D) that the 'detaining officer' performs a purely administrative act and therefore need only satisfy himself that the person detained has been arrested in terms of reg 3(1)'.

operation of the *audi alteram partem* rule *after* the Minister had given his decision. This meant, in turn, that the detaining authorities were obliged to furnish detainees with the opportunity and means of making representations, and that the Minister was obliged to consider such representations.[1] Furthermore, in order to make the right to *ex post facto* representations meaningful, the Minister was obliged to state the reasons (not detailed information)[2] on which he had relied.[3] Had the regulation been construed as clearly conferring on the Minister authority to deprive a detainee of the right to a hearing during the entire period of his detention, it seems that the courts would have declared it *ultra vires* for being so unconscienable and unreasonable in the *Kruse* sense that parliament could not be deemed to have countenanced it.

When the *Omar*, *Fani* and *Bill* decisions came before it, [4] the Appellate Division had therefore to decide whether the above interpetation was correct, and, if so, whether a regulation having the effects specified in the previous paragraph exceeded the bounds of the State President's powers. [5] The court was asked by counsel representing the detainees to hold that the earlier decisions that the State President had the power to deprive them of a right to hearing before the taking of his decision went too far, even though the courts adopting this view had found that such a right remained after the decision had been taken. It was argued that the Minister could not possibly exercise his discretion fairly and properly if he had heard only one side of the case. Such a position, so it was argued, was 'grossly unreasonable and repugnant to right-thinking men'.[6]

In a judgment remarkable for its brevity in view of the importance and complexity of the issues involved, the full bench of the senior court [7] unanimously dismissed the argument that the State President was not impliedly authorised to eliminate the right to a hearing before the Minister acted. The court relied exclusively for this conclusion on the wording of s 2(1) of the Public

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1 See *Momoniat & Naidoo v Minister of Law and Order* 1986 (2) SA 264 (W) at 276C-E & 278J.
2 For the distinction between 'grounds', 'reasons' and 'information' see 3.4 above.
3 *Bill v State President* 1987 (1) SA 265 (W) at 272E.
4 In *Omar/Fani v Minister of Law and Order, State President v Bill* 1987 (3) SA 859 (A).
5 *Omar* was the first challenge to the validity of emergency regulations on the basis of their incompatibility with fundamental common-law rights (see Dugard 'Omar: Support for Wacks's Ideas on the Judicial Process?' (1987) 3 *SAJHR* 295 at 297).
6 At 863G. Counsel did not take the point that the regulation was in fact so worded as to relieve him of the duty to consider *either* side.
7 *Per* Rabie ACJ, Joubert, Viljoen, Hoexter JJA and Boshoff AJA concurring.

Safety Act, which it quoted three times in two pages of the judgment [1] to meet all appellant's arguments on this head. Thus the section empowering the State President to declare a state of emergency where 'the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public of to maintain public order' justified the conclusions that parliament contemplated that

> 'the need to ensure the safety of the public or to maintain public order might necessitate the taking of extraordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals',[2]

that the regulation was not so grossly unreasonable as to justify the conclusion that parliament could not have intended to authorise it,[3] and that it fell within the parameters of s 3(1)(a).[4]

The court did not deem it necessary to inquire into the question, to which its attention had been drawn by counsel, whether *even in the circumstances of emergency rule* the elimination of the right to a hearing by persons incarcerated without trial, and who thus could not conceivably pose any threat to the public safety or the maintenance of law and order, could in fact be said to be *necessary* for the purpose of meeting the circumstances for which the emergency had been declared. It dismissed this issue with the assertion that 'the regulation was made as an emergency measure which was to be of application in an emergency situation'.[5] That the regulation in question was an emergency measure does not, however, in itself justify the conclusion that the Public Safety Act *necessarily* empowers the State President to ignore the fundamental right to procedural justice *in all circumstances*. It still remains the duty of a court to address — and, in the case of infringements of fundamental rights, anxiously to address — the question whether a particular infringement or curtailment was unreasonable in the *Kruse* sense when assessed against the ends it was purportedly designed to serve. That the court was not prepared to enter into such scrutiny is apparent from its uncritical acceptance of the averment by the State President that he had found it necessary to amend the detention regulation in order to exclude the *audi alteram partem* rule because he was satisfied

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1 At 891J, 893D and 893G.
2 At 892A.
3 At 893D-E.
4 At 893G-H.
5 At 893C-D.

> 'dat onder gegewe omstandighede voldoende feite mag vasgestel wees of omstandighede mag bestaan om die voortgesette anhouding van 'n persoon te magtig sonder dat hy die geleentheid gegee sou word om gehoor to word.'[1]

The reason cited by the State President for this conclusion was not administrative convenience, but the realisation that a consequence of allowing the principles of natural justice to survive in any form was that the Minister might then be compelled to disclose the reasons for the detention to the detainee. Such disclosure might, in his words, 'tot gevolg mag hê dat die bron van die inligting bekend mag word' [2]. And this, said the State President, would not be in the interest of the safety of the public, the maintenance of public order or the termination of the state of emergency.

Such reasoning was, in the court's opinion, adequate to justify the conclusion that the State President was authorised to exclude the right to a hearing before the Minister took his decision. But it had still to be decided whether the regulation should be construed as empowering the Minister to refuse to grant detainees a hearing after he had made the decision to extend their detention. In the appeal against the decision in *Bill's* case, the court seemed prepared to accept that reg 3(3) did not exclude the right to make written representations after the Minister had given his decision. As Rabie ACJ observed:

> 'I do not be wish to be understood as saying that a detainee may not, after his further detention has been ordered, make written representations to the Minister concerning such detention, for it seems to me that he would be *entitled* to do so.' [3]

A few sentences later, however, the learned Acting Chief Justice concluded that reg 3(3) in fact 'does away completely with the *audi alteram partem* rule'.[4] The court came to the latter conclusion in order to meet the argument that, if the *audi alteram partem* rule survived reg 3(3) to the extent that a detainee was still entitled to a hearing after the decision to continue his detention, he was entitled not only to make representations, but also to be afforded the means of making adequate representations. These included, no less self-evidently than writing materials to express himself, the making available of the grounds for the decision to extend the detention. This had been accepted by the court *a quo* in *Bill's* case, Leveson J observing that unless the

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1 Quoted at 893I-J.
2 At 893J.
3 At 900C-D. Emphasis added.
4 At 900H-I.

detainee was afforded enough information to put him in a position to know what case he had to rebut, the right to make representations would be rendered illusory.[1]

Rabie ACJ was not, however, prepared to accept that the right to make representations after the decision to extend the detention entailed the right to be informed of the ground or grounds on which the decision had been made. Nor did his lordship consider the denial of such right so gross a violation of the principles of procedural justice as to render *ultra vires* the regulation that created this situation. Although conceding that the regulation which excluded the *audi alteram partem* principle was a 'very harsh provision',[2] the court held[3] that it fell within the terms of s 3(1)(a) of the Public Safety Act. This was so not only because of practical considerations, like the number of detainees, but, more importantly, because

> 'it is quite conceivable that it was thought that the *audi alteram partem* rule should be exluded in order to avoid the danger of sensitive information, or the sources of such information, being disclosed to detainees.' [4]

The remaining question, then, was whether reg 3(3) should be interpreted as excluding a detainee's right to be provided with at least the grounds (as opposed to the evidence) on which the decision to extend his decision was based for the purposes of making representations as to why he should be released. The Appellate Division had decided in *Minister of Law and Orderv Hurley*[5] that persons detained under s 29(1) of the Internal Security Act[6] had such a right. Rabie ACJ pointed out, however, that *Hurley* provided no authority for the inference that such a right was available to detainees under the emergency regulations, since s 29(1) was phrased in 'objective terms', while the detention provisions of the emergency regulations were wholly subjective.

The second reason relied upon by Rabie ACJ for his conclusion that reg 3(3) did not oblige the Minister to provide a detainee with reasons for his decision to extend the period of detention after it was taken has more chilling implications. If the regulation indeed empowered the Minister to decide to extend a period of detention without giving the person concerned an oppor-

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1 1987 (1) SA 265 (W) at 271F.
2 At 900 I.
3 At 901A.
4 At 901 F-G.
5 1986 (3) SA 568 (A).
6 Act 74 of 1982.

tunity to be heard, his lordship observed, it was impossible to conclude that such a right arose later. This was because

> 'when the Minister makes an order for a person's further detention in terms of reg 3(3), the order is a final one, and ...there is thereafter no obligation on the Minister to inform the detainee of the grounds on which it was made and then, after considering such representations as the detainee may wish to make in regard to such grounds, to reconsider the order previously made by him.'

With these words the court effectively abandoned detainees entirely to their fate. But is such total obeisance to the Minister's will necessary or even justified? The answer, it is respectfully submitted, must be in the negative. There is something inherently repugnant about a situation in which an official can take a decision which has the effect of depriving persons of their liberty for an indeterminate period without at any stage having to reconsider it should the detainee be able to prove that the original order was in fact unnecessary. That situation becomes more repugnant when, as might happen, new orders are issued in successive states of emergency. What the court is saying in the above passage is that a person can be detained indefinitely without ever being afforded the opportunity of presenting new material to the Minister for his reconsideration. This alone is surely sufficient for a court to conclude that a regulation which creates such a situation is 'unreasonable' in the sense in which that word was used in *Kruse v Johnson.* But if it is not prepared to go that far, it surely remains a court's duty to interpret the regulation as restrictively as its express wording and context permit. It is respectfully submitted that the majority in *Bill's* case erred in the approach which they adopted towards the interpretation of the regulation in question. Having concluded, correctly, that reg 3(3) excluded the right to a hearing prior to the decision, they then inferred from this that the regulation *impliedly* excluded that right afterwards and for all time. But, as Hoexter JA pointed out in his dissent, the correct approach was directly the opposite:

> 'The real question to be asked is whether the contrary intention is manifest. One must examine the regulations to see whether they indicate, expressly or by necessary implication, that after the ministerial order has been made the detainee is deprived of his right to be heard.' [1]

A court genuinely reluctant to attribute to the lawmaker the desire to bring about consequences as unreasonable and unjust as those spelled out by Rabie ACJ had ample scope for declining to reach the conclusion that no such intention was to be *necessarily* inferred. In its attempt to

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1 At 906D-E.

negative the contention that a detainee had a right to be given the reasons for his detention, it is submitted that the majority in *Bill's* case overlooked one aspect of the regulations which gave good reason to conclude that the Minister's decision to extend the period of detention was not, as Rabie ACJ had put it, a 'final' one. As Hoexter JA observed, an administrative decision was only to be regarded as 'final' if its subsequent revocation or variation was legally impermissible.[1] This was not the case with a ministerial order under reg 3(3). The State President had, in fact, expressly recognised that the circumstances of an individual detainee might change when he authorised the Minister to order the release of a detainee subject to such conditions as he deemed necessary.[2] Statutory provision was therefore made for the Minister to change his mind. Surely, then, if practical effect was to be given to the regulation empowering the Minister to order the release of a detainee after he had made his original decision, it had to be assumed that the *audi alteram partem* principle applied during the period of detention.[3] To decline to accept this view is to assume that the State President did not take seriously the provision authorising the Minister to order the release of detainees should their particular circumstances change. Reg 3(6) indicated at least tacitly that the State President had considered it desirable that detainees be afforded an opportunity to persuade the Minister to change his mind. This they could never do if they remained in ignorance of the reasons why the Minister had decided to detain them in the first place.[4] It is submitted, therefore, that Hoexter JA's assessment of the legal effects of reg 3(3) is correct, and that, in his words,

> 'after the Minister has in terms of reg 3(3) ordered the further detention of a detainee the latter is entitled to require the Minister to furnish him in writing with the grounds

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1 At 907A-B.

2 On this power, see 6.3 below.

3 Whether the Minister was obliged to give a hearing before releasing a detainee under restriction was considered, and decided in the negative, in *Visagie v State President* AD 1 June 1989 Case No 553/87, unreported.

4 The foregoing argument is not intended to suggest that the Minister is obliged to disclose in full the information on which his decision was based. That an administrative official is not obliged to disclose 'chapter and verse' is well recognised in our law. It would not be beyond the ingenuity of the responsible officials to ensure that such information as might disclose the identity of informants be excluded from any information which is disclosed to detainees.

> for such further detention; that the Minister is in law obliged to inform the detainee in writing of such grounds; and that the Minister is in law obliged to give due consideration to such written representations as the detainee may make in response thereto.' [1]

The last point made by Hoexter JA arose for consideration in *Sisulu v Minister of Law and Order*.[2] In that case, applicant had been detained during the emergency of 1986/7 and the Minister had ordered his detention extended at the beginning of that of 1987/8. During the former emergency, applicant's attorneys had filed a memorandum to the Minister setting forth reasons why he should be released. The memorandum was, however, never placed before the Minister because, after the renewal of the emergency, a member of his staff had considered it 'irrelevant'.[3] It was contended that the Minister's failure to consider the memorandum before he ordered the extension of applicant's detention vitiated his decision as he had based it on incomplete information.[4] The court held that the Minister was not obliged to consider the memorandum because the renewal of the detention was a fresh decision, and he was not compelled to grant a hearing before the decision was taken.[5]

5.7 Failure to apply the mind

An official upon whom a discretion has been conferred must give proper attention to relevant circumstances before acting.[6] As far as administrative acts of a legislative nature are concerned, Steyn gives the following illustration of a failure by a law-making authority to apply its mind:

> 'Indien bv 'n persoon aan wie 'n regulerende mag verleen is, 'n stel regulasies wat aan hom voorgelê word, onderteken en uitvaardig sonder om van die inhoud kennis to neem, sou sy daad geen wetgewing uitmaak nie.' [7]

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1 At 907E-F.
2 1988 (4) SA 731 (T).
3 See at 736B.
4 At 736C.
5 At 737A-C, relying on *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) at 900H-J. In *Minister of Law and Order v Swart* 1989 (2) SA 295 (A) the Appellate Division upheld an order releasing a detainee on the ground that he had never been informed that he was being held under the emergency regulations. In *Minister of Law and Order v Parker* 1989 (2) SA 633 (A), however, the court held that the detainee could have inferred from the circumstanes of his arrest (he was caught red-handed printing 'subversive' pamphlets) that he was being detained under the emergency regulations (see also *Suttner v State President* TPD 5 August 1986 Case Nos 13500/86 and 13501/86, unreported).
6 See *Shidiack v Union Government* 1912 AD 642 at 651-52, cited at 3.3 above.
7 Steyn *Uitleg* at 214 *in fine*.

Such abdication by the repository of the duty to exercise the discretion entrusted to him would, of course, be a classic instance of 'failure to apply the mind'. The unconsidered execution of an act cannot by any stretch of the imagination be said to result from a *decision*. And the main characteristic of a discretionary power, as opposed to a purely mechanical one, is that the repository should make a conscious decision — ie weigh alternatives and take into account appropriate factors — before acting. Instances of failure to apply the mind of the kind illustrated by Steyn's example would, in practice, be difficult if not impossible to prove. In the case of emergency regulations, in particular, it is almost inconceivable that any applicant would be in a position to produce evidence of the degree of attention paid by the State President to the drafts of regulations placed before him for signature.

In the case of subordinate legislation, however, the courts have on occasion been prepared to extend this ground of review to the point where they will apply it, not only if there is evidence that the repository took into account irrelevant or extraneous factors, but if the result of the act — ie the content of the regulation — shows that he has not considered the matter *properly*. As Baxter has shown, failure to apply the mind has in practice become a general ground for review relating to most forms of abuse of discretion.[1] In other words, this ground can be invoked not only in cases of complete abdication of discretion, but also when the repository of a discretionary power has not understood the limits — both express and implied — of his statutory authority. One might say that the legal basis of the striking down of a regulation on the ground that the subordinate lawmaker has not properly applied his mind to the matter is that he has failed to adhere to certain minimum standards of rationality in reaching his decision. Since these minimum standards are ultimately determined by the courts, they offer considerable scope for rigorous scrutiny of the exercise of his discretion by the State President.[2] In practice, however, this ground of review is normally invoked in an attempt to expose defects in the reasoning process of the legislative authority. It is therefore normally confined to those cases in which the repository of the power has stated the reasons which induced him to draft a particular regulation in a particular way.

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1 See Baxter *Administrative Law* at 476- 7. Professor Baxter does not discuss this ground as such in his work, but includes it in his general discussion of unreasonableness. Wiechers, too, states that the requirement that an administrative organ must apply its mind to the matter means that 'the organ must ensure that all the requirements for validity are met' (see Wiechers *Administrative Law* at 296-7).

2 Andre Rabie, 'Failure of the Brakes of Justice: *Omar v Minister of Law and Order* 1987 (3) SA 859 (A)' 1987 (3) *SAJHR* 300 at 304.

The courts' power to set aside regulations on the ground of failure by the repository to apply his mind is not eliminated by the conferment of legislative authority in wide and subjective terms [1] or by an ouster clause. Parliament, after all, must be taken to intend that *all* discretionary powers conferred by it be used rationally.

The Appellate Division has affirmed that regulations of the State President may be set aside if it can be shown that he 'failed to apply his mind'. [2] Yet this plea has not often been relied on by those seeking to challenge emergency regulations, probably because the State President rarely informs the courts of his reasons for framing a particular regulation. In the few cases in which the ground was relied upon, it has failed to evoke much positive response from the bench. For an assessment of how it has been treated we must return again to cases involving the regulation authorising the Minister to extend the period of detention of people arrested and held by the security forces.

That the State President had failed to apply his mind and misdirected himself in making this regulation was one of the two grounds of attack by applicants in *Omar v Minister of Law and Order*.[3] Reliance was placed on a passage in an affidavit in which the State President had sought to justify the exclusion of the *audi alteram partem* rule. The State President averred that he was satisfied that *in particular cases* circumstances might exist which made it necessary to extend a person's detention without affording him a hearing. The primary consideration, he said, was that to accord a detainee a hearing might result in the source of the information upon which the decision to detain was based being disclosed to him.[4] It was argued that the State President had hereby acknowledged that it was not in all cases necessary to exclude the rules of natural justice. There were cases, such as those of mistaken identity or where a person had been detained for his own safety, in which the exclusion of a hearing could not be justified on the basis that the source of the information could be endangered. The State President, so it was argued, had failed to apply his mind to the circumstances of such detainees. It was further submitted that there was in fact no reason why the source of the information on which the decision

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1 See *Shidiack of Union Government* 1912 AD 642 at 651-2 and *Visagie v State President* AD 1 June 1989 Case No 553/87, unreported.

2 See *Omar/Fani v Minister of Law and Order, State President v Bill* 1987 (3) SA 859 (A) at 892 G-H; *Staatspresident v United Democratic Front* 1988 (4) SA 859 (A).

3 1986 (3) SA 306 (C).

4 At 315F-G.

had been based should be released to a detainee held for his own safety, where there were no grounds for supposing that his safety would be endangered thereby. [1]

The majority of the court *a quo* in *Omar* rejected both points. While the State President might have made a general rule to cover particular instances in which it was considered possible that disclosure of information might be undesirable for the reason stated, this did not mean that he had not properly applied his mind. In the words of Vivier J:

> 'If the State President decided, after considering the matter, that because there may be cases where a denial of the right of hearing would be necessary, and that the *audi alteram partem* rule should therefore be excluded altogether *as a matter of policy*, it cannot, in my view, be said that he either exceeded his power or that he failed to apply his mind to the matter.' [2]

The argument received shorter shrift on appeal,[3] Rabie ACJ holding that the State President

> 'could reasonably have thought...that in view of the emergency situation seen as a whole it would be advisable to authorise the Minister to exclude the rule in all cases, ie whenever the Minister considered that it should be done.' [4]

While Rabie ACJ accepted that a hearing would not necessarily result in the disclosure of the sources of information, he accepted that the State President was within his powers when he made a regulation which 'was designed to avoid *all* danger of the disclosure of potentially harmful information'.[5]

It is submitted that the court *a quo* erred in allowing the State President to shelter behind the fact that he had purported to lay down a general policy. That he had framed a regulation in such sweeping terms as to ignore possible injustice to certain categories of detainees was, after all, the principal objection to the regulation. As counsel argued on appeal:

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1 See 315G-I and argument by counsel on appeal 1987 (3) SA 859 (A) 867C-E.
2 At 316A-B. Emphasis added.
3 1987 (3) SA 859 (A).
4 At 894C.
5 At 894E-F. Emphasis added.

> 'He [the State President] has made a rule out of a possible exception instead of acknowledging the basic right to a hearing and providing for possible exceptions or limitations to the rule.' [1]

Had he properly exercised his mind, the State President would surely have considered the effect of total exclusion of the right to a hearing on those detainees to whom disclosure of sources of information could not possibly result in any adverse consequence. And the regulations which he framed should have catered specifically for the exceptional cases in which harm could be expected from full disclosure.[2] The Appellate Division's view that the State President was empowered to 'avoid all danger' by adopting the most drastic course of action possible comes close to a blanket judicial endorsement for the making of emergency legislation which is not only unreasonable in effect, but also the result of defective reasoning.

That it was possible to subject the reasoning process of the legislative authority to more rigorous scrutiny than was done by both courts in *Omar* emerges from the dissenting judgment of Friedman J in the court *a quo*. The learned judge pointed out that it was implicit in the State President's affidavit that the considerations he had cited for the general denial of a hearing did not apply to all detainees, and observed:

> 'To make a regulation which deprives all detainees of the right to be heard before the Minister makes an order for their further detention, when such a procedure may be necessary in the case of only certain detainees, is...indicative of the fact that the State President has not correctly applied his mind to the question of whether *audi alteram partem* should, in all, and not merely in exceptional cases, be abolished.'[3]

The State President's contention that a hearing could result in disclosure of the sources of information also indicated a fatal misconception on his part. Freidman J accordingly concluded that, although the State President had stated that his affidavit did not contain all the reasons which he had taken into account in framing the regulation, those reasons which he had given indicated that he had applied incorrect principles which were material to his decision. They were enough to warrant the conclusion that he had failed to apply his mind.[4]

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1 At 867F- G.

2 Such regulations should not be beyond the ingenuity of any careful draftsman. The regulations could, for example, have obliged the Minister to afford a hearing except in those cases where disclosure of information could reasonably be regarded as prejudicial.

3 At 329I.

4 At 330D-E.

The regulation and rule prohibiting unauthorised access by legal advisers to detainees was also attacked in *Omar v Minister of Law and Order* [1] on the ground that the State President had failed properly to apply his mind before making it. The reasons given by the State President for making these provisions were contained in the following passage from his affidavit:

> 'Die omstandighede wat dit noodsaaklik gemaak het om 'n noodtoestand af te kondig bring egter na my mening mee dat dit nodig en raadsaam mag wees om onder gegewe omstandighede 'n spesifieke aangehoudene nie toe te laat om in aanraaking te kom met persone buite die plek van aanhouding nie.
>
> 'Daar is persone buite die plekke waar aangehoudenes aangehou word, wat die openbare orde wil versteur, wat die veiligheid van die publiek bedreig en wat die omstandighede wat dit noodsaaklik gemaak het om 'n noodtoestand te verklaar, wil laat voortduur en vererger en dus die beëindiging van 'n noodtoestand wil teenwerk.
>
> 'Gevolglik mag dit die veiligheid van die publiek, die handhawing van die openbare orde en die beëindiging van die noodtoestand bevorder as 'n besondere aangehoudene onder gegewe omstandighede nie toegelaat word om kontak te hê met sodanige persone buite die gevangenis nie.'

Contact between a detainee and such persons could in the State President's view occur through a legal adviser or private medical practitioner. The question whether a person should have contact with the outside world could thus only be decided with reference to the specific detainee's participation and role in the turbulence and violence which had occurred or could be anticipated.[2]

Once again, the State President had made a general rule to cover specific cases. More important, so it was argued, the failure by the State President to consider the 'whole spectrum of conditions ranging from restrictions on physical contact, to some form of supervising consultations, and to the making of even more onerous stipulations in the case of particular individuals' indicated that the State President had failed properly to apply his mind to the possible results of the general regulation which he had made.[3] Apart from the fact that detainees — including those who were being held merely for their own safety — might urgently require access to legal advisers for reasons unconnected with the emergency,[4] a regulation which rendered access to legal advisers dependent on official permission placed before detainees an insoluble conun-

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1 1987 (3) SA 859 (A).
2 The full text of the relevant part of the affidavit is cited at 895E-I.
3 At 897D-E.
4 Which is the reason the regulation was declared *ultra vires* in *Metal and Allied Workers Union v State President* 1986 (4) SA 358 (D) at 373 *et seq.*

drum. For how could they attack a refusal of permission to consult a lawyer without access to legal advice?

Rabie ACJ was unwilling to enter into such speculative possibilities. In reply to the contention that detainees might be refused access to lawyers for reasons unrelated to the state of emergency, he was content with giving the sanguine reassurance that it was 'not to be supposed that the Minister or Commissioner of Police may, or will, refuse leave for the necessary access on just any ground whatsoever'. The rule governing access to detainees implied, said his lordship, that leave for access to a detainee could only be granted or refused on 'grounds related to the emergency'.[1] This may be so. But one wonders whether it would not have been preferable for the court to insist that a subordinate legislative authority should spell out in more precise terms the grounds on which access could be refused. Rabie ACJ was unmoved by the practical difficulties which could confront a detainee or his legal advisor were the authorities to refuse access. Even though such refusal would itself be subject to judicial attack, the chances are that any such challenge would be met with a bland statement that refusal was considered 'necessary for the safety of the public, the maintenance of law and order, or the termination of the emergency'.[2] It is not a court's function to reassure the public that the repositories of drastic executive powers will act responsibly, but rather to ensure that subordinate legislation which confers such powers is, as far as possible, so framed as to preclude or minimise the possibility of abuse.

Rabie ACJ was even less willing to examine the possibility that the State President might, had he properly applied his mind, have considered options less drastic than authorising his subordinates totally to eliminate a detainee's right to consult his lawyer. Such alternatives, said his lordship, 'may, or may not have been, feasible. I do not know'. The learned Acting Chief Justice added:

> 'It may even have been that the State President and the Minister of Justice considered [alternative] measures of the kind suggested but decided against them on the ground that they would be impracticable.'[3]

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1 At 896H-J.

2 Which, on the basis of his lordship's judgment in *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A), would be sufficient for the Minister to discharge the onus for justifying a refusal (see 3.4 above).

3 At 897E-F.

It may well have been. The fact is, however, that nothing in the State President's affidavit disclosed that the State President or the Minister had considered alternatives. And it was precisely because of the State President's failure to disclose that he had considered alternative less drastic steps that the court was invited to decide whether he had properly applied his mind. In response, the court simply accepted the reasons given by the State President without any critical analysis whatever.

The attacks on the State President's emergency regulations which have so far been considered in this section have all sought to rely on alleged defects in the reasons provided for the provisions concerned. It is also possible to deduce from the nature of the regulations themselves whether the State President had applied his mind to their formulation. As Van Heerden JA recognised in his dissenting judgment in *Staatspresident v United Democratic Front*,[1] regulations which were vague or purposeless indicated that the State President could not have paid proper attention to their making.[2] In fact, as the learned judge pointed out, the rule against the making of vague subordinate legislation was merely part of the general principle that the subordinate legislative authority must properly apply its mind when exercising its powers.[3] This view was accepted and applied by the court in *Visagie v State President*,[4] in which a restriction order imposed by the Minister on a detainee (a form of quasi-legislation) was struck down on the basis that it was so vague and unreasonable that it indicated that the Minister had not properly applied his mind.[5]

5.8 Procedural requirements

As in the case of any subordinate legislation, emergency regulations promulgated by the State President in terms of s 3(1)(a) or the Minister of Law and Order in terms of s 5A (4) of the Public Safety Act can be set aside by a court if either fails to comply with the procedural requirements laid down by the Act. For an instrument which confers such vast powers, the Public Safety Act is remarkably sparing with regard to procedural matters. The only requirements with which the State President and the Minister are expressly enjoined to conform relate to the man-

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1 1988 (4) SA 830 (A).
2 At 859I-J.
3 This point becomes of great importance in view of the authoritative ruling that an ouster clause precludes review on the ground of vagueness: see 3.2 above.
4 AD 1 June 1988 Case No 553/87, unreported.
5 At 33 of the unreported judgment. The court refused, however, to take into account the considerations on which the Minister had relied as a basis for deciding whether he had applied his mind. This aspect of the judgment is discussed at 6.3 below.

ner of publication of regulations, the tabling of such regulations in the respective houses of parliament, and the time in which such regulations may be promulgated. These requirements will now be considered in turn.

5.8.1 The manner of publication

The Act requires that regulations made by the State President be published in the *Government Gazette.*[1] This means that a 'regulation' published in any other medium will be of no force and effect, unless the State President has invoked the power conferred on him by s 16A of the Interpretation Act [2] to make alternative rules for the method of promulgation where he is satisfied that publication in the *Gazette* is either impossible or will be seriously delayed due to circumstances beyond the control of the Government Printer. Regulations published in the *Gazette* acquire the force of law from the moment of publication, and all persons are presumed to know of their contents from that moment.

As we have seen, the State President and the Minister are authorised to delegate emergency powers to officials or bodies specified by them. The Public Safety Act is silent on the publication requirements of legislation issued by such specified bodies. It may be assumed, however, that they must adhere to their normal mode of publication, where there is one. Thus emergency by-laws issued by a local authority must be published in the manner in which it normally publishes by-laws. If the body or official to whom legislative power is delegated by the State President or the Minister does not have an established method of publishing legislation, however, it is normal practice for the State President or the Minister to specify the manner of publication. Where this is done, the subordinate legislative authority is legally bound to use the prescribed method of publication.

Natal Newspapers v State President [3] affords the only reported example of an emergency decree being set aside for want of compliance with a prescribed mode of publication. The order in question, issued by the Commissioner of Police under reg 7(1)(c) of the 1986 emergency regulations,[4] prohibited the unauthorised presence of any journalist, for the purpose of reporting, in any 'black' area in which unrest was occurring.[5] Reg 8 required promulgation by publi-

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1 Section 3(1)(a).
2 Act 33 of 1957.
3 1986 (4) SA 110 (N).
4 Proc R109 of 1986.
5 For the contents of the order see the *Eastern Province Herald* 17 June 1986.

cation in the *Government Gazette*, or by means of radio, television or a newspaper circulating in the area in respect of which the order applied, by affixing copies of the order on public buildings or in prominent public places in the area, or by 'oral announcement to any particular person, or to members of the public in general, in the area concerned in a manner deemed fit by the Commissioner'. *In casu*, the Commissioner had 'promulgated' the order by means of telex messages sent to the head offices of the country's two major newspaper companies. The court declared the order invalid on the ground that the Commissioner had not complied with the publication procedure laid down by the State President.[1]

5.8.2 Tabling requirements

Section 3(5) of the Public Safety Act[2] provides:

> 'Any regulation made under subsection (1) shall be laid on the tables of the respective Houses of Parliament within fourteen days after promulgation thereof if Parliament is then in ordinary session, and if Parliament is not then in ordinary session, within fourteen days after the commencement of the next ensuing ordinary session.' [3]

The original version of the Public Safety Act provided that the regulations would lapse if parliament had not during the same session as they had been tabled *approved* of them by resolution. Any regulation which had not been so approved would lapse either from the date of the disapproving resolution or after they had lain on the tables unapproved for 28 days, whichever

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1 It pointed out in addition that in any event the telex messages were fatally defective because one omitted 12 words of the original order and the other, apart from containing the same omission, reproduced part of the authentic order 'out of syntax and in a confused manner' (at 1128G- I).

2 As amended by Act 67 of 1986.

3 This section echoes the general tabling requirement laid down by s 17 of the Interpretation Act 33 of 1957. A further requirement that the regulations should remain on the tables for 28 days was repealed in the 1986 amendment to the Public Safety Act (Act 76 of 1986).

event occurred first.[1] In terms of the 1986 amendment,[2] however, a regulation will only lapse if it is *disapproved* by resolution. The current regulation 3(6)(a) reads:

> 'A regulation referred to in subsection (5) or any provision thereof may be annulled by Parliament by resolution passed during the same session during which it was tabled, and if the regulation or provision thereof has been so annulled, that regulation or provision thereof shall cease to be of force and effect from the date on which it was annulled by the last of the three Houses of Parliament.' [3]

It is apparent from these provisions that parliament, when enacting the Public Safety Act, intended to ensure that it would remain in a position to oversee and scrutinise the manner in which the vast legislative powers it had conferred on the executive were exercised.[4] A discussion of the effectiveness of such parliamentary control falls outside the scope of this work.[5] Of relevance here, however, is the question whether failure by the State President to table his regulations before the lapse of the 14-day limit set in s 3(5) means that they thereafter cease to be of legal force.

This question arose in two cases turning on the 1986 emergency regulations, *Metal and Allied Workers Union v State President* [6] and *Bloem v State President,*[7] which were heard and decided without reference to each other. The factual background to both cases was as follows. The State President had declared a state of emergency and promulgated a set of regulations on 12 June 1986. Two houses of the tricameral parliament then adjourned 12 days later on 24 June, the third following suit the next day. It was announced at the time that parliament would reassemble on 18 August of the same year for a special sitting. According to the State President the adjournment entitled him to table the regulations 14 days after the date on which parliament reassembled. Counsel for applicants in the *Metal and Allied Workers Union* and *Bloem* cases

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1 See s 3 (6)(a) of the original Act 3 of 1953.

2 Section 3(c) of Act 67 of 1986.

3 The Act provides, however, that any such annulment will not affect any right, privilege, obligation or liability acquired, accrued or incurred under the regulation prior to its annulment (see s 3(6)(b)). This presumably means, *inter alia*, that subsequent annulment cannot be taken into account in any criminal prosecution launched against a person for a breach of the regulation prior to its annulment. Annulment will also not presumably render the state liable for any harm which might have been caused by actions taken in terms of the regulation.

4 On the function of tabling see Wiechers *Verloren van Themaat: Staatsreg* at 250.

5 On parliamentary control of emergency legislation in Britain, see Bonner *Emergency Powers* at 37-50. No study has been undertaken of this aspect of the control of emergency powers in South Africa. But it may be mentioned that, to the writer's knowledge, no regulation made by the State President or Governor-General during any emergency in South Africa has been annulled by parliament.

6 1986 (4) SA 358 (D).

7 1986 (4) SA 1064 (O).

took the point, however, that parliament, although ceasing physically to sit on 24 or 25 June, nevertheless remained 'in ordinary session'. This meant that the tabling period continued to run after the adjournment of the houses and, reckoned in the normal way from the date of proclamation, expired on 26 June.

The courts had therefore to decide, first, whether parliament, though temporarily not sitting in a physical sense, could nevertheless be said to be 'in ordinary session' during the adjournment, and if so whether non- compliance with the tabling requirements meant that the regulations lapsed on 26 June. In the *Metal and Allied Workers Union* case, the court did not consider it necessary to inquire into the first question in the light of its answer to the second. In *Bloem*, however, M T Steyn J went into the first question in some detail. The learned judge pointed out that 'tabling', according to the procedures currently used by parliament, was possible only when parliament was *actually sitting* and its members physically present.[1] The 14 days mentioned in s 17 of the Interpretation Act [2] therefore must have referred to days on which the required tabling could be physically effected. This meant that the computing of the period of 14 days had to be done in consonance with the procedure adopted by parliament, into the validity of which the court was precluded from inquiring by s 34(2)(b) of the Republic of South Africa Constitution Act.[3] Even if the sittings prior to and after the adjournment were to be regarded as forming parts of a single session, therefore, the only days which could be taken into account for purposes of establishing the deadline for tabling were those on which the respective houses were *actually sitting*.[4] Days during which the houses were adjourned had therefore to be disregarded. *In casu*, therefore, the fourteenth possible day was August 18, the day on which parliament was due to reassemble and on which the State President had stated that the regulations would be tabled. The regulations therefore remained of full force until that date.[5]

Given the peculiarity of these facts, the aspect of *Bloem* and the *Metal and Allied Workers Union* case outlined in the foregoing paragraph is probably of mere historical interest. But both courts also dealt with a question of more general importance: does failure to comply with the tabling requirement result in the automatic lapsing of the regulations after the stipulated period of 14 days? Prior to the 1986 amendments to the Public Safety Act, the answer to this question

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1 At 1084H.
2 It is not clear why the *Bloem* court chose to measure the tabling requirements against s 17 rather than the provisions of s 5(3) of the Public Safety Act.
3 Act 110 of 1983.
4 See at 1088E-G.
5 See 1079I-1085D.

was certainly in the affirmative; the original version of s 3(6)(a) expressly stated that regulations which were not positively endorsed within 28 days of their tabling would cease to be of force and effect. Provision was thus made for lapsing of the regulations by the mere efflux of time. In the new s 3(6)(a), however, parliament chose to remain silent on the effect of non- tabling, and expressly allowed for only one means of annulment, namely, a positive resolution to that effect by parliament. The answer to the question posed above depends, therefore, on whether the new sub-section is to be regarded as mandatory or merely directory, a matter notoriously difficult to establish where the legislature, as in the present case, had failed expressly to stipulate the consequences of non-compliance.[1]

One factor that might persuade a court that a statutory procedural provision was intended to be mandatory — meaning that non-compliance would result in invalidity — is the wording of the provision itself. The use of the imperative 'shall' is, for example, *prima facie* an indication that the provision is meant to be mandatory.[2] This presumption is, however, rebutted by other contra- *indicia*. The courts in both the *Metal and Allied Workers Union* case and *Bloem*, for example, attached much importance to the availability of methods — ie a writ of mandamus or a resolution of parliament itself — of forcing the State President or the Minister to table regulations where they had failed or refused to do so.[3]

In the *Metal and Allied Workers Union* case, the court concluded that s 3(5) was intended for the benefit only of members of parliament, and that it was accordingly for them alone to enforce compliance. Members were, however, free to decline to do so if they did not wish to avail themselves of the opportunity of moving a resolution for annulment. The court was unable to accept that parliament could have intended that regulations should lapse automatically even when it was plain that none of its members wished to move for their annulment.[4] In *Bloem*, the

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1 On the various tests used for establishing whether a statute is peremptory or merely directory see, generally: Steyn *Uitleg* at 192-203; Du Plessis *The Interpretation of Statutes* at 143-9; Cockram *The Interpretation of Statutes* at 158-68. Leading cases are *Sutter v Scheepers* 1932 AD 165 and *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (A).

2 See eg *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 709H.

3 *Metal and Allied Workers Union* case at 363A-G; *Bloem* at 1089B-C.

4 See at 363I-364B.

court relied heavily on *R v Daniels*[1] in which it was held that non-compliance with the tabling provisions of a provincial ordinance [2] was not fatal to regulations made by the Administrator.[3] In addition, MT Steyn J noted in *Bloem* that s 3(5) of the Public Safety Act carried no sanction for non-complaince and was couched in positive form. It is, however, with respect hard to imagine how a tabling provision could be couched in negative form (by which is normally meant the phrase 'no person shall') or what kind of sanction, other than invalidity, the legislature could impose on the State President or the Minister for non- compliance. The learned judge also considered 'the circumstances under which the state of emergency had been declared and the emergency regulations promulgated' as well as 'the countrywide serious consequences' of the regulations being declared invalid as additional factors pointing to the conclusion that the tabling requirements were intended to be merely directory.[4]

It may be asked, however, whether more weight should be attached to the requirements of s 3(5) than was accorded them in the *Metal and Allied Workers Union* and *Bloem* cases. As was pointed out in the former judgment, the remedy of a mandamus may be protracted, especially if an appeal is noted.[5] It may well turn out to be the case that a writ is issued only after the emergency has itself lapsed through the passage of time. Moreover, the consequences of automatic lapsing as a result of non-compliance with the tabling procedure to which the court pointed in *Bloem* are not, it is submitted, a consideration which should properly be taken into account. It may well be that parliament intended such consequences to be an important inducement to the State President and the Minister to comply with the procedures laid down.

There are also considerations other than the availability of alternative remedies which may lend some weight to the view that s 3(5) should be construed as mandatory. Not the least of these are the lengths to which parliament has gone to remove judicial checks on the exercise of emergency powers. Section 3(6) provides the only method by which emergency laws may be controlled by the country's elected representatives. If this can be frustrated by evasion or avoidance of the tabling procedure, none is left to them. It may well be that, as the court pointed out in the *Metal*

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1 1936 CPD 331.
2 Section 12 of Ordinance 4 of 1911 (C).
3 In *Daniels* case *supra*, the court expressed the view that if the Administrator's regulations were to lapse merely because of non-compliance with a tabling requirement, the law 'would be left in a complete state of uncertainty because nobody would know on what date such regulations ceased to have validity'. This was because the laying of regulations upon the table of the Provincial Council was not a public act, and few people were even aware of it.
4 At 1091B-C.
5 See 363F-G.

and Allied Workers Union case, the tabling provisions were intended to be for the benefit of members of parliament alone. But it must be remembered that members exercise their functions on behalf of the wider public. When the State President has declared an emergency, one of these functions is to scrutinise decrees which encroach far into the normal rights of the citizen. Finally, it may be noted that the cases cited in *Daniels*, which was accepted by the *Bloem* court as entirely in point as far as the tabling requirements of the Public Safety Act were concerned, were in the main concerned with statutory provisions imposing obligations on private individuals.[1] The tabling requirement in the Public Safety Act is not imposed on a private individual, but on officials to whom the most drastic powers available in peacetime have been conferred.

It may also be noted in the present context that there is one further tabling requirement mentioned in the Public Safety Act. This provides that when any person is held for longer than 30 days in terms of a regulation providing for summary arrest and detention, the Minister of Law and Order shall table his name in the respective houses of parliament within 14 days of the expiration of such period of 30 days, or, if parliament is not then in session, within 14 days of the beginning of the next session.[2] The reasoning in the *Bloem* and *Metal and Allied Workers Union* cases would appear to apply to this provision. However, for the reasons already given, it is submitted that non-compliance with this tabling requirement should render unlawful the subsequent period of detention.

5.8.3 Timing of promulgation

A further requirement of section 3(1)(a) of the Public Safety Act is that the State President may only promulgate regulations once a state of emergency has been properly declared under s 2. Should he purport to issue regulations before the declaration of a state of emergency, they would clearly be invalid, even if a state of emergency was declared later. But what if the proclamation of the state of emergency and the promulgation of emergency regulations occur simultaneously? It has been argued in a number of cases that simultaneous proclamation of the emergency and of regulations is impermissible because of the grammatical construction of s 3(1)(a) which, in the English version, authorises the State President to make regulations 'in any

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1 *Sutter v Scheepers* 1932 AD 165, for example, dealt with a provision laying down requirements for the attestation of a notorial bond (s 6 of Act 13 of 1918).

2 Sections 4 and 7. Section 7 provides for the tabling of the names of persons detained in terms of a regulation made by the Minister of Law and Order for an 'unrest area'.

area in which a state of emergency *has been* declared'.[1] These words, so the argument typically went, indicate unambiguously that the declaration must precede the proclamation of regulations and not occur at the same time. If the State President signed the proclamation declaring the state of emergency and that setting forth the regulations on the same day, both could be deemed, in terms of the provisions of s 13(2) of the Interpretation Act,[2] to have come into operation immediately after the expiration of the previous day. Or, to put an even finer point on it, the regulations could be deemed to have been 'made' the day before the state of emergency came into existence, since the regulations could be regarded as having been made when they were *signed*, while the state of emergency was declared on the date on which it was *proclaimed*, this usually being the day after signature. It follows, according to both of these arguments, that the jurisdictional precondition for the making of emergency regulations (ie the declaration of a state of emergency) is lacking where the regulations and the emergency are proclaimed simultaneously.

These points were not sympathetically received by the courts in which they were raised. In *Nkwinti v Commissioner of Police*,[3] the court simply accepted that the state of emergency and the regulations came into effect simultaneously and that, as a matter of logic, when the regulations were made, the state of emergency existed.[4] And in the *Metal and Allied Workers Union v State President*[5] Didcott J observed that had the regulations been promulgated 5 seconds after the declaration of the emergency, the effects on the rights of the subject would have been no less severe than where they were promulgated simultaneously with the declaration. The learned judge could accordingly find no reason to interpret the timing requirement in s 3(1)(a) in a way favouring the liberty of the individual.

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1 The Afrikaans version uses the expression 'waneer 'n noodtoestand *verklaar is*'.
2 Act 33 of 1957.
3 1986 (2) SA 421 (E).
4 At 430F.
5 1986 (4) SA 358 (D).

6: Administrative Action

6.1 Introduction

One of the characteristics of emergency rule is the delegation to officials on all rungs of the administrative hierarchy of far-reaching and even dictatorial powers.[1] States of emergency in South Africa are no exception. The execution by subordinate officials of powers conferred on them by presidential regulations represents the final stage in the deployment of the latent powers embodied in the Public Safety Act. We now examine some of the legal issues raised by administrative and police action performed pursuant to regulations promulgated by the State President under s 3(1)(a). The main forms of administrative power are dealt with *seriatim*.

6.2 Arrest and Detention

Summary arrest and detention without trial is typically associated with emergency rule, and is justified by the need or perceived need to remove trouble-makers from public life, or to elicit information urgently needed for the prevention of anticipated acts of violence. Such objectives may be defensible under conditions of real crisis. But the power to detain without trial lends itself to abuse. The principal dangers are that the security forces might be tempted to use it indiscriminately, without consideration of less drastic alternatives, and against people whose only 'crime' was to hold and propagate ideas with which the authorities happened to disagree. Of all emergency powers, therefore, that of detention is the one needing most careful control.

In South Africa, detention without trial forms part of the 'ordinary law'. In terms of the Internal Security Act,[2] the Minister of Law and Order may detain any person indefinitely on vague grounds which are determined subjectively,[3] and any commissioned police officer of or above the rank of lieutenant-colonel may order the arrest without warrant and detention of any person he has reason to believe has committed certain specified offences or is witholding any information relating to the commission or planned commission of such offences.[4] Persons arrested under the last-mentioned provision may be held until such time as the Commissioner of Police

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1 See 1.3 above.
2 Act 72 of 1982.
3 Section 28.
4 Section 29(1).

is satisfied they have satisfactorily answered all questions or that no purpose will be served by further detention.[1] In terms of a 1986 amendment to the Internal Security Act, any police officer of or above the rank of warrant officer who is of the opinion that the arrest and detention of any person will help combat, prevent or terminate civil unrest may hold such person for up to 48 hours, after which a commissioned officer of or above the rank of lieutenant-colonel may order his further detention for up to 180 days.[2]

These permanent statutory provisions notwithstanding, in all states of emergency thus far declared in South Africa the security forces been given additional power to detain people without trial — a power which they have not hesitated to deploy on a massive scale against opponents and suspected opponents of the existing system.[3]

6.2.1 The Emergency Detention Provisions

Detention without trial is the only form of emergency action which is expressly recognised in the Public Safety Act.[4] The Act does not, however, prescribe the form in which this power is to be conferred.

The regulations of the emergency of 1960[5] contained two provisions authorising summary arrest and detention. The first empowered the Minister, magistrates or commissioned police officers to order the arrest of any person whose detention was, in their opinion, 'desirable in the

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1 Section 29(3).

2 Section 50A. This provision was clearly introduced to avoid the effect of *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A), in which the Appellate Division held that the reasons for the arrest of s 29 detainees were objectively justiciable. Professor Mathews has expressed the view that the new s 50A was specially adopted to 'abolish any effective safe-guards and controls over the exercise of the power to detain' (see Mathews *Freedom* at 78).

3 During the state of emergency in 1960, an estimated 11 503 people were held for varying periods under emergency regulations (*1960 Annual Survey of Race Relations* at 45). In February 1987, the Minister of Law and Order tabled the names of 3 875 persons detained under the emergency regulations, 1 388 of whom were under the age of 18 years. In the same period, 3 989 people were detained under the Internal Security Act 74 of 1982. The Detainees' Parents' Support Committee (DPSC) claimed that at least 5 000 were detained during this period, and further estimated that from June to December 1987 about 25 000 people were detained. For statistics on detention see the *Annual Survey of Race Relations* for 1986 at 822-4 and for 1987/88 at 535-9.

4 In the provisions (ss 4 and 7) requiring the tabling in parliament of the names of persons held for a certain period (on which see 5.8.2 above).

5 Proc 139 of 1960.

interest of the public order or safety or of that person or for the termination of the state of emergency'.[1] Although no time limit was placed on the period a person could be detained under this provision, the regulations also empowered the Minister of Justice to extend the period of detention for as long as he deemed fit.[2] In addition, magistrates were bound to commit any person so detained who was not in possession of a reference book or was without work or illegally resident in the area in which he was arrested to an institution designated by the Commissioner of Police, upon which he became a prisoner for purposes of the Prisons Act.[3]

The detention provisions of the 1980s differed from their predecessor in several important respects. First, the power to arrest and detain for a limited period — to begin with 14 days, later 30 — was extended to the lowest rungs of the security hierarchy.[4] A written order signed by any member of the security forces was also required before an arrested person could be committed for the initial period of detention. While the provisions governing arrest and detention by members of the security forces in the emergencies after 1985 were framed in subjective terms, they set the mental requirements somewhat higher than those of 1960 by stipulating that an arresting officer should be of the opinion that the arrested person's detention was *necessary*, rather than merely 'desirable', for the maintenance of public order or the safety of the public or the person himself,[5] or the termination of the emergency. The regulations further required that after the initial period of detention at the behest of a member of the security establishment, the Minister of Law and Order had to issue a written notice, directed to the officer in charge of the prison in which the detaineee was being held, authorising further detention for the period mentioned in the notice or for as long as the regulations remained in force. Absent such an order, detention for longer than the initial period would be unlawful, subject of course to the proviso that there was nothing in the regulations to prevent the detainee immediately being arrested again after his release. The Minister was not given any statutory direction as to the matters on which he had to be satisfied before ordering the further detention of a person, and, after 1985,

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1 Reg 4(1).
2 Reg 4(2).
3 Reg 4 *bis*, introduced by Proc 139 of 1960. This remarkable provision is discussed at 5.3 above.
4 The regulations now conferred the power to detain on '*any* member of a Force', 'Force' being so defined as to include municipal policemen.
5 The latter ground was removed from the regulations after 1987, presumably in response to the dissenting judgment of Hoexter JA in *Omar v Minister of Law and Order* 1987 (3) SA 859 (A), in which his lordship objected to the elimination of the *audi alteram partem* rule on the basis that it was indefensible to deny a hearing to detainees held for their own safety (see 5.3 above).

he was expressly authorised to do so without notice to and without hearing the person concerned.[1]

6.2.2 The Interdictum de Libero Homine ad Exhibendo

A person detained under these awesome provisions may seek the assistance of the court by way of an application for an interdict *de libero homine ad exhibendo*, in terms of which the courts can order a detained person's release unless the authority who is responsible for the detention can show that there is lawful cause for continuing to deprive the applicant of his liberty.[2] The interdict is based on the assumption that any deprivation of a person's liberty is *prima facie* unlawful.[3] The onus of proving that the arrest and detention was and remains lawful is therefore on the detaining authority.[4] In the case of arrests and detentions purportedly affected under statutory authorisation, this entails showing that the repository has acted *intra vires* the enabling provision. If he has not, the arrest is unlawful and the applicant is entitled to his liberty.

Thus the theory. In practice, however, the task of challenging a detention under the above emergency powers is a complex and formidable one. This is so not only because of the breadth and subjective nature of the discretion conferred, which according to the prevailing theory renders the exercise of the discretion unchallengable on the merits, but also because, in the case of the latest detention provisions, the detainee whose detention has been authorised by the Minister has not one, but two, formidable hurdles to overcome — first, the averment by the arresting officer that he was indeed of the opinion that the detention was necessary for one of the purposes specified in the regulation; second, and potentially more problematic, the Minister's declaration that he was of the required opinion.[5] We deal first with the legal issues raised by the initial arrest and detention.

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1 The issues raised by the elimination of the *audi alteram partem* rule are discussed at 5.3 above.

2 See *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) at 309.

3 *Swart v Minister of Law and Order* 1987 (4) SA 452 (C) at 455I.

4 *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714 F-H; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 586J-589G. But see *Minister of Law and Order v Dempsey* 1988 (4) SA 19 (A), discussed at 6.2.6 below. In *Radebe v Minister of Law and Order* 1987(1) SA 586 (W), however, the court held that the effect of the indemnity clause (*in casu* reg 16(4) of Proc R 109 of 1986, on which see 3.7 above) had the effect of transferring the onus to the applicant (see at 591D-H). This approach has not been followed (see 6.2.6 below).

5 See Grogan 'Judicial Control of Emergency Detentions: A Glimmer of Hope' (1988) 4 *SAJHR* 225 at 228.

6.2.3 The Decision of the Arresting Officer

In view of the subjective nature of the empowering provision, it is not open to an applicant in such cases to demonstrate that the conclusion reached by the arresting officer or Minister as to the desirability of the detention was wrong, injudicious or unjust. The sole precondition for the exercise of the power is the detaining authority's opinion as to its 'necessity'. The only hope for an applicant, therefore, is to persuade the court either that the arresting officer held no opinion, or, if he held one, that it was not the kind of opinion required by the empowering provision.[1] This can be achieved either by showing that he had acted *mala fide* (ie in conscious disregard of the limits of his authority) or had failed to apply his mind to circumstances relevant to the proper exercise of his discretion.[2]

To what must the detaining officer have 'applied his mind' before he can be said to have formed the opinion required by the regulation? To answer this question, a close examination of the terms of the empowering provision is necessary. The arrest and detention provisions of the regulations of the emergency of 1986/7,[3] which formed the basis of most of the cases discussed hereunder, are cited by way of example. The relevant provisions read:

> 3(1) A member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public of that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.
>
> (2) No person shall be detained in terms of subreg (1) for a period exceeding 14 days from the date of his detention, unless that period is extended by the Minister in terms of subreg (3).
>
> (3) The Minister may, without written notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison, order that any person arrested and detained in terms of subreg (1), be further detained in that prison for the period mentioned in the notice, or for as long as these regulations remain in force.

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1 See 3.3 above.

2 The question, in the words of Goldstone J, was whether the detaining officer 'had honestly applied his mind to the question as to whether the detainee's [detention] was necessary for the purposes stated [in the relevant regulation]' (*Radebe v Minister of Law and Order* 1987 (1) SA 586 (W) 592 (W) at 592E).

3 Proc R109 of 1986.

A thorough exposition of the legal requirements created by this provision is to be be found in *Swart v Minister of Law and Order*,[1] in which the court stated:

> 'The person who is arrested must be a person whose detention is, in the opinion of [the arresting officer], necessary for the maintenance of public order, or the safety of the public, or the person himself, or for the termination of the state of emergency. The opinion must be held by the policeman effecting the arrest. Opinions of other persons, which the person effecting the arrest did not have, cannot be attributed to him in testing the validity of the arrest. He must hold the opinion at the time of the arrest because the requlation requires the existence of the opinion as a jurisdictional fact which must exist before an arrest in terms of the regulation can lawfully be effected....[T]he opinion must be an opinion on the matters specified in the regulation, that is, that the detention of the person to be arrested is necessary for the purposes mentioned in the regulation, and not for other purposes which may commend themselves to the policeman but for which the regulation does not give him the power of arrest. It goes without saying that the opinion must be *bona fide*....'[2]

What emerges from this passage is that the regulation requires the arresting officer to hold a *particular kind of opinion*. In particular, he must regard the detention as necessary for the stated purposes, and he must show that he has formed that opinion on the basis of evidence related to the person's conduct. If he regards the detention as necessary for some other purpose, such as punishment for some past conduct, he does not hold the opinion required by the regulation; similarly if he decides to detain a person without having examined and drawn conclusions from that person's conduct, he does so without holding any opinion at all.

The two essential questions which must be asked when assessing the legality of an arrest and detention under provisions worded along the lines of that just cited are, therefore:

(1) Did the arresting officer consider the incarceration of the detainee under the emergency regulations necessary for the stated purposes?

(2) Did he pay sufficient attention to the detainee's conduct before the arrest to honestly form the opinion that the answer to (1) was in the affirmative?

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1 1987 (4) SA 452 (C).

2 At 462H-463A. For a briefer resume of the requirements of the arrest regulation see *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) (at 33J-34A): 'Reg 3(1) has four essential elements. They are (1) that an opinion must be formed (2) by a member of a force (3) that the detention of a particular person is necessary (4) for any of the purposes mentioned in the regulation.' See also *State President v Tsenoli; Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A) at 1118D-E & 1182G-H.

We now examine how the courts have treated these questions.

(1) The Necessity of the Arrest and Detention

Can a policeman be said to be of the opinion that arrest under emergency regulations, with its drastic implications for the rights of the the subject, is necessary if he has not considered other alternatives, in particular arrest under the ordinary law, before acting? An affirmative answer to this question has chilling implications, sanctioning as it would reflexive resort to a power which, by its very nature, should be used with the utmost circumspection.

Failure by the arresting officer to aver or prove that he had considered the alternative of conventional arrest before invoking emergency powers was considered enough to vitiate emergency detentions in a number of cases. One was *Dempsey v Minister of Law and Order*,[1] the facts of which could not have demonstrated more clearly the dangers of an off-the-hip recourse to emergency detention. According to the deposition of the arresting officer, which the court was prepared to accept as correct for purposes of its judgment, the events leading to the arrest and detention of a nun, Sister Clare Harkin, were as follows. A contingent of policemen, including the arresting officer, was observing a funeral service at Guguletu. After the burial, which was conducted without incident, a procession of youths left the cemetery and began singing, dancing and giving 'black power' salutes. The procession, accompanied by a single car occupied by two nuns, was ordered to disperse. As some of the participants were showing signs of obeying, they were called back by a nun in the back seat of the car. The policemen were then ordered to disperse the group with sjamboks, and while this was going on, one of the nuns (Sister Harkin) observed a policeman who was 'busy with' a black man. She ran to the scene of the struggle, grabbed the policeman from behind, and began belabouring him on the shoulders with his sjambok. The commanding officer of the platoon thereupon ordered Sister Harkin's arrest, and she was still in detention at the time the application for her release was launched some weeks later.

Observing that there might have been some justification for Sister Harkin's impression that she was intervening in a 'gratuitous assault', Marais J nevertheless conceded that the arresting officer had sufficient ground to conclude that she had interfered with police action and with the restoration and maintenance of public order.[2] If this was correct, the learned judge noted, Sister

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1 1986 (4) SA 530 (C).
2 At 541H-I.

Harkin had indeed by her conduct rendered herself liable to arrest in terms of the ordinary law of the land. Yet the arresting officer had nowhere in his affidavit suggested that he had considered this alternative. The court observed:

> 'Before he could conclude that her arrest and detention in terms of the emergency regulations was necessary, I think that it is manifest that he would have to consider this obvious alternative. Certainly resort to that alternative would have put an end to any further participation by her in that day's events just as effectively as an arrest under the emergency regulations would have done.'[1]

Moreover, said Marais J, even if the arresting officer was of the opinion that Sister Harkin's arrest under the emergency regulations was justified, he had given no indication that he had considered her subsequent detention necessary. And it was to the necessity of the *detention* that he was enjoined to apply his mind by the empowering regulation.

One of the applicants in *Bishop of the Roman Catholic Church of the Diocese of Port Elizabeth and another v Minister of Law and Order and three others*[2] was also released on this ground. The duty to consider less drastic alternatives available under the 'ordinary law',[3] said Kroon J, was to be inferred from the use by the State President of the word 'necessary' in the empowering provision, which the court considered itself entitled to interpret literally in view of the serious consequences which arrest under the emergency regulations entailed for the subject. The learned judge observed:

> 'In my view it cannot be said that an arrest and detention is necessary for the purposes set out in reg 3(1) unless there is no other viable alternative and accordingly there can be no opinion that such an arrest and detention is necessary unless alternatives to such action are considered and opined to be not feasible or practical.' [4]

At first glance, this dictum appears to suggest that the correctness of the opinion of the arresting officer is subject to objective scrutiny. A closer reading indicates, however, that the court was merely pointing out that, since the presence of a viable alternative meant that arrest and

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1 At 542B-C.

2 ECD 11 August 1986 Case No 1101/86, unreported.

3 *In casu* the detainee was arrested to prevent him from conducting a church service to commemorate Soweto Day. It was argued for the applicant that a less drastic means of preventing the service would have been to prohibit it under s 46 of the Internal Security Act 74 of 1982, an alternative which the court found had not been considered by the arresting officer.

4 At 13 *in fine*-14 of the typed judgment. Cited with approval in *Nqumba v State President* 1987 (1) SA 456 (E) at 472 D-E.

detention under the emergency regulations could not *in fact* be regarded as 'necessary', failure by the arresting officer to consider alternatives meant that his opinion had not been properly formed. Had he shown evidence of having considered that alternative, the court would not have intervened, even if it considered the arresting officer's opinion wrong.

The same approach was adopted by in *Swart v Minister of Law and Order*,[1] in which Rose Innes J observed:

> 'If a police officer considered that the person he intends arresting is committing a criminal offence and also considers that the conduct of the person may foment public disorder or jeopardise the safety of the public, the provisions of reg 3(1) oblige the police officer to decide whether it is sufficient for him to proceed with the conventional arrest and detention of the person on a charge of the offence, or whether it is necessary that the person should be detained in the manner and for the purposes of such detention.'[2]

The learned judge added that the consideration of these alternatives was 'not a complex exercise'.[3] Complex or not, however, it was an essential requirement of the regulation that the arresting officer should at least have the existence of alternatives on his mind at the time of the arrest. If he did not, he could not be said to have held the opinion required for the proper exercise of the discretion. This reasoning is perhaps open to the objection that it places an impossible burden on arresting officers. To insist that every exercise of emergency powers is *ultra vires* to the extent that it seeks to realise some objective or purpose realisable under the 'ordinary law' would be to render almost anything done under the Public Safety Act vulnerable to attack. As already pointed out,[4] there is barely nothing in the way of infringements of individual liberties, short perhaps of the imposition of curfews, which the government is not empowered to do under standing legislation. But the requirement that the detaining officer consider alternatives was not put this strictly by the courts which insisted upon it. Rose Innes J, for example, conceded in *Swart* that a person's conduct may well be such as to render him at once liable to ordinary arrest and prosecution and to arrest and detention under the emergency regulations [5]. In *Nqumba v State President*[6] the court placed a further restriction on the requirement by stressing that the importance which it would attach to an arresting officer's failure to

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1 1987 (4) SA 452 (C).
2 At 469H-I.
3 At 469I-J.
4 At 4.5 above.
5 At 468D-G.
6 1987 (1) SA 456 (E).

consider the alternative of ordinary arrest would vary from case to case. Two factors which had to be taken into account were the degree of urgency of the decision and the nature of the situation in which it was taken. The court pointed out, by way of example, that where the decision to arrest was based on hearsay information which could not withstand the rigorous evidential standards applied in a court of law, where prosecution could lead to the disclosure of sources, or where the detained person was likely to persist with his conduct in spite of the possibility of criminal prosecution, the alternative of ordinary arrest, though attractive in theory, could prove abortive in practice.[1] The court was, moreover, unsympathetic to the view that failure by the police to use less drastic administrative action available to them under the emergency regulations, such as house arrest or restriction to a particular areas, warranted the inference that they had not properly applied their minds to alternatives. The court seemed disposed, therefore, to limit the alternatives to which the arresting officer was required to apply his mind to arrest with a view to criminal prosecution.[2]

Even this cautious approach was, however, further limited by the senior court in the appeals against *Dempsey* and *Nqumba*.[3] In the former case, Hefer JA was prepared to accept with reservation that, had the arresting officer not considered the alternative of conventional arrest, a finding that he had not properly applied his mind would be justified.[4] His lordship ruled, however, that the arresting officer's mere failure to note in his affidavit that he had considered alternatives was not enough to warrant the inference that he had not in fact done so. *In casu*, the arresting officer had in the opinion of the court said enough to meet the respondent's allegation that he had not properly and honestly applied his mind to relevant facts and had acted from improper and ulterior motives. Since the arresting officer had not been called on to deal with the matters in respect of which the court of first instance had found his affidavit to be fatally lacking, there was no justification for the inference that he had not considered the alternative of ordinary arrest[5].

In *Ngqumba (2)*, Rabie ACJ was likewise prepared to concede that, the subjective nature of the discretion notwithstanding, it was possible that a decision to detain a person under the emer-

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1 At 472G-473C.
2 At 475F-H.
3 *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) (hereafter *Dempsey (2)*); *Ngqumba/Damons/Jooste v Staatspresident* 1988 (4) SA 224 (A) (hereafter *Ngqumba (2)*). The spelling of the name 'Nqumba' was apparently incorrectly given in the original application.
4 At 40F-G.
5 At 41G-H.

gency regulations could be seen, in the light of the circumstances, as so 'drastic and unecessary' that, in the absence of a satisfactory explanation from the detaining authorities, the conclusion could be justified that the arresting officer had not properly applied his mind.[1] But, his lordship hastened to add, this did not mean that the detaining authority was always under a duty to declare that he had weighed alternatives and to explain why he had not resorted to another possible course of action. Although not strictly necessary for the purposes of his judgment, the learned Acting Chief Justice proceeded to criticise the view expressed by Kroon J in the *Bishop of the Roman Catholic Church* case.[2] Rabie ACJ objected in particular to Kroon J's observation that 'it cannot be said that an arrest and detention is necessary for the purposes set out in reg 3(1) unless there is no other viable alternative'. The Acting Chief Justice pointed out [3] that the regulation conferred a 'subjective' discretion and that therefore the arresting officer

> 'is die persoon wat moet beslis oor die vraag of aanhouding nodig is, en al sou daar volgens die mening van ander 'n "viable alternative" wees, sou dit nie vanself sy mening dat die aanhouding nodig is ongeldig maak. Die vraag is dus nie of 'n arrestasie en aanhouding "is necessary" nie, maar of die persoon wat 'n arrestasie doen van mening is dat dit nodig is.' [4]

With respect, however, the learned Acting Chief Justice seems to have misconstrued the words of Kroon J. As already pointed out, Kroon J and the other provincial courts which had adopted a similar approach to the question of a 'viable alternative' were not sanctioning judicial correction of the subjective judgment of the arresting officer, but pointing to one factor which had necessarily to be considered if the kind of opinion required by the regulation was to be properly formed. In any event, Rabie ACJ's emphasis on the purely subjective nature of the discretion to arrest and detain and his eschewel of the test propounded by the provincial courts is difficult to reconcile with his statement that such a decision could be so 'drastic and unecessary' as to warrant the inference that the arresting officer had failed to apply his mind. For how can it be determined that a person's detention is 'unnecessary', and the arresting officer's opinion as to its necessity be contraverted, except by examining the circumstances in which the decision was taken and asking whether it was reasonable in an objective sense?

Dempsey (2) and *Ngqumba (2)* seriously weakened but did not go so far as entirely to eliminate the possibility of impugning an emergency detention on the ground that the arresting

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1 At 252F-G.
2 Quoted above.
3 At 253D-F.
4 At 253E-F.

officer has not considered the possibility of a conventional arrest before coming to his decision to detain. In a separate judgment which received no concurrence from the rest of the bench in *Dempsey (2)*, however, Nestadt JA went a step further, holding that a conventional arrest was not among the relevant data to which an arresting officer had to apply his mind. His lordship came to this conclusion by attaching a wide meaning to the word 'necessary'. Because of the context in which the word was used, said Nestadt JA, 'necessary' meant not the only possible alternative, but merely 'reasonably necessary'.[1] It followed, according to his lordship, that the regulation did not require the arresting officer to be of the opinion that arrest and detention under the emergency regulations was 'the only exclusive or unavoidable course'.[2]

> 'The existence of another option (conventional arrest), even though it be regarded by the member as a viable one, does not necessarilly preclude him from acting under reg 3(1). And, if this be so, he may still, in a given case, properly think it necessary (in the sense indicated) to resort to an arrest and detention under reg 3(1) without having considered the alternative of an arrest according to the ordinary law.'[3]

It may be accepted, as Nestadt JA states in the above passage, that a policeman may properly arrest a person under the emergency regulations even though the alternative of an ordinary arrest is a possibility. But, with respect, his lordship appears to have missed the point made by Kroon, Rose Innes and Marais JJ. In no case had the learned judges insisted that the arresting officer be of the opinion that arrest and detention in terms of emergency powers by the *only* possible course.[4] It is, moreover, difficult to follow the logic of the passage just quoted. For the use of the word 'regarded' in the first sentence necessarily implies that the arresting officer has considered the possibility of ordinary arrest. The conclusion reached in the second sentence — namely, that an arresting officer may 'properly think it necessary...to resort to an arrest and detention under reg 3(1) without having considered the alternative of an arrest according to the ordinary law' — is therefore a *non sequitur*.

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1 At 43E-I. Nestadt JA relied on *Black's Law Dictionary* (5 ed), which says the following about the word 'necessary': 'The word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.'

2 At 44A.

3 At 44B.

4 In fact, as already indicated, Rose Innes J expressly stated in *Swart's* case (at 468D-G) that a person's conduct could render him liable both to ordinary arrest and to emergency detention.

One other matter may be considered under this head. What is the position where the detaining authorities have *already* availed themselves of the alternative of arrest or detention under the ordinary law? May a person be detained under the emergency regulations while held under the authority of another law? It appears that the answer is in the affirmative. In *Kerchhoff's* case, the detainee had been arrested in terms of s 50A of the Internal Security Act. The next day, he was informed that he was being detained under the emergency regulations, and the Minister had in terms of his emergency powers ordered his further detention ten days later. Both the court *a quo*[1] and the Appellate Division [2] found no merit in the argument that, since the applicant had already been detained under a law in terms of which he could be incarcerated for fourteen days, the officer who had ordered his detention in terms of the emergency regulations could not possibly have been of the *bona fide* opinion *at that stage* that detention under the emergency regulations was necessary for the safety of the public or the maintenance of public order. The Appellate Division pointed out that the officer could well have been of the opinion that detention under the emergency regulations was a *more effective* means of providing for the safety of the public.[3] By parity of reasoning it would seem, therefore, that conventional arrest and detention with a view to criminal prosecution may lawfully be converted into emergency detention without trial. It is submitted also that a person can lawfully continue to be held in emergency detention after the decision is taken to prosecute him under the ordinary law.

(2) The Detainee's Conduct

It is self-evident that before a security official can form a proper opinion as to the necessity for an arrest and detention for the purposes stated in the regulation he must direct his attention to the nature of the activities in which the person concerned has been engaged. These must be such as to enable him to conclude that, if the person concerned remains at liberty, he is likely to pose a danger to the public safety and the maintenance of order, or to prolong the emergency.[4] It is clearly impossible to set out an exhaustive list of the kind of activities which might be said to justify such inferences. What is clear, however, is that the person concerned need not have been directly linked to illegal activities. It is quite enough that his activities might, in the

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1 *Kerchhoff v Minister of Law and Order* NPD 14 August 1986 Case No 1912/86, unreported.
2 See 1986 (4) SA 1150 (A) at 1186G-1187C.
3 See also *Suttner and another v State President* TPD 5 August 1986 Case Nos 13500/86 and 13501/86, unreported, in which the applicants had also originally been detained under s 50 of the Internal Security Act.
4 During the emergencies of 1985 and 1986, people could also be detained 'for their own safety' (see regs 3(1) of Procs R120 of 1985 and R 109 of 1986). This provision, which appears to be of dubious legality, was removed from subsequent regulations.

opinion of the authorities, have the indirect results of undermining law and order or threatening the safety of the public. When conduct, innocent on the face of it, may reasonably be considered to have that result depends on the nature of the crisis with which the authorities are contending. Those occasioned by widespread popular rejection of the authority of the government will encourage the security forces to view almost any opposition political activities with suspicion. And when the vehicles of that popular resistance are driven underground, the temptation to view new formations as 'front' organisations is increased. Thus whenever the police are able to put forward evidence linking a person to some extra-parliamentary mass political organisation, hope of persuading a court that his conduct could not possibly pose a threat to public safety and order must virtually be abandoned.[1] This is because the courts, once convinced that there is some evidence on which the arresting officer formed his opinion, will not question the validity of the opinion held.[2] To do so would be to violate the rule that where a dis

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1 *Stanton v Minister of Justice* 1960 (3) SA 357 (T) provides an example of the weight the courts will attach to an allegation that a detainee has been linked to a suspect organisation. In that case, applicant had put forward uncontraverted evidence of the innocuous nature of her activities and contended that, since the crisis which had occasioned the declaration of a state of emergency was over, the arresting officer could not *bona fide* have formed the opinion that her detention was, in the words of the enabling regulation, 'desirable' for any reason recognised in law. The court found that it would have 'strange results' if a person detained in a formally proclaimed state of emergency could be permitted to challenge the *bona fides* of the authorities 'by merely avowing his or her innocuousness' (at 357F-G). Apart from this, the court found that the applicant did have contact with members of organisations which had been declared illegal and that 'rightly or wrongly', the police suspected that her association with them had been 'more than casual'. This suspected association made it impossible to infer with any degree of probability that the arresting officer was not genuinely of the opinion that the detention of the applicant was desirable for the purposes stated in the empowering regulation, in spite of his refusal to provide any evidence to justify the suspicion on which his opinion was based (at 537H). See also *Mabena v Commissioner of Police, Kwandebele* 1988 (4) SA 446 (T), in which the detainee was alleged to be an organiser of the 'Federation of Moutsi Youth Congress'. Applicant's bare denial that he had anything to do with the organisation or with any other political movement was not accepted by the court.

2 As Kannemeyer J (adapting the words of Lord Atkin in *Liversidge v Anderson* [1942] AC 206) put it in *Nkwinti v Commissioner of Police* 1986 (2) SA 421 (E): 'If A thinks he has a broken ankle he is of the opinion that he has a broken ankle....His opinion is not something capable of determination by a third party. However biased, fanciful or demonstrably incorrect it is, it remains his opinion.' (At 435B. See also *Stanton v Minister of Justice* 1960 (3) SA 353 (T) at 355H-356A and *Krish Naidoo v Minister of Law and Order* ECD 17 February 1986 Case No 978/86, unreported in which Jennet J upheld a detention order which he conceded was based on facts which were 'open to doubt'.)

cretionary power is conferred in subjective terms, a court may not substitute its opinion for that of the responsible official.[1] It is only in cases in which the decision to detain is based on conduct so manifestly innocuous as to be incapable, by any stretch of the imagination, of constituting a threat to the safety of the public that a court might be persuaded to intervene.

One such was *Radebe v Minister of Law and Order*,[2] in which the detainee, a Mr Mashiyane, had been arrested while sleeping in his girlfriend's room in a university residence at 3 o'clock one morning. The admitted facts were that Mashiyane had been unknown to the arresting officer before the night of his arrest, and that the latter was not even aware of Mashiyane's presence in the room before the raid. A number of (legal) posters and tapes had been found in the girl's possession. All but one of the tapes contained music. The exception contained singing and slogans recorded by Mashiyane at two funerals in the course of his employment as a sound man with an overseas television network. When the police heard that Mashiyane worked for the network, he was promptly detained. The arresting officer stated that at the time of the arrest he was *bona fide* of the opinion that the detention of Mashiyane was necessary for the purposes stated in the regulation, that he had been advised that it was not necessary to attempt to answer the applicant's averment to the contrary, and that he accordingly declined to do so.[3] The court noted that there was no suggestion that Mashiyane's conduct constituted a threat to the maintenance of public order, the safety of the public, his own safety or the termination of the state of emergency. It also observed that if the posters constituted such a threat it was inexplicable why Mashiyane, and not their owner (that his, his girlfriend), should have been detained. The only conclusion, therefore, was that Mashiyane had been detained because he worked for a foreign news service. But if such employment constituted a threat to the public, the court noted, it would follow that all overseas television newsmen and their local employees should be arrested and detained. The absurdity of such a conclusion was, in the court's opinion, so manifest as not to need stating.[4] The admitted facts were, according to the court, sufficient to warrant the conclusion that the arresting officer, if not acting *mala fide*, had at least acted under a misapprehen-

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1 The reluctance of the courts to question the opinion of the arresting officer, or to scrutinise the information on which it was based, is strikingly illustrated by the approach of the court in *Nkwinti v Commissioner of Police supra*. In that case, it was widely recognised that applicant had played a prominent part in ending a boycott by blacks of white shops in Port Alfred. The court nevertheless found that it was impossible to question the arresting officer's opinion. The detention was, however, declared illegal as the Minister had not afforded applicant a hearing (see 5.6 above).

2 1987 (1) SA 586 (W).

3 At 590C-D.

4 At 595D. Given the number of foreign journalists deported during the emergencies, there is a measure of irony in the court's view.

sion as to the extent of his powers. His vague say-so was accordingly not enough to dischange the burden of proving that he had formed the opinion required by the empowering regulation:

> 'The probability is that [the arresting officer] did not properly apply his mind to the precise terms of reg 3(1) and did not form an opinion that the detention of Mashiyane was necessary for one or more of the purposes stated therein. He may not have appreciated that reg 3(1), wide as its terms are, nevertheless place limits upon the exercise of the discretion granted thereby to members of the force.' [1]

Perhaps the most significant aspect of the *Radebe* judgment is the rejection by the court of the submission that it could not go behind the arresting officer's statement that he had acted *bona fide*. Such a contention, in the court's view, was tantamount to saying it should abdicate its function in favour of a policeman.[2]

Cases in which the facts disclose that the reasons for the arrest were as demonstrably spurious as those on which the arresting officer had relied in *Radebe* are, however, infrequent. In most, the police can usually show that the detainee has in some way infringed the unwritten canons of emergency rule. But even where the detainee's conduct was such as to justify the conclusion that his arrest was necessary, there remains some hope of impugning the arresting officer's opinion as to the necessity of his *further* detention. A number of applications for release from detention have succeeded on this ground. The facts in *Jaffer v Minister of Law and Order* [3] provide so striking an example of the cases in which detainees have been freed for this reason that it is worth citing in full the court's summary of the evidence:

> 'Adam Jaffer is a businessman, being the proprietor of a butchery and a service station, both situated in Wynberg but not adjacent to each other. He is a non-political person concerned with the conduct of his business and his business affairs, most of his attention being devoted to the butchery. The service station is managed or controlled by a manager and Mr Jaffer only calls there for about an hour a day some four days a week. He had visited the service station on Thursday 12 June, and he did not go there again until summonsed to come on Saturday 14 June. The summons to go to the service station came from the manager following the arrival of four members of the police force, one of whom was Warrant Officer Stipp. They found on their arrival at the service station a number of what were referred to then as "UDF posters" displayed on the premises and a number of what were called "Eid pamphlets"[4] and they wanted to see Mr Jaffer, the proprietor. Hence the summons and his arrival there.

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1 At 595I-J.
2 At 596A.
3 1986 (4) SA 1027 (C).
4 The meaning of this term is not explained in the judgment.

> 'In response to questioning he explained that he knew nothing about the posters or the pamphlets. They had not been on his premises when he was last there two days before. More members of the police force arrived and, despite his protestations, he was obliged to accompany them to the police station. There, with the permission of Warrant Officer Stipp, he spoke to his wife who was told that he would be taken to Victor Verster Prison but would be released on Monday 16 June. On that day, as a result of inquiries made at the police station, she was informed that her husband, and I quote: "...was being detained in terms of the emergency regulations". She saw him again on Sunday 29 June, when she learned that his detention had been extended.'[1]

The court accepted that the arrest of Mr Jaffer on 14 June was unassailable, as was his detention up to and including June 16.[2] It was clear from the arresting officer's affidavit that he had been of the opinion that Mr Jaffer should be prevented from taking further action with regard to the 16 June stay-away and that 'he should be...held in detention until the conceivably explosive consequences of the stay-away campaign, which might take place on that date, had taken place or had not eventuated'.[3] But this, said the court, was as far as the arresting officer's opinion extended. He had never applied his mind to the necessity of detaining Mr Jaffer after 16 June *had passed.* This was not therefore a case of his holding an opinion '*mala fide* or *bona fide*, honestly or dishonestly' (or, it may be added, correctly or incorrectly) but of him 'holding no opinion at all, and continuing the detention notwithstanding'.[4]

The principle to be derived from *Jaffer* is that, detention being a on-going event, the detaining authority should apply his mind to the necessity of its *continuation.* He cannot simply decide that there was cause for an arrest and temporary detention and simply 'throw the key away' pending the Minister's decision as to whether the detention should be further extended.[5] It was, the court pointed out, open to an arresting officer, and encumbent on him where a person had been detained in order to keep him out of circulation for a period falling short of that for which he could be detained without ministerial authorisation, to couch the detention order in appropriate terms.[6]

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1 See at 1029F-J.
2 At 1034C and F.
3 At 1033F-G.
4 At 1034G-H.
5 See also *Dempsey v Minister of Law and Order* 1986 (4) SA 530 (C) at 531I-J: 'It is not an arrest in isolation which must be considered necessary. It is primarily the ensuing detention...which must be considered necessary.' A detainee was also released on this ground in *Vale and others v Minister of Law and Order* ECD 5 September 1986 Case No 1210/86, unreported. In that case, the arresting officer had stated that he had detained one of the applicants to prevent her taking part in an End Conscription Campaign concert in July. She was still in detention nearly two months later.
6 At 1034J.

The same salutary principle was applied in *Dempsey*, the facts of which have already been set out. The court *a quo* found in that case that the arresting officer had at no stage given any attention to the question whether the detained person, whose conduct was found to justify her arrest and temporary detention, would or was likely to pose any threat in the future. On appeal, the majority was prepared to accept, without finally deciding, that had the arresting officer indeed not applied his mind to assessing the detainee's future conduct, a finding that he was not of the requisite opinion would be justified.[1] The court *a quo's* finding was reversed, however, on the ground that the arresting officer's failure to specify that he had considered the matter was not, in itself, sufficient to justify the conclusion that he had not done so.[2] In a separate judgment, however, Nestadt JA held that an arresting officer was not obliged by the terms of reg 3(1) to consider the likelihood of the detainee's future conduct posing a threat to the public safety. The learned judge of appeal opined [3] that the detention of a person could be regarded as necessary for the maintenance of public order, the safety of the public, the termination of the state of emergency 'irrespective of such person's possible or likely further conduct'. This conclusion, with respect, comes close to sanctioning the use of emergency detention for purely punitive purposes. The only consideration cited by Nestadt JA in support of it was that the regulations provided for the possible interrogation of emergency detainees. While this is indeed so, the conclusion does not inevitably follow that *any* person can be held indefinitely even if the reasons given for his arrest patently disclose that no consideration was given to the necessity of his continuing detention. If the arresting officer in *Dempsey* had considered it necessary to interrogate Sister Harkin, surely this fact would have been mentioned to the Minister as a reason for extending the detention. That no mention was made of interrogation in the police affidavits or by respondent's counsel leads ineluctably to the conclusion that it was not the reason for her continued detention.

A further question arises: must the arresting officer have formed his opinion by applying his mind to direct evidence relating to the detainee's past conduct, or can he rely on hearsay? The question was raised in *Nqumba's case*,[4] in which the court found[5] that the respondents had based their belief on the necessity of arresting the applicants to a large extent on hearsay. Such

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1 See 1988 (3) SA 19 (A) at 40F-G.
2 At 40H-J and 41H-I.
3 At 44E-F.
4 1987 (1) 456 (E).
5 At 473D-E.

evidence, even though not vouched true, was held by the court to be sufficient to justify the opinion formed in terms of it. Kannemeyer J pointed out that a policeman could validly form the opinion that a person's arrest and detention was necessary even if he had some doubt about the information on which the opinion was based. The information could be of such a nature that, unless he was satisfied that it was false, he could still feel bound to act upon it.[1] It does not follow from what was said in *Nqumba*, however, that a detaining authority can be said to have formed the opinion required by the enabling regulation if his decision was based on evidence which is wildly improbable or demonstrably false.[2]

6.2.4 The Detaining Officer's Discretion

The officer who effects the arrest and the officer who signs the notice committing the detainee to detention for the period pending the Minister's decision ('the detaining officer') need not be one and the same person. Can a detention be impugned on the ground that the detaining member did not apply his mind to the facts before acting? It was held in *Nqumba v State President*[3] that this officer's decision cannot be attacked because he performs a ' purely administrative' function and is not required to exercise a discretion, except to 'satisfy himself that the person to be detained has been arrested in terms of reg 3(1)'.[4] An improper arrest would therefore vitiate the detaining officer's order.

6.2.5 The Minister's Discretion

If, as has been shown, there are certain limited grounds on which the validity of arrests and detentions by members of the security forces can be challenged, what of the Minister's decision to extend the detention? As we have seen, the regulations in all states of emergency since 1985

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1 At 473H-I.
2 See also *Mabena v Commissioner of Police, Kwandebele* 1988 (4) SA 446 (T) at 454I-J.
3 1987 (1) SA 456 (E).
4 At 465D; confirmed on appeal (see *Ngqumba/Damons NO/Jooste v State President* 1988 (4) SA 224 (A).). Plasket suggests (Plasket 'Developments in Administrative Law in Regard to the Discretion of Arresting and Detaining Members' in Haysom and Mangan (eds) *Emergency Law* 17) that Berman J may have held a contrary view in *Jaffer supra* (see Plasket's article at 22 n 23). The passage on which Plasket relies for this suggestion (see *Jaffer* at 465D) does not, however, clearly support it.

have provided that a person can be detained at the behest of members of the security forces for only a certain period (initially 14 days, later extended to 30), after which further detention is permissible only by ministerial order. The respective regulations empowering the Minister to issue such an order have all been silent on the matters on which he must be satisfied before so acting.[1]

The delegation to the Minister of an 'unfettered' discretion to extend a person's period of detention indefinitely without hearing him (or, indeed, without hearing anybody) having been declared *intra vires* the powers of the State President,[2] the task of assailing a ministerial order may seem all but hopeless.[3] The Appellate Division has held, however, that the absence of legislative direction as to the grounds on which the Minister may act does not mean that he can extend a person's detention for any reason whatsoever. In *State President v Tsenoli/Kerchhoff v Minister of Law and Order*,[4] Rabie CJ rejected the contention that the regulation conferring on the Minister a discretion to order further detention[5] was framed so widely as to empower him to issue an order for purposes other than those stipulated in the Public Safety Act and echoed in the regulation authorising arrest and detention for the initial period. Noting [6] that the regulation empowering the Minister to extend detentions (reg 3(3)) did not state in express terms on what grounds he could act, the court observed, with respect correctly, that reg 3(3) should be read in relation to the regulation authorising the original arrest and detention (reg 3(1)). It therefore followed by necessary inference that the Minister should, when considering whether to extend a person's detention, 'decide whether the person concerned should, in his opinion, be further detained for the purposes for which he was previously arrested and detained'.[7]

While a link between the Minister's decision and that of the arresting officer is suggested by these words, Rabie CJ did not go so far as to imply that the Minister is necessarily confined

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1 They simply state that the Minister may issue a notice 'signed by him and addressed to the head of a prison, order[ing] that the person arrested and detained in terms of subregulation (1), be further detained, and in that prison, for the period mentioned in the notice....' The current regulation is reg 3(3) of Proc R 86 of 1989.

2 See 5.6 above.

3 In *Sisulu v State President* 1988 (4) SA 731 (T), for example, it was held: '[I]t was for the Minister and for him alone to decide on what material to base his decision [to extend a person's detention], and on what could be excluded from consideration' (at 736C-D). This case, and the issue of the Minister's obligation to adhere to the principles of procedural justice, are discussed at 5.6 above.

4 1986 (4) SA 1150 (A) at 1183.

5 *In casu*, reg 3(3) of Proc R 109 of 1986.

6 At 1183C.

7 At 1183H-I.

to *the reasons* for which the arresting officer considered the initial period of detention necessary, or to the information on which the decision to arrest was based. Reg 3(3) confers an independent discretion on the Minister; it is therefore open to him to opine that further detention of the person concerned was necessary for the stated purposes, but for different reasons. If this is so, the person alleging that his detention is unlawful may be confronted with the task of attacking the Minister's decision without reference to the reasons put forward by the arresting officer. This task would seem all but hopeless if, as is often the case, he is met with a bare assertion by the Minister that he was *bona fide* of the opinion that further detention was necessary for the purposes set out in the Public Safety Act. Almost, but not quite. For the phrase 'arrested and detained in terms of subregulation 3(1)' carries another implication, not mentioned in *Tsenoli/Kerchhoff*, but of great importance. This is that the person whose further detention is considered by the Minister to be necessary must have been *lawfully* detained in terms of reg 3(1).[1] If the person was illegally held the Minister was not authorised to consider his further detention. The detainee was simply not 'detained in terms of reg 3(1)', and the Minister has no independent power to effect a detention unless an arresting and detaining officers have first acted in terms of reg 3(1).

This view, adopted in *Radebe*, *Jaffer* and *Swart*,[2] was accepted as correct by the Appellate Division in *Minister of Law and Order v Swart*.[3] In that case, the police had failed to tell the detained person that he was being held under the emergency regulations until well after the Minister had ordered his detention to be extended. The court held that an unreasonable delay in informing a detainee of which law he was being held under vitiated the subsequent period of detention, the Minister's order notwithstanding. In response to appellant's argument that the Minister's decision fell to be judged entirely on its own without reference to the legality of the arrest and detention which preceded it, Hefer JA observed:

> 'Regs 3(1) and 3(3) do not operate independently since the Minister's power to extend the detention has been related to persons "arrested and detained in terms of subreg (1)". From this it follows logically that, unless a detention can be brought within the ambit

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1 The importation into the regulation of the word 'lawfully' is justified by the presumption that reference to conduct in a statute is reference to lawful conduct (see Steyn *Uitleg* at 127).

2 *Supra* at 596I-C, 1036D-E and 473A-74D, respectively.

3 1989 (1) SA 295 (A), being an appeal against an unreported judgment of the CPD of 3 April 1987, Case No 11947/86 (*per* Selikowitz AJ), not to be confused with the *Swart* case already referred to, and discusssed in the following paragraphs.

of reg 3(1), it cannot be said to be one which the Minister may extend under reg 3(3).'[1]

Rose Innes J demonstrated in *Swart v Minister of Law and Order*[2] how the circumstances of the initial arrest could affect the legality of the subsequent exercise by the Minister of his discretion to extend the detention. The learned judge noted that the Minister had made his order after considering the following document:

> 3.25 (1) Swart
>
> (2) Dehran
>
> (3) WP 288/86
>
> (4) S/Onb
>
> (5) 1986/06/26
>
> (6) Victor Verster
>
> (7) SAP Wynberg
>
> (8) In besit gevind van 'n groot aantal plakkertjies getiteld "26th June Freedom Charter Day" asook UDF T- hempies.
>
> (9) Hy verleen geen samewerking tydens ondervraging nie. Hy is 'n student van die Universiteit van Kaapstad en is die huidige Staatsbestel baie vyandig gesind. Hy is beslis betrokke by die voortsetting van onluste. 'n Saak dossier weens oortredings onder die noodregulasies word tans teen hom ondersoek.'[3]

In order the better to comprehend the discussion which follows, the facts of *Swart's* case must be briefly considered. Applicant and a friend were arrested by two policemen while out for a midnight stroll in the deserted streets of Wynberg. Shortly before, they had made the fatal mistake of accepting a number of stickers offered to them by a person or persons unknown. The stickers depicted six people beneath a banner bearing the legend '26 June South African Freedom Day' and on their base the words 'The People Shall Govern'. Worse still for both men, a subsequent search of their homes yielded a number of T-shirts emblazoned with what the police described as 'opruiende spreke', other literature which the police deemed 'subversive' and an armband in the colours of the African National Congress. The result was foregone. Both men remained in detention at the behest of the police for 14 days, whereupon their further indefinite detention was ordered by the Minister.

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1 At 298H-I.
2 1987 (4) SA 452 (C).
3 At 475F-H.

What concerned the court was not the extraordinary — but probably typical — brevity of the report which formed the basis of the Minister's decision, but its patent inaccuracies. For one, the detainee concerned was not a student of the University of Cape Town. More seriously, the allegation that the applicant had been unco-operative during interrogation conflicted with his uncontested claim that he had been questioned twice during his detention and had answered all question put to him truthfully. In addition, the fact that the applicant was in possession of UDF T-shirts was clearly insufficient to prove that his detention was necessary for the purposes envisaged by reg 3. The court declined to accept that applicant's alleged hostility to the existing constitutional order had by itself persuaded the Minister that detention was necessary. Indeed, the only statement in the entire report that warranted such an opinion was that applicant had been 'beslis betrokke by die voortsetting van onluste'. The court accepted that if, as a matter of fact, this claim were proved, it would be a reasonable and proper consideration on which the Minister could exercise his discretion in terms of reg 3(3). Ministerial acceptance of the claim was not, however, enough to render it sacrosanct. In the court's view, the claim was an inference of fact which could not withstand scrutiny.[1] This, the court hastened to add, did not mean that the Minister had not *bona fide* formed the opinion that the detention was necessary for the public safety. He was indeed at liberty to take into account such matters in the report as he considered relevant. Was the court therefore entitled to question whether the Minister had formed the opinion required by reg 3(3) before exercising his choice? On the minimalist approach adopted by Rabie ACJ in *Tussentydse Regering v Suidwes-Afrika v Katofa*,[2] the answer was certainly no — the Minister had simply said he was of the required opinion. But Rose Innes J refused to accept so complete a surrender of the court's review function. He accordingly approached the problem from a different angle:

> 'The principles of our law governing the testing, or review, by the Supreme Court of the lawfulness of administrative action in a case of wrongful imprisonment in my opinion require the release of a detainee who has been imprisoned by a ministerial order, which has been procured or substantially influenced by the placing of information before him which must have influenced the exercise of his discretion, but is shown to have been false.' [3]

The position in such a case, said the court, was much the same as if the Minister's decision or opinion had been procured by fraud, in which case the decision would certainly be vitiated by irregularity. The question *in casu* was therefore not whether the Minister was mistaken, since

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1 At 447C-478I.
2 1986 (1) 695 (A), discussed at 3.4 above.
3 At 497H-I.

mistake without resulting irregularity or illegality was not reviewable by a court. The issue was rather whether the Minister's discretion had been exercised in a manner required by the empowering legislation. It mattered not whether the misrepresentation which influenced the formation of the Minister's opinion was intentional or innocent.

> 'If the compiler of the report *bona fide* believed the truth of the information which he furnished in the report, but the information was false, or if the compiler carelessly stated as a fact what is not more than an erroneous inference of fact...which is subsequently proved to be unfounded and false, the effect of the information upon the exercise of the Minister's decision is the same. His discretion has been trammelled and misled, not only by an improper and extraneous consideration, but by false information and considerations which have impinged on the due exercise of his discretion.' [1]

The link between the legality of the arrest and original detention and the subsequent exercise of the Minister's discretion is thus re- established. As the court was at pains to point out, what was at issue was not the merits of the Minister's decision, nor even its correctness. The Minister remained at liberty to err, or even to take into account facts which the court might itself not regard as sufficient to justify the detention order. Thus Rose Innes J was even prepared to accept that one of the reasons relied on by the Minister for his decision — that Mr Swart was 'hostilely disposed' to the existing constitutional order — was not an irregular consideration in that it may have persuaded the Minister that it was necessary to detain the applicant for the purpose of maintaining public order.[2] What mattered was whether the facts or inferences of fact presented to the Minister were true. If not, the Minister had been misled and the exercise of his discretion warped to the extent that it could be said to have been improperly formed in a sense impeachable in law.

This approach comes perilously close to the accepting that the Minister's decision had been vitiated on the ground of mistake, which the court correctly stated was no ground for judicial interference in the exercise of a subjective discretion. But it does not extend quite that far. For, in *Swart's* case, the irregularity reposed not in the Minister's error, but in the mistake of his informants and advisers. The difference, if accepted, is of importance to all multi-tiered decisions like that of the decision to extend a person's period of detention under reg 3(3). The legal propriety of each decision in the chain becomes dependent on the quality of the information and advice presented to the decision-maker. False information introduced or inferences drawn at

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1 At 480B-D.

2 At 480I-481I. The court was, however, perhaps over-generous in this respect. A 'hostile disposition' is surely too Orwellian a notion upon which to base a decision to detain a person under emergency regulations. Detaining a person for not liking a person's facial expression follows not too far on its heels.

any stage in the process taints all subsequent decisions which can shown to have been influenced by them.

The possibility of impugning the Minister's decision to extend a person's detention on this ground depends, however, on the extent of the information which the arresting officer has placed before court. We now turn to this problem.

6.2.6 The Onus of Proof

The successful challenges to detentions under the emergency regulations outlined in the previous sections all depended on the availability of some evidence from which the court could infer that the responsible official had not properly applied his mind when exercising his discretion. The release of the detained persons in *Swart v Minister of Law and Order*,[1] *Jaffer v Minister of Law and Order* [2] and *Dempsey v Minister of Law and Order*,[3] for example, can be attributed in each case to the arresting or officer's self-proclaimed reliance on improper considerations or false information. But what is the position where the respondents in such cases are cautious enough to refrain from saying so much as to prove that they had acted ineptly or arbitrarily? The answer depends largely on the approach adopted by the court towards the onus of proof in cases involving detention and how that onus is to be discharged.

The general rule in cases involving applications for release from detention is that the onus rests on the detaining authority to prove that there was and is lawful cause for depriving the applicant of his liberty.[4] What must the arresting officer or Minister, as the case may be, place before court in order to discharge this onus? Since the empowering regulations confer a 'subjective' discretion, is it enough for the authorities concerned simply to depose on affidavit that they were of the opinion that the arrest and continued detention was necessary for one or other of the reasons stipulated in the empowering provision? Or must they go further and disclose as much detail as the court considers necessary to draw the conclusion that they had indeed taken into account relevant facts and circumstances, and properly appreciated the scope of the legislation under which they had acted? The conflicting approaches to this question advo-

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1 1987 (4) SA 452 (C).
2 1986 (4) SA 1027 (C).
3 1986 (4) SA 530 (C).
4 See 6.2.2 above.

cated by Rabie CJ and Trengove JA respectively in *Kabinet van die Tussentydse Regering van Suidwes-Afrika v Katofa* [1] have already been discussed.[2] In that case, the learned Chief Justice rejected the finding by the court *a quo* that the mere *ipse dixit* of the detaining authority that he was of the required opinion was insufficient to discharge the onus. Trengove JA, on the other hand, was of the view that the detaining authority must adduce sufficient evidence to show that he had appreciated and considered what was required by the enabling legislation. It is apparent, however, from a close reading of the judgment of Rabie CJ that his approval of the '*ipse dixit*' approach was confined to cases, like *Katofa*, in which the applicant had based his plea for an in--terdict *de libero homine ad exhibendo* on a mere assertion that his detention was unlawful. In the sentence in which he approved the '*ipse dixit*' approach, the learned Chief Justice expressly excluded cases in which *mala fides* and the other *Shidiack* grounds were raised.[4] It must be assumed, therefore, that Rabie CJ was of the opinion that in cases in which the *Shidiack* grounds were raised, the detaining official was required to produce some reasons which could be said to justify the conclusion that he had formed the required opinion. The courts which, after *Katofa*, continued to require some proof from the arresting officer to justify detention under the emergency regulations where such grounds were in fact raised by applicants were therefore fully in accord with both approaches suggested in *Katofa*.

In the appeal against the *Dempsey* case,[5] however, the Appellate Division placed a further qualification on the traditional approach to the question of the onus in cases involving applications for release from detention. According to the court, those cases in which a detention under statutory authority conferred in subjective terms were challenged on any of the limited grounds mentioned in *Shidiack* involved not one, but *two* questions: first, whether the repository had *actually* formed the required opinion; second, whether he had formed that opinion *properly*.[6] In regard to the first question, the court accepted that the onus fell on the detaining authority. It appears that the court was satisfied that this onus would be discharged by the simple averment that

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1 1987 (1) SA 695 (A).
2 See 3.4 above.
3 *Shidiack v Union Government* 1912 AD 642 at 651-2, cited at 3.3 above.
4 At 735G-H: 'Indien my bevinding...dat die Administrateur-generaal nie verplig is om sy redes aan die Hof te openbaar nie, korrek is, volg dit na my mening logies dat, waar hy nie op grond van *mala fides* of een van die ander gronde wat in *Shidiack* se saak...genoem word, aangeval word nie, dit vir hom voldoende is om van die bogemelde onus to kwyt as hy sê dat hy die aangehoudene laat aanhou omdat hy oortuig is dat hy 'n persoon is soos bedoel in art 2 van Prok AG 26 van 1978.'
5 *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A).
6 At 38H.

he was of the necessary opinion.[1] As far as the second question was concerned, however, the burden shifted to the applicant — it was for him to show that the opinion had been improperly formed.[2]

This approach is, with respect, open to criticism. Its practical effect is to undermine the distinction between applications for an interdict *de libero homine ad exhibendo*[3] and applications for the review of the exercise of other statutory powers. The courts have, presumably, adopted a stricter approach to the onus in the former category of cases because of the exceptionally drastic incursion on liberty entailed in detention without trial. This reason alone provides compelling grounds for avoiding the result which the court acknowledged had been achieved by splitting the onus in the way it had suggested: namely, bringing applications entailing challenges to detention 'into line' with 'other applications for the review of decisions of statutory functionaries' and with those involving alleged negligent performance of statutory powers.[4] There are several good reasons for *not* treating the former category of cases in the same manner as the latter. For one, the applicant who has been detained is often in no position to adduce evidence, other than a bare denial that he had done anything wrong, to contradict the assertion by the detaining officer that he was of the opinion that the detention was necessary. The detainee will, after all, in many cases merely have been informed that he was being detained 'under the emergency regulations', and the courts have themselves freed the detaining authorities from telling him anything more.[5]

In the appeal against *Dempsey*, the court placed considerable emphasis on the practical problems which could arise from placing the onus of proving the proper exercise of the discretion on a detaining authority.[6] To do so, said Hefer JA, would mean that

> '[u]nlike other statutory functionaries, he will in effect be obliged to disclose the reasons for his decision and be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged may ensue. Such a state of affairs is quite untenable.'[7]

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1 See at 38F-J.
2 At 38I-J.
3 See 6.2.2 above.
4 At 38J-39B.
5 See *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A) at 263E-267B.
6 At 36H-I.
7 At 37J-38A.

But why 'untenable'? This *dictum*, with respect, appears to be based on the assumption that a court appraising the reasons cited by the detaining authority will require separate positive affirmations that he has considered each of the matters to which he is expressly or impliedly enjoined to direct his attention before exercising his discretion. If so high a degree of 'proof' is required, the authority may well be placed in a difficult position. But, in practice, the courts require only that the authorities disclose sufficient reasons to enable them to establish whether the discretion has been properly exercised. When Trengove JA observed in *Katofa*[1] that a detaining authority

> 'die behoorlike uitoefening van die diskresie moet bewys, al is dit dan slegs met verwysing na die beperkte gronde waarop die uitoefening van sodanige diskresie aanvegbaar is'

it would appear that his lordship did not intend to be understood to be suggesting that the arresting officer should expressly refer to and defend each possible ground, but merely that the papers which he placed before court would be enough to justify the inference that he had properly considered all relevant factors. The court *a quo's* finding in *Dempsey* was not based on the arresting officer's mere failure to state that he had applied his mind to the alternative of arrest under the ordinary law and to the question of whether the detainee was likely to pose a threat in future. It was based, rather, on the fact that his account of the events leading to the decision to detain was enough to satisfy the court that he had not considered these matters.[2] That such inadvertance appeared so clearly from the papers probably explains why applicant's counsel did not avail himself of the opportunity of cross- examining the arresting officer, an omission on which Hefer JA placed great store on appeal.[3] By splitting the onus as it did in *Dempsey*, the Appellate Division was able entirely to ignore the question whether the admitted facts were sufficient to justify the conclusion that the arresting officer in that case had properly applied his mind. It is respectfully submitted that he had not.

The approach adopted by the Appellate Division in *Dempsey* also raises a problem of a conceptual nature. As we have seen, the court placed the onus on the arresting officer to prove that he *actually* held the required opinion, and on the applicant to prove, if possible, that the opinion actually held had nevertheless not been formed *properly*. The distinction between the question

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1 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A) at 743D-E.

2 The court *a quo* in any event recognised that where *mala fides* was alleged, the onus of proof was on the applicant (see 1986 (4) 530 (C) at 534H-I).

3 At 41I-J.

whether an opinion is actually held and whether it is held properly cannot be absolute. Does one say, for example, that a person holds no opinion if the conclusion that he has drawn rests on irrelevant or inadequate considerations, or merely that his opinion is improperly formed? One must bear in mind, as Hefer JA himself indicated by talking of the 'required opinion' in *Dempsey*,[1] that when inquiring into whether an opinion was *actually* formed, a court is in fact asking whether the repository was of a particular kind of opinion, namely, the opinion required by the enabling provision. On this view, failure to consider matters to which he is expressly or impliedly directed to apply his mind by statute means not that the required opinion was improperly formed, but that it was not held at all. The onus therefore rests on the detaining authority to disclose at least enough facts to show that he had formed the opinion required by the statute. If he is not placed under this obligation, he can meet any allegation, however plausible on the face of it, by an inscrutable and unchallengeable silence.

The only possibility open to an applicant in such circumstances is to call for the hearing of oral evidence in terms of rule 6(5)(g) of the Supreme Court Rules, which vests the courts with a discretion to direct the hearing of *viva voce* evidence in motion proceedings where an insoluble dispute of facts appears from the papers. After some uncertainty, it has now been authoritatively decided that the emergency regulations do not preclude a court from ordering the appearance of a detainee for this purpose.[2] The courts have also on several occasions adverted to the possibility of calling arresting officers for the purposes of giving oral evidence subject to cross-examination.[3] In order to avail himself of this opportunity, however, an applicant must persuade the court that there is good reason for exercising its discretion in his favour. Although no hard-and-fast rules exist as to when a court must exercise this discretion, the general rule is that oral evidence will only be allowed where there are reasonable grounds for doubting the correctness of the allegations on the papers.[4]

How difficult it can be to persuade a court that there are grounds for doubting the correctness of a policeman's version of the events leading up to an arrest is illustrated by *Bloem v Minister of Law and Order and others*,[5] in which the arresting officer claimed, *inter alia*, that he had

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1 At 38G.
2 See *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A), discussed at 3.6 above.
3 See *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) and *Nqumba v State President* 1987 (1) SA 456 (E) at 475 B-C.
4 See *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93H.
5 1987 (2) SA 436 (O).

received 'certain information' from a 'religious source' which indicated that the applicant had supported and taken part in the organisation of school and consumer boycotts. Acting on further information, he had accompanied two other policemen to applicant's parent's shop (which she was managing because her parents had already been detained)[1], where he found her wearing a UDF T-shirt and addressing a number of youths. No indication was given of what she had said to them. Responding to an urgent radio message, the police left the shop. On his return some time later, the arresting officer found that applicant was no longer wearing the T-shirt. For her part, applicant denied that she was involved in any political activities and further averred that the arresting officer had either never received the information on which he claimed to have relied or that, if he did, he could not *bona fide* have believed it. The court refused to grant an application for the hearing of oral evidence, holding that there were no reasonable grounds for doubting what the arresting officer had said. It added that applicant had not and, since most of the facts were peculiarly within the knowledge of the arresting officer, 'understandably could not' put before the court any facts which served to cast doubt on his version. In the absence of oral evidence to resolve conflicts in the respective versions of the applicant and the detaining authority, it seems the courts will accept the allegations by the respondents.[2]

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1 The parent's application for release was dealt with in *Bloem v Minister of Law and Order* 1986 (4) SA 1064 (O), already discussed.

2 See also *Nqumba v State President* 1987 (1) SA 456 (E) at 468B-C and *Mabena v Commissioner of Police, Kwandebele* 1988 (4) SA 446 (T) at 454I-J.

6.2.7 Treatment of Detainees

Notwithstanding the fact they have been convicted of no offence and, indeed, could during the emergencies of 1985 and 1986/87 be held solely for their own safety,[1] persons detained under the emergency regulations have been held under conditions of extreme severity.[2] In the first place, a detainee may be cut off from all contact with his friends, family and the outside world at large, including his lawyer. Visits to detainees by any person other than authorised officers are allowed only with official permission.[3] The regulations also provide that no person shall be entitled to any official information relating to a detainee, or to 'any other information of whatever nature obtained from or in respect of such person.' Legal representives also require special permission to visit detainees.[4] Detainees may also be cut off from contact with other categories of prisoners or other detainees. This means that a detainee can be held at the pleasure of officials in what amounts for all practical purposes to solitary confinement.[5] *Molobe v Minister of Law and Order and others* [6] illustrates this point. In that case, the court dismissed with costs an application by a detainee to be allowed contact with fellow detainees at the police station where he had been held for more than two months. It was common cause that applicant had been held in a cell measuring about five paces by six and with access to a courtyard of similar dimensions.[7] It was contended on his behalf that this amounted to solitary confinement. Preiss J held, however, that although he was 'cut off from a great measure of human conduct',[8] the con-

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1 The provision empowering members of the security forces to detain a person when they considered it necessary for his own safety was removed from the emergency regulations in 1988/9, doubtless in response to Hoexter JA's exposition of the implications of this phrase in *Omar v State President* 1987 (3) SA 859 (A), discussed at 5.6 above.

2 See, generally Kahanovitz and Dison 'Prison Conditions of Detainees Held under the State of Emergency in South Africa' and Nicholson 'Children in Detention' in Haysom and Mangan (eds) *Emergency Law* at 44 and 53, respectively.

3 Regs 3(10) of Procs R 121 of 1985 and R109 of 1986, 3(8) of Proc R 96 of 1987 and 3(7) of Procs R 97 of 1988 and R 86 of 1989. The wording of these regulations is cited at 5.3 above.

4 The courts have agreed that that the words 'no person' should be taken to include lawyers (see 5.2 above and the cases there cited). The regulations of the 1960 state of emergency were, however, explicit in this regard, providing that no detainee 'shall, without the consent of the Minister or a person acting under his authority, be allowed to consult with a legal adviser in connection with any matter relating to the arrest and detention of such person' (reg 30 of Proc 167 of 1960). This provision, however, at least makes it clear *ex contrariis* that a detainee retains his right to consult a lawyer about matters not relating to his arrest and detention.

5 They can, of course, be formally punished with solitary confinement for various disciplinary transgressions (see below).

6 WLD 17 February 1988 Case No 00210/88, unreported.

7 See at 8 of the typed judgment.

8 Ibid.

ditions under which the detainee was being held did not amount to 'solitary confinement' within the special meaning of that phrase. The learned judge pointed out that applicant's wife had been allowed to visit him on two occasions and that he had seen his legal representatives. Furthermore, the judge observed (with a touch of doubtless unintended irony) that applicant had been given the opportunity of 'meeting with' the security police or police staff at the Jeppe police station whenever he had sought such meetings.[1] Solitary, or not, however, applicant contended that his isolation from other detainees was unfair and illegal. The court was satisfied, however, that the prison regulations relating to detainees were so widely phrased as to authorise the isolation of a detainee from any person, fellow detainees included.[2] In addition, the court took cognisance *mero metu* of the fact that a recent amendment to the emergency regulations [3] had given all detainees the status of awaiting trial prisoners, subject to normal prisons rules which provided *inter alia* that association between prisoners awaiting trial or sentence 'shall be restricted to a minimum in order to prevent collusion or conspiracy to defeat the ends of justice'.[4] The court accordingly accepted respondent's claim that it was necessary to keep detainees apart until their interrogation was completed.[5]

In addition, detainees could effectively be made to disappear without trace, at any rate until their names were tabled in parliament in compliance with s 3(2)(a) of the Public Safety Act.[6] This was made possible by a prohibition in the regulations of the emergencies of 1985, 1986/7 and 1987/8 on the publication of the names of any person detained under emergency regula-

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1 *Ibid.*
2 At 11 of the typed judgment.
3 Proc R 106 of 1987, on which see below.
4 Reg 132(2) of the Prison Regulations, set out in GN 2080 of 1965 and amendments.
5 At 12.
6 Usually within 30 days of their arrest, but possibly much more if parliament dissolves before the expiration of that period. For a discussion of the tabling requirements see 5.8.2 above.

tions before their identities were officially disclosed.[1] In addition, the authorities could withold information relating to the detention or whereabouts of a detainee in terms of the provision denying official information concerning detainees.[2]

All regulations issued in the states of emergency of the 1980s have expressly provided for the interrogation of detainees.[3] The regulations lay down no guidelines for or limitations on the methods that may be used in interrogating a detainee, merely stating that interrogation may be conducted 'with a view to the safety of the public or the maintenance of public order or the termination of the state of emergency'. This omission, coupled with the fact that powers of interrogation are conferred on all members of the security forces, including the most junior, probably helps explain why some serious allegations of ill- treatment and even torture have from time to time reached the courts, [4] some of which have resulted in the issuing of restraining orders against the police.[5] Such cases make it clear that, in spite of the unrestrained terms in which the power of interrogation is conferred by the regulations, the courts will not be prepared to read into them a licence for 'third degree' methods.[6] But whether the use of such methods can be proved is another matter.[7]

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1 Reg 8(d) of Proc R 120 of 1985; reg 13(d) of Proc R 109 of 1986; reg 9(e) of Proc R 96 of 1987.

2 Currently reg 7(b) of Proc R 86 of 1989, which has the same wording as its counterpart in all previous regulations.

3 Regs 3(5) of Procs R 121 of 1985 and R 109 of 1986 and 3(6) of Proc R 96 of 1987, R 97 of 1988 and R 86 of 1989.

4 Given the restrictions on media reporting of the treatment of detainees (see 7.2 below), the courts and parliament are the only the places in which such allegations may be publicly aired. Even the former channel was, however, partially blocked in late 1986 by a provision (reg 3(4)(iii) of Proc R224 of 1986, reproclaimed as regs 3(6)(a)(iii) of Proc R 98 of 1987, R 99 of 1988 and R 88 of 1989) which provided that evidence relating to the 'circumstances or manner of arrest of, or the circumstances of, or treatment in' detention of emergency detainees could not be disclosed until the court had given final judgment. 'Final judgment', in cases involving applications for restraining orders, presumably means the granting of the final as opposed to the interim order.

5 Of these, the most dramatic case was that in which a district surgeon, Dr Wendy Orr, placed evidence of ill-treatment of detainees examined by her before the Eastern Cape Division of the Supreme Court. Dr Orr was subsequently prevented from seeing detainees.

6 For powerful judicial confirmation of this point, see the dissenting judgment of Rumpff CJ in *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A).

7 This difficulty has, however, been to some extent ameliorated by the Appellate Divisions's decision in *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A) that the provision blocking unauthorised access to detainees does not preclude a court from exercising its discretion to call a detainee before it for the purpose of giving *viva voce* evidence. *Nkwentsha* is discussed at 3.5 above.

An emergency detainee may be held in either a police cell or a prison, [1] and may be removed at the behest of the Minister of Law and Order from the place to which he was originally committed to another prison (as defined) in any other locality.[2] In the state of emergency of 1960 detainees who were not South African citizens could be summarily deported,[3] and African detainees who were not in possession of a reference book at the time of their arrest, who were unlawfully in the areas in which they were arrested or who had 'no sufficient honest means of livelihood' could be committed to prison and thereafter be treated as persons undergoing sentences imposed on them by courts of law.[4]

Responsibility for formulating the rules for regulating the conditions under which emergency detainees are held falls on the Minister of Justice. On the declaration of the state of emergency in 1985, he approached this task with exceptional rigour. Those held during the partial state of emergency of that year found themselves in a position far worse than that of convicted prisoners. They were, for example, denied the right normally enjoyed by ordinary prisoners to receive reading matter other than religious works,[5] to study,[6] to communicate with prisoners of other categories,[7] or to communicate with visitors except in English or Afrikaans.[8] The denial of study material and non-religious reading matter was absolute: prison staff were not authorised to grant exceptions. This oppressive regime was, however, gradually tempered. The right to study was conditionally restored a month later,[9] and 'selected magazines' later added to the religious reading matter to which detainees were formerly restricted.[10] Permission for visits obtained by any person, including lawyers, was valid for one visit only.[11] Provision was also made for the punishment of detainees by various means, including whipping or solitary con-

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1 'Prison' is defined in the various emergency proclamations as including a 'police cell of lockup'.
2 Reg 3(4) of Procs R 121 of 1985 and R 109 of 1986 and 3(5) of Procs R 96 of 1987 and R 97 of 1988.
3 Proc 151 of 1960.
4 The legality of this provision is questioned at 5.3 above.
5 Reg 7 of GN 1674 of 1985.
6 Reg 11. This provision had disastrous implications for the many students held under the emergency regulations.
7 Reg 3(7). This had particularly serious implications for a person who happened to be the only emergency detainee in some small centre.
8 Reg 3(5). Where unable to speak either of these languages, however, a detainee was permitted to speak through an official or approved interpreter.
9 GN 1877 of 1985, which allowed a detainee to enroll for formal study with the permission of the prison commander acting in concurrence with the Commissioner of Police or his nominee.
10 Reg 7 of GN 2483 of 1986, which also allowed detainees to receive a 'reasonable amount' of private money.
11 Reg 5(1) of GN 2483 of 1986. This provision often made the task of gaining access to detainees a bureaucratic nightmare of Kafkaesque proportions (conversations with legal practitioners).

finement — part of it on spare diet — for up to 30 days for a variety of disciplinary infractions such as disobedience, idleness, carelessness, negligence, insolence or disrespect, swearing, singing, whistling, making a nuisance or, generally, acting 'in any manner contrary to good order and discipline'.[1] Soon after the declaration of the state of emergency of 1987/8, however, the government had a change of heart. From 26 June of that year emergency detainees were given the same status as awaiting trial prisoners and, subject to the exception that they were still to be segregated as far as possible from other categories of prisoners, were subject to normal prison discipline.[2]

6.3 Restrictions on Individuals

Apart from detaining them without trial, the government has another method of putting its opponents out of circulation — the restriction order. Such orders can be imposed in two sets of circumstances. First, the Minister of Law and Order can release a person detained under the emergency regulations subject to such conditions as he may determine.[3] Second, the Minister can prohibit *any* person from carrying on an activity or performing a particular act, or activities of a nature, class or kind, or from leaving a particular area or his house.[4] These conditions can

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1 Regs 21 of GN 1674 and 2483 of 1985 and 1196 of 1986, and 20(1) of GN 1300 of 1987.

2 Proc R 106 of 1987, repeated for the subsequent state of emergency by Proc R 98 of 1988 (currently Proc R87 of 1989). These provisions incorporated by reference the prison disciplinary regulations as set out in GN R 2080 of 1965, as amended, which was issued under s 94 of the Prisons Act 8 of 1959.

3 The regulation authorising him conditionally to release a detainee (see eg reg 3(6) of Proc R109 of 1986, repeated as reg 3(9) of Proc R 96 of 1987 and reg 3(8) of Procs R 98 of 1988 and R 86 of 1989) reads: 'The Minister may at any time by notice signed by him order that a person detained in terms of this regulation, be released on such condition or conditions, if any, as may in his discretion be determined by the Minister in such notice.'

4 This power was first conferred early in 1988 by way of an amendment (reg 6B of Proc R 23 of 1988) to the emergency regulations then in force (Proc R 96 as amended by Proc R 106 of 1987). See also regs 8(1) of Proc R 97 of 1988 and Proc R 86 of 1989. The orders may prohibit absolutely the performance by the person concerned of the specified activities, or the prohibition may be subject to the proviso that permission for its performance may be obtained from the Commissioner. The Commissioner is, however, permitted to grant an exemption only if he is *convinced* that it will not result in the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed (reg 8(3)(b) of of Proc R 86 of 1989). Following the reasoning in *Castell NO v Metal & Allied Workers Union* 1987 (4) SA 795 (A), it would seem that the Commissioner is not obliged to provide reasons for the refusal to grant an exemption, since a restricted person has no right to perform a prohibited activity.

be revoked or amended, and potentially remain in force for as long as a state of emergency endures.

Before June 1988, any restrictions imposed during a particular state of emergency lapsed on its expiration. In the regulations of the states of emergency from June 1988, however, special provision was made for the automatic extension of all restriction orders imposed during the previous emergency and still in force on its termination, notwithstanding that particular orders may have expressly mentioned that they would lapse when the current emergency expired.[1] This provision is of dubious legality. The State President cannot be said to have applied his mind to the circumstances of each restricted person when he imposes a blanket extension of all restrictions orders which were, after all, originally imposed by another functionary.

These banning provisions, once again, supplement the already copious powers conferred on the Minister by the Internal Security Act [2] to control the lives of selected individuals without actually locking them up. Under that Act, the Minister may prevent individuals from joining or remaining as members of organisations or public bodies,[3] from leaving or entering certain areas [4] or from attending gatherings.[5]

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1 Regs 3(d) of Procs R96 of 1988 and R 86 of 1989. This provision relates to restrictions imposed on former detainees only.
2 Act 74 of 1982.
3 Section 18(1).
4 Section 19(1).
5 Section 20. A 'gathering' has been defined in the act in such a way as to include a meeting of two persons, including the banned person (see *S v Wood* 1976 (1) SA 703 (A)).

The emergency regulations, however, impose no limitations whatever on the kind of activities which the Minister can forbid. When imposing a restriction on a person who has not been detained, however, he must be of the opinion that a particular form of restriction is 'necessary' for the safety of the public, the maintenance of public order or the termination of the state of emergency. Although the regulation authorising the conditional release of a detainee is silent on the matters on which the Minister must satisfy himself, the Appellate Division has ruled that he can only impose restrictions which serve the purposes laid down in the Public Safety Act.[1]

In the case of detentions, the courts are prepared to scrutinise the reasons given by the detaining authorities to establish whether they had formed the opinion required by the enabling regulation.[2] In cases dealing with challenges to restriction orders, however, the courts have adopted a more diffident approach. In *Mbeki's* case,[3] the court rejected the contention that the order imposed on 77-year-old former political prisoner Govan Mbeki was so unreasonable and unjustified as to warrant the inference that the Minister had 'failed to apply his mind to the matter'.[4] Applicant had pointed out that the government was aware of his support for the South African Communist Party and the African National Congress at the time of his release from prison a short while before. It was natural, so went the argument, that he should have attended gatherings to welcome him back into the community, and had in fact done so on several occasions before the restriction was imposed. Applicant denied that he planned to do anything illegal at these gatherings and further contended that if the gatherings might have caused others

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1 *Visagie v State President* AD 1 June 1989 Case No 553/87, unreported, at 32-3 (see below). An attempt to impugn the regulation authorising the imposition of restriction orders on the ground that it contained no guidelines as to the kind of restrictions which might be imposed was rejected by a full bench of the Eastern Cape Provincial Division in *Mbeki v State President of the Republic of South Africa and others* (ECD 13 November 1988, Case No 427/88, unreported) on the strength of the ruling just handed down by the Appellate Division in *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A), which precluded a court from setting aside emergency regulations on the ground of vagueness. *Mbeki's* case was in fact postponed pending delivery of the the senior court's judgment. (The *United Democratic Front* case is discussed at 5.4 and 5.5 above.) Counsel for the applicant in *Mbeki* sought, however, to distinguish that case from the Appellate Division decision by arguing that the restriction provision conferred judicial or quasi-judicial, and not merely administrative powers, on the Minister (at 15 of the typed judgment). The court pointed out, however, that the *United Democratic Front* decision was concerned with legislative powers, and since a restriction order was a legislative act, the cases were not distinguishable. The court accordingly considered itself bound by the Appellate Division ruling that a regulation promulgated by the State President under s 3(1)(a) of the Act cannot be struck down because it failed to provide clear guidelines to the *delegatus* (at 15-16).

2 See 6.3 above.

3 *Supra.*

4 At 21 of the typed judgment. The terms of the banning order are set out at 16 *in fine*- 17.

to perform acts which threatened the safety of the public, conditions could have been imposed on the gatherings. The Minister, for his part, stated that he was in possession of information which showed that the banned African National Congress was seeking the assistance of other organisations and persons to carry out its objects. The organisation had seized upon and used the release of Mr Mbeki and his appearance at large gatherings all over the country to boost its image and 'fan the flames of the revolutionary climate which existed in certain quarters of the country'. The applicant was, in short, being used as a pawn by the African National Congress to achieve its purposes of 'creating a revolutionary climate in the country'. The Minister further stated that he had considered all the options open to him and concluded that the restriction order was the least drastic step he could take to combat these activities, which he believed constituted a real threat to public order and safety.[1] The court did not consider it necessary or desirable to inquire into the validity of these these claims, merely reiterating the point made in *Omar's* case [2] that the question was

> 'not whether the Minister could have achieved the objects he wanted to achieve in a different way, but whether he applied his mind properly to the problem and whether he honestly thought that he needed to do what he did.' [3]

In *Visagie v State President,*[4] a case turning on the conditional release of a detainee, the court was entirely unsympathetic to the contention that the Minister's decision was vitiated in its entirety because he had taken irrelevant or improper considerations into account in deciding to impose restrictions on appellant. Among the facts on which the Minister claimed to have relied were that appellant had in his capacity as a member of the Midland Council of Churches helped canalise funds to organisations which had as their aim the 'discrediting' of existing community organisations 'wat as regeringsinstellings beskou word', that the Midland Council of Churches was co-ordinating various programmes aimed at 'discrediting' the policy of the existing government, and that appellant was abusing the high profile and status which he enjoyed as a minister of the N G Sendingkerk to 'influence people and organisations against the existing constitutional structure in South Africa'. Appellant contended that these activities fell within the

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1 The Minister's affidavit is summarised at 22-23. Other steps had in fact been taken. The Divisional Commissioners of Police had, for example, banned several gatherings at which Mr Mbeki was to have appeared.

2 *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) at 892 E-F.

3 At 23.

4 *Supra.*

normal democratic rights of the citizen and that, because they had patently been central to the Minister's decision to impose restrictions, the Minister's decision was fatally infected.

The court *a quo*[1] rejected this contention on the basis that there there was no evidence that the matters mentioned substantially affected the Minister's decision, since his affidavit disclosed a host of other factors which would in fact have justified the restrictions.[2] But on appeal[3] Hoexter JA went a step further, and dismissed the entire 'extraneous factors argument' as 'fatally flawed'.[4] The defect which his lordship detected in the argument was as follows:

> 'As long as the Minister *bona fide* considers a fact to be relevant no Court may disturb his exercise of discretion simply because the Court itself regards that fact as being unhelpful or indeed entirely irrelevant. Whether in the result, in the instant case, [the Minister] exercised the decision entrusted to him wisely or unwisely is a matter with which the Court has no concern.'[5]

It was, said the court, 'for the Minister, and for him alone, to ponder and weigh those facts which appear to him in the honest exercise of his discretion, to bear upon a particular detainee's case'.[6]

That a court should not interfere with the honest exercise of a decision simply because it is felt to be unwise is of course trite law. But *non constat* that a court should therefore ignore the relevancy or otherwise of the facts on which his decision was based. In *Visagie*, the court accepted that 'failure to apply the mind' was among the grounds for the review of actions pursuant to discretionary powers of the kind at issue,[7] and that the power could not be exercised in an 'arbitrary' or 'capricious' fashion. It is therefore difficult to understand how the court could in the same breath have regarded the whole extraneous factors argument as 'fatally flawed'. For how is it to be determined whether the repository 'applied his mind' if the relevance or otherwise of the facts which shaped his decision are to be left out of account? Surely a failure to consider relevant factors, or the reliance on irrelevant ones, is the hall-mark of a mindless — and hence capricious and arbitrary — decision?

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1 *Visagie v State President* ECD 5 February 1987 Case No 1815/86, unreported.
2 At 11 of the typewritten judgment.
3 *Visagie v State President* AD 1 June 1989 Case No 553/87, unreported.
4 At 22.
5 At 24.
6 *Ibid.*
7 See at 22 & 25.

Although the point was not apparently drawn to the attention of the court, its dismissal of the 'extraneous factors' argument also subverts another fundamental principle of administrative law. This is that the repository of a discretionary power may not use it for ulterior or improper purposes. For how does one guage whether a power has been exercised for ulterior or improper purposes other than by examining the facts which shaped the decision to use it? It is true that the enabling regulation at issue in *Visagie* did not lay down express guidelines as to what circumstances the Minister should take into account before imposing conditions on a detainee's release. But, as the court accepted,[1] the regulation should be read in the context of the detention provisions as a whole. These indicate the objectives which the lawgiver wishes detention without trial to serve — namely, the protection of the safety of the public, the maintenance of law and order or the termination of the emergency. Just as the Minister has been held to be implicitly obliged to exercise his wide discretion to extend detention for those purposes alone,[2] it may be inferred that he may not use his power to impose conditions on the release of a detainee for any other purposes. This the court accepted in *Visagie*.[3] It is therefore difficult to understand how the court could have rejected the extraneous considerations argument. Should the evidence disclose that he had relied substantially on improper considerations of the kind at issue in *Visagie*, surely this indicates that he is using his powers for purposes not contemplated by the regulations? Assuming that the Minister had in fact decided to restrict appellant because he was involved in organisations which, as was claimed, were aimed at 'discrediting the present government' and 'influencing the people against the existing constitional order', one could undoubtedly infer that he was using his power for an unauthorised purpose. The Public Safety Act, even on the most generous interpretation, cannot be seen as authorising the government to protect its policies or constitutional proposals from criticism. Indeed, the court *a quo* perceived the link between the considerations taken into account by the Minister and the conditions which he had in fact imposed when it observed[4] that

> '[b]ecause of the social status [applicant] enjoyed in the community he influenced those attending such meetings and took the lead in inciting them to opposition to the existing constitutional system in the country. The condition presently under consideration was therefore obviously directed to retraining him from persisting in this form of activity.'

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1 At 32-33.
2 See *State President v Tsenoli/Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A) at 1183H-I.
3 See at 32.
4 At 17 of its judgment.

A clearer aknowledgment that the condition had been imposed for improper purposes can hardly be imagined.

In *Visagie*, the Appellate Division could without sacrifice of principle have decided, like the trial court, that the improper considerations relied on by the applicant were not in fact central to the Minister's decision. But its summary rejection of the whole 'extraneous factors' argument is inconsistent with its willingness to divine an unauthorised purpose from the *content* of the conditions.[1]

Two of the four restrictions which had been imposed on Mr Visagie were specifically challenged on appeal, the one restricting the appellant to the magisterial disrict of Middleburg, the other forbidding him to take part in any gathering

> 'waar enige staatsvorm of enige beginsel of beleid van, of optrede deur die regering van die Republiek van Suid-Afrika aangeval, of gekritiseer word nie.'

The court did not accept the geographical restriction as unreasonable, primarily, it seems, because the papers disclosed that applicant had in fact obtained permission from the police to leave the magisterial area for his pastoral duties. With regard to the second restriction, however, the question was whether it could be said serve the purposes for which the power had been conferred. The court framed its approach to this question in the following passage:

> 'Although the Minister's discretion under reg 3(6) is a general one, this does not mean that he enjoys an uninhibited freedom of choice to impose whatever conditions of release may take his fancy. The power conferred on the Minister is not an unlimited one. It is a limited power conferred only for the statutory purposes stated in sec 3(1) of Act 3 of 1953 [the Public Safety Act].'[2]

It is interesting to note that with these words the court shifted the enquiry from that posited in appellant's affidavit (gross unreasonableness leading to an inference of failure to apply the mind) to a notionally different ground of review, namely, unauthorised purpose. It found the first limb of the prohibition (attendance at any gathering at which 'enige staatsvorm' was attacked or criticised) to be so wide-ranging in scope as to be 'at once entirely repugnant to ordinary common sense and wholly unrelated to any of the statutory purposes' envisaged by the

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1 It is submitted that when the repository of an administrative power decides to utilise it for reasons not contemplated by the enabling statute, he travels as surely beyond his powers as he does when his act itself has an unauthorised effect.

2 At 32.

Public Safety Act. The second part of the prohibition, namely, attendance at any gathering at which any principle, policy or action of the government of South Africa was criticised or attacked, was found to be likewise objectionable. Such a restriction, embracing the right to discuss matters wholly unrelated to state security, represented 'an insupportable abridgement of the appellant's rights',[1] which indicated that the Minister had 'travelled beyond the precincts of his legitimate powers'.[2]

Although, given the marked conservatism of most previous Appellate Division judgments dealing with emergency powers, this aspect of the *Visagie* decision was something of a watershed, another aspect of the judgment showed that the court was still not prepared to use the grounds of review available to it as robustly as it might. Although there was substantial ground for striking down the above-quoted restriction on the ground of vagueness, the court declined the invitation to do so.[3]Hoexter JA observed that the court could not declare the condition void for uncertainty 'unless upon an interpretation of its terms this Court is *quite unable* to reach *any* conclusion as to what was on the mind of its draftsman'.[4] With respect, however, his lordship appears to have set the test for uncertainty somewhat high. A declaration of nullity on the ground of vagueness ought not, as the court suggested, be confined to those instances in which the meaning of an administrative order, particularly one which carries a criminal prohibition, cannot be determined at all. The test, it is submitted, is whether 'a *reasonably precise* meaning is ascertainable and whether the order 'indicates *with reasonable certainty* to those who are bound by it the act which is enjoined or prohibited'.[5] The condition at issue in *Visagie*, even if it did not fail on the strict test formulated by Hoexter JA (and that is arguable), certainly fails the test as enunciated in *Jopp*. It will have been noted that the prohibition forbade appellant from attending gatherings at which 'enige staatsvorm' was attacked or criticised. The court *a quo*, in holding that the condition was not so vague as to be legally void, pointed out that the word 'gathering' had received 'much judicial interpretation' and was 'well understood'.[6] It is noteworthy, however, that Eksteen J did not refer to, let alone attempt to give meaning to, the other words in the condition. Hoexter JA, however, regarded the other words as unreasonable in their breadth. He found the term 'enige staatsvorm', for example, unreasonable because it 'signified the abstract notion of any constitutional system of any state at any time, whether in the

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1 At 37.
2 *Ibid.*
3 See at 32.
4 At 31, emphasis added.
5 *R v Jopp* 1949 (4) SA 11 (N) at 14, emphasis added.
6 At 16 of its judgment.

past, present or future'. The condition, is, however, equally amenable to the construction that the words 'enige staatsvorm' were intended to qualify 'regering van die Republiek van Suid-Afrika'. It may well have been intended to restrict appellant from attending meetings at which only indigenous past or proposed constitutional dispensations were discussed. How, it may be asked, was appellant to decide which of the two possible constructions to follow? Furthermore, the prohibition on attendance at gatherings at which 'enige beginsel of beleid van, of optrede deur' the government was criticised defies comprehension. The court itself pointed out, with respect correctly, that 'few if any topics of commonplace daily discussion do not directly or indirectly touch on the subject of public security'.[1] The court could have added that the word 'principle' is one of almost infinite elasticity. What on earth is a 'principle' of a government? If (as it does) the South African Government claims to base its system of rule on Christian principles, does this mean that appellant would have to leave a bible study group on which some doctrine of the Christian faith was being critically discussed? And, finally, at what point does discussion end and 'criticism' begin? Appellant would undoubtedly have been confronted with these conundrums, and more, had he wished to reconcile obedience to the order with the continuation of any semblence of normal intellectual discourse with his fellow citizens. No subordinate lawgiver, it is submitted, is lawfully entitled to plunge a legal subject into such uncertainty.

The regulations providing for the imposition of restrictions are devoid of procedural safeguards.[2] The Minister may impose restrictions on persons other than released detainees, in the now familiar phrase, 'without notice to any person and without hearing any person'. In *Mbeki's* case,[3] the court summarily rejected the argument that applicant was in the special circumstances of his case entitled to a hearing notwithstanding the general exclusion of the *audi alteram partem* rule by the enabling regulation.[4] It is, however, submitted that the words do not

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1 At 36-37.

2 The restriction provision of the Internal Security Act 74 of 1982, s 25, provides that the notice served on a person informing him of his restriction must be accompanied by a statement of the reasons therefore and as much of the information upon which the decision was based as can, in the Minister's opinion, be disclosed without detriment to the public interest. A restricted person is, furthermore, entitled to make written representations to the Minister and submit further information relating to his case. He may also avail himself of a statutory review procedure and, if unsuccessful, submit an application for periodical review of his restriction by a special review board.

3 *Mbeki v State President* ECD 13 October 1988 Case No 427/88, unreported.

4 Applicant's counsel sought to rely on the so-called 'legitimate expectation' rule developed by the English courts (see *Schmidt v The Secretary of State for Home Affairs* [1969] 1 All ER 904 at 909D-F and *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350. These cases were referred to but not applied in *Castell NO v Metal & Allied Workers Union* 1987 (4) SA 795 (A), which left open the question whether the 'legitimate expectation test' formed part of South African law.

deprive a restricted person of his right to make representations after the order has been imposed, and, accordingly, do not relieve the Minister of the duty to provide reasons for the restrictions. A number of orders have in fact been altered or lightened by the Minister after such representations.[1]

The regulation authorising the Minister to release a detainee subject to conditions, however, contains no express exclusion of the *audi alteram partem* rule. In *Visagie's* case,[2] the question arose whether the Minister was obliged to grant a hearing to a detainee before releasing him conditionally. The rules of natural justice require, of course, that a public official should give a person a hearing before taking a decision which adversely affects his rights. The novel point to be decided in *Visagie* was whether the *audi alteram partem* principle applied in situations where the effect of an administrative act was *less* prejudicial to the individual concerned than the restrictions under which he languished before the act was effected. The court *a quo* expressed doubts that it did, saying:

> '[I]t appears that the rule of natural justice requires that whenever an act will affect the property or liberty of an individual adversely or prejudicially, then he must be afforded an opportunity of submitting representations in defence of his rights. Where, however, the proposed act will not affect him prejudicially or adversely but would benefit or ameliorate his circumstances the same considerations would not seem to apply....'[3]

Hoexter JA, however, found himself unable to conclude merely from the fact that the conditions were in fact 'ameliorative' rather than prejudicial that the individual concerned had no right to be heard in regard to the conditions for his release.[4] There is, with respect, good reason for his lordship's reluctance to draw this conclusion. The court *a quo* appears to have been influenced by the doctrine laid down in *Laubser v Native Commissioner, Piet Retief*[5] that an individual does not have a right to a hearing unless the proposed action will adversely affect one or more of his legally recognised rights. The relevance of this rule to the circumstances in a case like *Visagie* is, however, dubious. The release of a detainee subject to conditions may constitute a less drastic inroad on his liberty than incarceration itself. But the effects of the restriction order should not be compared with the former detainee's position *as a detainee*. To do so would be to overlook the fact that he possessed the normal rights and freedoms of an ordinary

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1 Conversations by the author with various legal practitioners.
2 *Supra*.
3 At 6 of it typed judgment.
4 At 9.
5 1958 (1) SA 546 (A).

citizen before his detention, and would in normal circumstances have been entitled to them again on his release. Restrictions such as those at issue in *Visagie* unquestionably constitute a drastic inroad on the rights and liberties to which the ordinary citizen is entitled, whether of not he had been detained without trial. When it comes to deciding whether conditions imposed on a released detainee are 'ameliorative' or prejudicial, therefore, the effect of the conditions should be compared with his entitlements as an ordinary citizen, and not with what few rights he retained while in detention.

Eksteen J had ruled, however, that even if it should be held that the *audi alteram partem* principle did apply, an opportunity to make *ex post facto* representations would in the circumstances of the case constitute sufficient compliance with the rules of procedural justice. In the absence of any allegation that the Minister had refused to entertain representations from Mr Visagie after his release, however, his lordship found it unnecessary to pronounce further on whether the applicant had a right to a hearing after his release. On appeal, appellant contended that the court below had erred by so watering down the *audi alteram partem* principle when it came to the Minister's power conditionally to release a detainee. There was, so the argument went, no urgency which justified departure from the requirement of a prior hearing.[1] Hoexter JA, however, recognised the irony implicit in this contention. For, as his lordship observed,[2] the release of a person detained without trial was a matter of the highest urgency. Allowing for the facts that conditions imposed on a detainee became effective immediately on his release and rendered him liable to prosecution for non-compliance, the court observed:

> '[W]here the Minister has decided to make an order in terms of subreg 3(6), whether for unconditional or conditional release, the speedy setting free from prison of the detainee is a matter of paramount importance. Any construction of subreg 3(6) which encumbers and retards its procedure for conditional release by requiring that the Minister's order should be preceded by a hearing of the detainee would, in my opinion, be alien to the purview and spirit of its provisions. It would involve, in the words of the court *a quo* "an unwarranted extension of the deprivation of that detainee's liberty".'[3]

The sentiment behind this passage is beyond criticism. But it may be asked whether, in practical terms, the fear expressed by the court that insistance on a hearing before conditional release would retard the process has any real foundation. One assumes that the Minister, before ordering the extention of a person's detention, has fully appraised himself of the details of his case.

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1 See at 13.
2 At 13-14.
3 At 13-14.

The decision to release a person detained after such due consideration, and as to what conditions are suitable, is also presumably not taken on the spur of the moment. With modern communications technology, it would not take an unconscienable time to inform a detainee of his right to make written representations, and to communicate them to the Minister, before the latter decided on conditions for release. Some detainees might prefer spending a little longer in detention if they feel there is some prospect of persuading the Minister to dispense with post-detention restrictions which they find unacceptable. Applicant's argument that the conditional release of a detainee is not the kind of urgent decision which justifies departure from the prior hearing requirement is therefore, it is submitted, not entirely without substance.

Be that as it may, the court's finding[1] that the Minister was 'legally obliged to give due consideration to such representations as the conditionally released detainee may wish to make in regard to the conditions of release imposed' is significant, at least in the context of emergency law. It will be recalled that in *Omar/Fani v Minister of Law and Order, State President v Bill*[2] the court effectively deprived detainees of their right to a hearing even after the Minister had issued the order for the extension of their detention beyond the period for which they could be held at the behest of the police. This ruling was based on the view that the decision to detain was a final one, and hence that no duty to reconsider rested on the Minister.[3] The court's finding in *Visagie* that the Minister should afford a restricted former detainee the right to make representations for the amelioration or removal of restrictions on his liberties indicates that, at least in this context, the court is not prepared to uphold the pernicious principle that an official who makes an order drastically affecting the liberty of a citizen need never give it another thought.

The restrictions just described may only be imposed on specified individuals. In the regulations of 1988/9, however, the State President went a step further by empowering the Minister to prohibit activities or acts, including the possession of specified objects and the wearing of specified apparel in an area or in circumstances likewise specified. [4] Such an order may be directed at persons generally or at those belonging to a specified category, and may be made operational for the duration of the state of emergency. Again, the Commissioner may grant permission for the performance of the prohibited acts, but only where he is 'convinced' that the

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1 At 15.
2 1987 (3) SA 859 (A).
3 At 900G-I. This aspect of *Omar* is discussed at 9.2 above.
4 Reg 9(1) of Procs R 97 of 1988 and R 86 of 1989.

grant of such consent will not threaten the safety of the public or the maintenance of law and order or the termination of the state of emergency.[1] It is doubtful whether the delegation of a power in terms so unrestrained would have survived judicial challenge during the brief period of activism displayed by some courts before the Appellate Division showed its restraining hand in *Staatspresident v United Democratic Front*.[2] A general authorisation to prohibit 'activities' or 'acts' is at least as vague as that authorising the power to identify 'any matter' as a 'subversive statement', which latter authorisation was struck down by the court *a quo* in the *United Democratic Front* case.[3] A general prohibition on activities is an act of a legislative nature, the delegation of which is permissible under s 3(2)(a)(i) of the Public Safety Act. As the full bench of the Natal Provincial Division pointed out, however, that section authorises the making of regulations, orders, rules etc 'for the purposes of which the State President is by this section authorised to make regulations'. Section 3(1)(a) authorises the State President to make such regulations 'as appear to *him* to be necessary or expedient' for certain purposes. There can be no doubt that a regulation empowering another to ban any activities which in the latter's opinion are necessary for those purposes constitutes a total abdication of the discretion conferred on the State President. The State President has made no attempt to circumscribe or describe the kinds of activities which the Minister may prohibit. In the case of general bans on forms of activity, the State President cannot justify such delegation on the grounds of overriding urgency. He could easily have specified, for example, that the Minister should use his power to forbid the performance only of acts of violence, or those likely to encourage violence, or to prohibit the carrying of weapons or dangerous objects. It is simply not enough to say, as the Appellate Division did in *Tsenoli/Kerchhoff*,[4] that the conferment of such blanket powers was permissible because the State President was at liberty to 'choose the means and methods whereby the purposes stipulated in the Act are to be achieved'.[5] In this case, the State President has in fact empowered another to choose the means and methods for him.

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1 Reg 9(3).
2 1988 (4) SA 830 (A).
3 1987 (3) SA 315 (N), discussed at 5.4 above.
4 *State President v Tsenoli/Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A), discussed at 5.3 above.
5 See also *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) at 842D.

6.4 Orders

In all states of emergency the Commissioner of Police has been granted extensive power to issue orders by which general restrictions imposed or powers conferred by presidential decree are augmented or supplemented. The regulations conferring these powers[1] stipulate that they must be used for the purposes specified in the Public Safety Act and may not be inconsistent with the principal regulations. This presumably means that the Commissioner may not by order alter or amend any presidential regulation or, unless expressly permitted to do so, authorise such actions as the State President has chosen to prohibit.

The matters to which the Commissioner's orders may relate are far-reaching in the extreme. By the time of the emergency of 1988/9 they included the demarcation and closing off of areas, the control of entry or departure from them, the prohibition of specified activities within particular areas, and the imposition of curfews. He also has the power to close any place, whether public or private, and any business or industrial undertaking.[2]

In the emergencies of 1985 and 1986/7 the Commissioner was given the additional power to make orders relating to the control or prohibition of the communication of information or comment on or in connection with 'any conduct of a security force or member thereof regarding the maintenance of the safety of the public or the public order of the termination of the state of emergency'.[3]

One of the first orders issued under this provision was a general prohibition on reporting of 'unrest' in areas under emergency rule.[4] The delegation of such powers have all been ruled within the competence of the State President,[5] the Full Bench of the Natal Provincial Division

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1 Regs 10(1) of Procs R 96 of 1988 and R 86 of 1989.

2 An order closing down a business or industry was required to be 'temporary' only after June 1988 (see regs 10(1)(a)(v) of Procs R 96 of 1988 and R86 of 1989).

3 Regs 6(1)(i) of Proc R 121 of 1985 and Proc R 109 of 12 June 1986. This provision was rendered unnecessary in subsequent emergencies because unauthorised publication of such information was generally prohibited in the special media emergency regulations (on which see 7.2 below).

4 Proc R 208 of 1985. Another order prohibiting news reports or television coverage of the conduct of the security forces in black townships was, however, struck down because it was improperly promulgated (see 5.8.1 above).

5 *Natal Newspapers v State President* 1986 (4) SA 1109 (N).

taking the view that the matters over which the Commissioner had been given powers were 'pre-eminently the sort of precautionary measures that may well have to be adopted during a state of emergency'.[1] The court was not troubled by the fact that the 1986 regulations did not stipulate the purposes for which the Commissioner could issue the orders in question. This omission, was, however, corrected in the regulations of 1987/8 and after.[2] The court stated, however, that should the Commissioner abuse the powers for an extraneous or improper purpose, the particular order could be impeached.[3]

In addition to the powers just described, the Commissioner was authorised by the regulations of 1960 to make orders 'for all matters necessary and desirable to maintain public peace and in order to end the state of emergency',[4] and by those of 1986/7

> 'relating to any other matter the regulation and control or prohibition of which in his opinion is necessary or expedient for the safety of any member or members of the public or the maintenance of public order, or in order to terminate the state of emergency, the generality of the powers conferred by this paragraph not being restricted by the preceeding paragraphs'.[5]

This sweeping provision was ruled *ultra vires* on the ground that it conferred a discretion in terms so wide as to constitute an abdication by the State President of his emergency legislative powers.[6] The offending provision was removed from subsequent regulations. It is doubtful, however, whether in the light of the Appellate Division's ruling in *Staatspresident v United Democratic Front*,[7] such wide delegation of powers would now be regarded as beyond the powers of the State President.

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1 At 1125G.
2 The Commissioner was from then instructed to issue orders 'for the purposes of the safety of the public, the maintenance of public order or the termination of the state of emergency' (see reg 10 of Proc R96 of 1988 and Proc R86 of 1989).
3 At 1125D.
4 Reg 21(1) of Proc 93 of 1960.
5 Reg 7(1)(d) of Proc R 109 of 12 June 1986.
6 *Natal Newspapers v State President supra* at 1126J-1127F.
7 1988 (4) SA 830 (A), on this aspect of which see 3.2 and 5.4 above.

6.5 Control of Gatherings

Even under the ordinary law, it is not possible to speak of freedom of assembly in South Africa. Like most other democratic rights, the freedom to gather has gradually been converted into a privilege, dispensation of which is carefully regulated by the state. The principal instrument for the regulation and control of gatherings is, once again, the Internal Security Act,[1] which authorises the Minister of Law and Order to prohibit the holding of gatherings generally, or of particular gatherings, or of gatherings of a particular class or kind,[2] and magistrates to prohibit or impose conditions on any gathering in their area of jurisdiction if they have reason to apprehend that the public peace would be seriously endangered.[3]

Extensive use has been made by the Minister of his power to prohibit meetings during all states of emergency so far declared.[4] In addition, special powers have been conferred on the security forces to issue orders having the same effect.[5]

The regulations of the 1960 state of emergency empowered a magistrate or commissioned officers of the police or defence forces to prohibit gatherings or processions in general, or specific assemblies any area.[6] A number of types of gatherings were, however, exempted.[7] During the emergencies of 1985 and 1986/87, the Commissioner of Police could and did prohibit the holding of gatherings under his general authority to issue orders.[8] After June 1987, however, specific provision was made for orders relating to gatherings.[9] From then, the regulations empowered the Commissioner to issue orders 'for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency' whereby 'a particular gathering, or any gathering of a particular nature, class or kind, is prohibited at a place or in any area specified in the order', or

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1 Act 74 of 1982.
2 Section 46(3).
3 Section 46(1). The maximum duration of a magisterial order is 48 hours. There is no time limit for a prohibition imposed by the Minister.
4 Immediately after the 1989 general election, however, the government adopted a more liberal approach to protest gatherings, allowing a number by both left- and right- wing organisations in various parts of the country. The Minister of Law and Order, however, made it clear that he was not prepared to tolerate unauthorised gatherings (SABC *Network* television broadcast 23 September 1989).
5 See eg reg 2 of Proc R86 of 1989.
6 Reg 2(1) of Proc 167 of 1960.
7 For example religious gatherings, weddings, meetings of statutory bodies, theatrical or cinematic performances, and funerals — provided that the deceased had died from causes other than 'violence committed during a state of emergency'.
8 This power is discussed at 6.4 above.
9 See regs 7(1)(d) of Proc R96 of 1987 and 10(1)(d) of Procs R98 of 1988 and R88 of 1989.

> 'prohibiting the holding of a particular gathering, or any gathering of a particular nature, class or kind, in an area specified in the order otherwise than in accordance with conditions likewise specified, which conditions may include conditions requiring the Commissioner's prior approval for the time, date and place of the gathering, prescribing the hours of the day or the days of the week during which the gathering may or may not take place, limiting the number of persons who may attend the gathering and prohibiting persons not belonging to a specified category of persons from making speeches at the gathering.'

This grant by emergency regulation to the Commissioner of Police of the power to regulate meetings seems curious in the light of the fact that in terms of the general ministerial ban on gatherings imposed under the Internal Security Act during the emergencies a magistrate's authorisation was in any event required for all outdoor gatherings other than those of a *bona fide* sporting or religious nature. Among possible reasons why the government adopted special emergency powers to control gatherings are that the Commissioner's power overrides that of a magistrate, may be more onerous than a magisterial restriction currently in force and is not limited as to the area and time in which it may be enforced. The forms of gathering in respect of which the Commissioner may act are also more extensive than those which may be prohibited or controlled by either the Minister or a magistrate in terms of the Internal Security Act. Under the Act, these officials may impose a general ban only on gatherings, concourses or processions 'of any number of persons *having a common purpose*, whether such purpose be lawful or unlawful.' [1] This means that gatherings of people not having a common purpose, such as a throng in a busy street, may not be prohibited under the Internal Security Act. In the emergency regulations, however, the word 'gathering' is defined without reference to common purpose. The Commissioner may, therefore, generally restrict all forms of assembly, and his order will be breached by any person forming part of that assembly, even if he shares no common purpose with other persons in the gathering.[2]

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1 Emphasis added.

2 The Commissioner has made extensive use of this power to control funerals of those killed in civil violence during the emergencies. Restrictions typically include a ban on addresses other than by ordained ministers and on the display or distribution of flags, banners, placards or posters, the following of prescribed routes, the use of motor transport only between the place of the memorial service and the graveside, restrictions of the number of persons who may attend the service, and prohibitions on joint funerals (see, for example, GN 1116 of 10 June 1988 (*GG* 11346)).

There are two other reasons why the State President may have decided to confer special emergency powers to control gatherings on the Commissioner. The first is that under the Internal Security Act, a magistrate may only ban a gathering if he 'has reason to apprehend' that certain results would eventuate were the meeting to be held. After *Minister of Law and Order v Hurley* [1], this means that a magistrate's decision is objectively reviewable.[2] While the Minister's discretion to impose a general ban on meetings is unchallengable on the merits, his countrywide prohibitions on meetings must be made subject to the proviso that permission for the holding of meetings of the kind prohibited may be obtained from a magistrate. Refusal by a magistrate to give such permission involves an independent exercise of discretion which is subject to review on procedural or substantive grounds. Thus in *Metal & Allied Workers Union v Castell NO* [3] the refusal by a magistrate of permission to hold a gathering was declared *ultra vires* on the ground, *inter alia*, that he had taken irrelevant factors into account.[4] The finding by the trial court in *Castell* that the magistrate had further erred in not affording the applicant trade union a hearing before taking his decision may provide another reason for the special conferment on the Commissioner of the power to control gatherings. The regulations concerned specifically provide that the Commisioner may issue orders 'without prior notice to any person and without hearing any person'. Official fears that the case just cited might presage an enhanced determination by the courts to uphold where possible the citizen's right of assembly were, however, assuaged by the Appellate Division's decision in the appeal against *Castell*,[5] in which Hefer JA ruled *inter alia* that magistrates were not obliged to afford a hearing to applicant's for permission to hold gatherings, and that 'an applicant to hold a gathering...has no right to receive permission *even though he may be able to show positively that the proposed gathering will not lead to a breach of the public peace*'.[6]

Difficult as it may now be in the light of the senior court's judgment in *Castell* to impugn a magistrate's refusal to authorise the holding of meetings, a restriction imposed by the Commissioner under the emergency regulations seems even more invulnerable to judicial challenge, except on the narrowest technical grounds. Since the empowering regulations are framed in

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1 1986 (3) SA 568 (A).

2 *Hurley* has undoubtedly settled the conflict on this point between *United Democratic Front (Western Cape Region) v Theron NO* 1984 (1) SA 315 (C), which held that a court could inquire into the reasons for a magistrate's decision, and *Matroos v Coetzee NO* 1985 (3) SA 474 (SE), which held that it could not.

3 1985 (2) SA 280 (D).

4 See also *Congress of South African Trade Unions v District Magistate of Uitenhage* 1987 (2) SA 102 (SE) at 109J-110A, where Kroon J was prepared to accept that exclusive reliance on improper and irrelevant considerations would vitiate the magistrate's decision.

5 *Castell NO v Metal and Allied Workers Union* 1987 (4) SA 795 (A).

6 At 809F. Emphasis added.

ostensibly objective terms, it may in theory be open to a person to challenge a restriction on the basis that it could not possibly serve any of the purposes stipulated in the empowering regulation, or that the reasons relied on for the restriction were improper or irrelevant. In the wake of *Castell*, however, it is unlikely that the courts will be readily persuaded that the Commissioner had relied on irrelevant or improper purposes.

The court *a quo* in that case had found that the reasons given by the magistrate for refusing the trade union concerned permission to hold its annual general meeting in an open-air sports stadium 'verged on the frivilous'[1] and could not be said to have been related to the purposes for which the Minister had imposed the general prohibition — namely, because it was in his opinion 'necessary or expedient in the interests of the security of the State or for the maintenance of the public peace or to prevent the causing, encouraging or fomenting of feelings of hosility between different population groups'. The factors relied on by the magistrate were that a heavy burden would be placed on traffic authorities and the police, that the proposed meeting, mainly of Africans in an area neighbouring white, Indian and coloured residential areas, would 'cause a nuisance and even a disturbance' to people living and working in the neighbourhood and to race-goers at a nearby race-track, that very little control could be exercised by the organisers over members and other persons who might attend the meeting, and that the electronic amplification of the 'emotional and political statements' that might be made at such a meeting could give offence to certain members of the public, resulting in breaches of the peace.[2] Hefer JA, however, could not understand how any of these reasons had been found to be irrelevant to the question whether the gathering would lead to a breach of the public peace. Nor did his lordship attach any importance to the fact that they were 'to some extent speculative'. It was enough that the magistrate had assessed the *possibility* of a breach of the public peace.[3]

In the light of this benevolent assessment by the Appellate Division of the kind of factors which could legitimately lead the authorities to conclude that a proposed gathering could lead to a breach of the peace, it is unlikely that any court will lightly infer that a decision by the Commissioner to impose restrictions on a gathering or gatherings generally was not reasonably

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1 At 287I.

2 Factors relied on by the magistrate are listed at 287I-F.

3 At 815A-B. Hefer JA gave no consideration to the argument by counsel for the respondent that the magistrate had wrongly decided that he could act to prevent individual breaches of the peace, whereas, so it was argued, the Internal Security Act contemplated threats to 'the peace in general' (at 803I; see also Abrams 'A Hearing Before a Gathering' (1988) 4 *SAJHR* 179 at 193).

necessary for the vaguer purposes set out in the emergency regulations. This conclusion is supported by the manner in which the Appellate Division has taken judicial notice of the high emotions generated at funerals of those killed during unrest.[1] It is placed beyond all doubt by that court's subsequent treatment of one judgment in which a provincial court had set aside a ban imposed on a gathering in terms of the emergency regulations.

In *Van der Westhuizen NO v United Democratic Front*[2] the Full Bench of the Cape Provincial Division had struck down a ban on a public meeting imposed under reg 7(1)(bA) of the emergency regulations of 1986[3] by the Divisional Commmissioner of Police in the Western Cape. The court reasoned that, since any restriction of a fundamental right was *prima facie* unlawful, the burden of proving the legality of the restriction rested on the responsible authority.[4] The court further observed that, in the case of a restriction of a right as fundamental as that of freedom of assembly, the question was whether there had been 'exact and precise' compliance with the enabling legislation under which the repository had purported to act.[5] That the restriction had been imposed during a state if emergency, said the court, in no way detracted from its duty to insist on the strictest compliance.[6]

The question was, therefore, what conditions were imposed by the enabling regulation concerned for the valid exercise of the power conferred? In answer, the court adopted applicant's contention that 'the approach of the authority imposing the restriction, ie in the instant case prohibiting the holding of the public meeting, must be an objective one'.[7] Although on appeal[8] Hefer JA found this statement 'confounding',[9] the principle which Berman J was attempting to

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1 See *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) at 842I (discussed at 5.3 above).
2 1987 (4) SA 926 (C).
3 Proc R 109 of 1986.
4 At 928H-I.
5 At 929A-B.
6 At 929C.
7 At 929F.
8 *Van der Westhuizen NO v United Democratic Front (Western Cape Region)* 1989 (2) SA 242 (A).
9 At 247D.

convey seems plain enough. This was that, before validly exercising the power concerned, the Divisional Commissioner had to have had at his disposal such evidence as would lead a reasonable person to conclude that a prohibition was necessary to achieve the purposes set out in the enabling regulation.[1] The onus resting on the Divisional Commissioner therefore obliged him to satisfy the court that he had in fact taken such matters into account as would indicate that the holding of the meeting concerned would with a reasonable degree of probability endanger the safety of the public, threaten law and order, or prolong the state of emergency. This, in the court's opinion, the Divisional Commissioner had failed to do.[2]

The court *a quo* did not venture to comment on the sufficiency of the reasons cited by the Divisional Commissioner. What it found objectionable, however, was his failure to disclose that he had given any consideration to steps short of an outright prohibition.[3] Again adopting the argument of applicant's counsel, Berman J put the objection in these words:

> '[A]dopting the objective approach it was unreasonable to prohibit outright the holding of the meeting in question when the objectives which respondent had in mind and for which provision was made in reg 7(1) could have less onerously been achieved by the imposition of conditions designed to safeguard and ensure those very objectives....By the imposition of reasonable conditions the safety of the public might well have been ensured, public order might well have been maintained and the prospect of the termination of the state of emergency might in no way have been delayed, whilst applicant for its part would have been able to exercise the fundamental right of free speech, albeit subject to a condition or restriction reasonably (in all the circumstances) imposed by the authorities.' [4]

In the result, and

> 'regard being had to the onus resting on respondent to justify the outright and total prohibition he imposed on the proposed public meeting, no more is required of a party in applicant's position than to state merely that he or it has organised a meeting and that respondent has prohibited it pursuant to the purported exercise of powers afforded

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1 See judgment of the court *a quo* at 930J-931A.

2 At 932F-G. The Divisional Commissioner's justification of the prohibition was as follows: three meetings held earlier by applicant had lead to riot, civil commotion and at least one killing; two of the advertised speakers had addressed an earlier meeting which had been followed by public violence; a large audience could be accommodated in the proposed venue (the Cape Town City Hall); people could be 'bussed in' from neighbourhoods where serious disturbances had taken place. In addition, the Deputy Commissioner avowed that he was in possession of information provided by 'reliable police informers' whose identity could not be disclosed (at 931D-I). He conceded that several gatherings organised by applicant had been held without hindrance from the authorities (at 931J- 932A).

3 At 931C-D.

4 At 930H-931B.

> by regulation 7(1): this obliges the respondent to satisfy the court that the outright and total prohibition on the holding of that meeting was justifiably imposed by him in the light of the duty resting on him to exercise an objective discretion when having resort to such powers. Respondent failed to discharge this onus....'[1]

What the court was insisting on, therefore, was that an official charged with the responsibility of deciding when the exercise of fundamental public rights should be curtailed in the interests of the public safety should be able to satisfy a court that such restriction as was in fact imposed was indeed necessary. A prohibition could not be said to be necessary for the attainment of that end where it could reasonably have been achieved by a lesser restriction. This conclusion is fortified by the fact that the regulations at issue expressly conferred on the Commissioner the powers to impose restrictions short of an outright prohibition.[2]

Hefer JA did not, however, favour this view. He observed:

> 'The difficulty I have with the court *a quo's* reasons...is to find anything in the wording of reg 7(1) (save, of course, the position which the repository of the power must hold) which can properly be said to be a jurisdictional fact....In reg 7(1) there is nothing that can be adjudicated upon apart from the exercise of the power itself. What, then, is the jurisdictional fact?'[3]

Hefer JA posed the rhetorical question after assuming that the court *a quo's* reference to an 'objective discretion' was intended to convey that the exercise by the Divisional Commissioner of his powers under the regulation concerned was 'objectively justiciable' in the sense in which that expression was used by Corbett J, as he then was, in *South African Defence and Aid Fund and another v Minister of Justice.*[4] In that case [5] Corbett J distinguished between two categories of 'jurisdictional facts', one consisting of 'a fact, or state of affairs, which, objectively speaking, must have existed before a statutory power could validly be exercised', the other of 'instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power'. In the former category, said Corbett J, a court finding that the jurisdictional fact did not exist in an objective sense could declare the purported exercise of the power invalid. But in the latter the jurisdictional fact 'was not whether the prescribed fact, or state of affairs, existed in the objective sense but whether, subjectively speaking, the repository of the power had decided that it did'.

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1 At 932E-G.
2 See reg 7(1)(b)(i).
3 At 249E-H.
4 1967 (1) SA 31 (C).
5 Which is discussed at 3.2 above.

In *Van der Westhuizen*, Hefer JA chose to regard the question whether reg 7(1) fell within the former or the latter category as determinative of the issue. If the court *a quo* was wrong in its categorisation of the discretion to ban gatherings as 'objective', therefore, its reasons could not stand. His lordship was not persuaded by counsel for the respondent's attempt to argue that the 'jurisdictional fact' was that a prohibition must be necessary or expedient for the purposes stipulated in the regulation. He was not persuaded, either, by the fact that, in its original form, the regulation authorised the Commissioner to issue orders in relation to matters the regulation or prohibition of which '*in his opinion*' were necessary or expedient for certain specified purposes, and that it was subsequently amended to omit reference to the Commissioner's opinion.[1] Respondent's alternative submission that it could not have been the intention of the State President 'to entrust the exercise of a power which seriously infringes on the freedom of assembly to the subjective discretion of the Commissioner' (and Divisional Commissioners) was also rejected. On the contrary, said Hefer JA,

> 'without derogating in any way from the importance of the freedom of assembly, but taking into account matters such as the nature and purpose of the powers, the status of those on whom they were conferred, and the fact that they were conferred and are to be exercised in a declared state of emergency, there is every reason to believe that the intention was to constitute the Commissioner the sole arbiter of the necessity or expediency of exercising his powers.'[2]

It is true that the regulation conferring authority on the Commissioner to ban meetings differs from the conventional form of enabling statute which confers a power and renders its exercise subject to the existence at the time of its exercise of certain facts which are either empirically determinable or which must in the opinion of the repository justify its exercise. In that sense, it may be said not to specify 'jurisdictional facts' of the kind which Corbett J had in mind in *Defence and Aid*. But this does not mean, as Hefer JA's judgment tends to suggest, that the exercise of the power to ban meetings is rendered entirely dependent on the whim of the Commissioner. Like many emergency regulations, reg 7(1) was couched in purposive terms — ie the power which it confers must be used for specified objectives. An assessment of whether a prohibition was necessary to serve these purposes therefore presupposes a factual inquiry into whether the conditions in which the power was exercised were such as to warrant the conclusion that the holding of the meeting in question would, in an objective sense, have en-

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1 That is, after the original regulation was struck down in *Natal Newspapers v State President* 1986 (4) SA 1109 (N).

2 At 251B-C.

dangered the safety of the public, the maintenance of law and order or have prolonged the emergency. It is submitted, therefore, that the 'jurisdictional facts' which Hefer JA was unable to discern in reg 7(1) are to be gleaned from the purposes for which the power to prohibit meetings was conferred. Were the Commissioner to impose a prohibition on, say, a bazaar to raise funds for an old age home on a balmy Sunday afternoon in a country dorp, he would act *ultra vires* because he would have acted in circumstances in which the ban could not conceivably be said to serve the ends specified in the regulation.[1]

It is submitted that the question whether the regulation at issue in *Van der Westhuizen* conferred a 'subjective' or 'objective' discretion should not have been treated as if it finally disposed of the matter. While the court of appeal acknowledged[2] that the Divisional Commissioner's prohibition could still be assailed on one of the grounds mentioned in *Shidiack v Union Government (Minister of the Interior)*,[3] it declined to assess his action against any of these criteria. True, these grounds were expressly abandoned by counsel for the respondent during argument (which is hardly surprising in the light of the court's observation that there was 'not a shred of evidence' to substantiate the contention that the Divisional Commissioner had failed to apply his mind to the correct criteria for a prohibition[4]. But the court's treatment of 'jurisdictional facts' as something distinct from the grounds of review mentioned in *Shidiack* is unfortunate and, with respect, misleading.

As already indicated, it was precisely the failure of the Divisional Commissioner to show that he had considered the less drastic expedient of imposing some sort of restriction, as opposed to an outright prohibition, which led the court *a quo* to conclude that he had acted *ultra vires*. This is tantamount to saying that the Divisional Commissioner had not, before exercising his discre-

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1 See partial dissent of Hoexter JA in *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) at 909A-B. There is another consideration which was not raised in argument before either the court of first instance or that of appeal. This relates to the nature of the power conferred. A decision to ban a meeting cannot be equated with decisions entailing general policy from which a court should rightly refrain from interfering. Whether a meeting is likely to cause a major breach of the peace is of course a question which must entail a certain degree of guesswork. But it must nevertheless be based on facts. Examples less extreme than that already cited can be envisaged in which such a prediction can be said to be so demonstrably improbable as to indicate a misuse or abuse of the power. Would a court have to sit with folded hands, for example, if the Commissioner repeatedly invoked his power to ban meetings of the ruling party?

2 At 249H & 251F.

3 1912 AD 642 at 651.

4 At 251F-G.

tion, properly applied his mind to the consideration of all the relevant 'decisional referents' implicit in the enabling regulation, and in that sense had acted unreasonably.[1] There was no reason for the court to mention, let alone base its finding upon, the justification that the discretion concerned was 'objective'.

Had the court *a quo* omitted reference to the 'objective' nature of the discretion conferred by reg 7(1), its judgment would have rested on a firmer theoretical foundation. The Appellate Division might still have found that the consideration of alternatives was not a necessary precondition for the formation of the proper opinion,[2] or that the repository was under no obligation to adduce proof that he had considered alternatives.[3] But had the court below been overruled on such grounds, the unfortunate impression created by the appeal judgment — ie that the court could not inquire into the rationality or otherwise of the Deputy Commissioner's decision — would have been avoided.

In the light of *Van der Westhuizen's* case, however, a restriction on gatherings imposed under the emergency regulations seems now to be challengable only on the narrowest of procedural grounds — for example, improper promulgation — or perhaps on the ground of vagueness. The Commissioner must at least set out the area in which the restrictions apply with reasonable certainty and ensure that they are possible to comply with.

For completeness, it may be mentioned that a prohibition or restriction on meetings under the emergency regulations or under the Internal Security Act affects not only what may be done at the meeting itself. Attendance at such a gathering, where it has been prohibited absolutely, or conduct in breach of a condition which has been imposed, is a criminal offence.[4] It is also an offence to make a statement, or to publish a publication containing a statement, which has the effect of or is calculated to incite or encourage other persons to attend a restricted gathering, even though it is perfectly lawful to attend such a gathering in compliance with the conditions imposed.[5] Publication of the time, date, place or purpose of such a gathering, or an account of a

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1 At 930G-H.

2 See, for example, the judgment of Nestadt JA in *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 43H-44A and *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A) at 253J-254B.

3 See judgment of Hefer JA in *Minister of Law and Order v Dempsey supra* at 40G-J.

4 Reg 12 of Proc R86 of 1989.

5 Reg 5 read with para (a)(i) of the definition of 'subversive statement' of Proc R88 of 1989. The courts' treatment of this provision is discussed at 5.3 above.

speech, statement or remark by any person 'performing' at the gathering in contravention of a prohibition is also forbidden. [1]

6.6 Control of Organisations

In the state of emergency of 1960 the Minister of Justice was empowered to investigate any organisation which he suspected was 'in any way connected with any matter relating to the state of emergency' by ordering a magistrate to interrogate under oath any person connected with it.[2] If as a result of the investigation the Minister considered that the activities of the organisation were 'detrimental to the safety of the public or the maintenance of law and order' or was 'in any way connected with any matter relating to the state of emergency', he was authorised to direct it to discontinue its activities.[3] Once such an order was made, any person who participated in the organisation's proceedings or promoted its activities was guilty of an offence.[4]

In the regulations of the emergencies of 1985, 1986/7 and the early part of 1987/8 no special powers were given to the authorities to act against organisations. Various political movements were, however, indirectly curbed by the banning of particular activities and of their meetings, as well as by detentions of their leadership cadres and followers. Organisations *per se* could, of course, be dealt with in terms of the ample provisions of the Internal Security Act.[5] The latter notwithstanding, however, special emergency powers to act against organisations were adopted late in the emergency of 1987/8.[6] and repromulgated in subsequent emergencies.[7] The latest regulation[8] authorises the Minister of Law and Order to prohibit an organisation from carrying out any activities or acts whatsoever, or such activities or acts, or kinds of activities, as he chooses to specify.

An organisation forbidden to conduct any activities or acts whatsoever does not become an 'unlawful organisation' in the sense in which that expression is used in relation to an organisation banned in terms of the Internal Security Act. An organisation which is declared an unlaw-

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1 Reg 3(1)(c) of Proc R88 of 1989.
2 Reg 11 of Proc 93 of 1960.
3 Reg 12(1) of Proc 93 of 1960.
4 Reg 12(2)of Proc 93 of 1960.
5 Act 74 of 1982, s 4.
6 Proc R23 of 1988.
7 Reg 7 of Proc R 97 of 1988 and Proc R 23 of 1989.
8 Currently reg 7 of Proc R86 of 1989.

ful organisation in terms of the Act ceases to exist in a legal sense, and its assets are forfeited to the state.[1] By contrast, an organisation restricted in terms of the emergency regulations is, the *de facto* ban notwithstanding, entitled to take such actions as are necessary to preserve its assets, keep its books and records up to date, comply with its legal obligations, take legal advice or institute legal action, or conduct such activities as the Minister may authorise.[2]

Although the effect of an emergency order leaves the organisation concerned in existence and is effective only for the duration of the state of emergency, the Minister's emergency power over organisations is in one respect more Draconian than that which he enjoys under the Internal Security Act. The Act provides that an office-bearer of an organisation banned under s 46 may within 14 days request the Minister for the reasons for his decision,[3] and thereafter either take the matter by normal process on review to the Supreme Court or request that it be referred direct to the Chief Justice, who is empowered to set aside the ban if he is satisfied that the Minister exceeded the powers conferred by the Act, acted in bad faith or based his decision on factors foreign to those mentioned in the enabling provision.[4] The Minister's emergency powers over organisations is, however, untrammelled by any procedural safeguards. The regulation expressly authorises the Minister to act against an organisation 'without prior notice to or without

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1 Section 14(3).
2 Reg 7(5).
3 Section 10(3) and (4).
4 Sections 11(4) and (6). After *Nkondo & Gumede v Minister of Law and Order* 1986 (2) SA 756 (A), it is doubtful whether any court will accept a mere assertion by the Minister that he was of the opinion that the statutory grounds existed for acting against the organisation concerned. The subjective nature of the discretion notwithstanding, reasons put forward should at least be sufficient to enable the court to satisfy itself that the Minister's opinion rests on an an adequate factual foundation (see argument to this effect at 3.4 above).

hearing any person'. He is therefore under no statutory obligation to provide reasons for his decision before acting.[1] It is submitted, however, that a restricted organisation retains the right to make representation to the Minister after the restriction has been imposed and is, in accordance with the findings of the courts *a quo* in *Bill* and *Nqumba supra* entitled to be put in possession of the reasons upon which the decision was based. Otherwise, the right to make representations would be rendered illusory. This conclusion is supported by the finding in *Visagie v Minister of Law and Order*[2] that the Minister is obliged to entertain representations from a restricted former detainee after his conditional release from detention.

Even with reasons, however, there is little hope of persuading a court that the Minister's decision was wrong in law. The requisite jurisdictional fact is the opinion of the Minister rather than any objective link between the necessity for the banning or restriction and the securing of the objectives specified in the empowering regulation. Even the requirement that the Minister should be of the opinion that the restriction is *necessary*, rather than merely expedient or desirable, for the stated ends does not appear to enhance the prospects of review in the light of the Appellate Division's treatment of that word where it appears in the arrest and detention provisions of the regulations.[3] In particular, the argument that a total prohibition cannot be considered 'necessary' if partial restrictions would be enough to achieve the objectives specified in the regulation is not likely to carry much weight. In terms of the Appellate Division's approach, once satisfied that *any* ground exists to warrant action against an organisation, it is for the Minister to decide on the extent of the restriction imposed.

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1 The power of the State President so to relieve a sub-*delegatus* of the common law duty to observe the *audi alteram partem* rule having been upheld in *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) (discussed at 5.6 above), the only question is whether the Minister is obliged to afford the organisation a hearing after the restriction has been imposed. It was decided in *Bill v State President 1987 (1) SA 265 (W) and Nqumba v State President* 1987 (1) SA 456 (E) that the words 'without notice to any person and without hearing any person' in the arrest and detention provision of the relevant proclamations must be understood to exclude the *audi alteram partem* rule only before the decision was made. The value of such *ex post facto* representations, which afford a person adversely affected by the exercise of statutory power the opportunity of persuading the responsible official to change his mind, has been generally recognised (see *Everett v Minister of the Interior* 1981 (2) SA 453 (C) at 458D-E and dissenting judgment of Hoexter JA in *Omar's* case *supra* at 906 F-G). Rabie ACJ's finding in *Omar* that the words excluded the right to a hearing both before and after the decision rests, with respect, on the incorrect view that, because the decision was a 'final' one, the Minister was not required to reconsider it on the basis of later representations (at 900G-H). As Hoexter JA has pointed out, however, the order for further detention could not be considered final because the regulation expressly authorised the Minister to order the release of a detainee at any time (at 907A-D). The regulation authorising the imposition of restrictions on organisations likewise expressly provides for the withdrawal of an order at the Minister's discretion (see reg 7(2) of Procs R 97 of 1988 and R 86 of 1989).

2 AD 1 June 1989 Case No 553/87, unreported, discussed at 6.3 above.

3 See *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A), in particular judgment of Nestadt JA, discussed at 6.2.3 above.

The government has used this measure effectively to ban scores of left- wing extra-parliamentary organisations, including the United Democratic Front and many of its affilliates. Cosatu, the country's biggest federation of trades union, has also been prohibited from performing a host of activities not immediately connected with labour matters.[1] Certain restrictions have also been placed on right-wing organisations. While there is no express limitation on the kinds of organisation against which the Minister can act in terms of the relevant regulations, it is worth considering whether any are impliedly protected. Can the Minister, for example, forbid a registered political party, established church or trade union from performing all their normal activities if he is of the opinion that such restriction is necessary for one of the purposes stated in the empowering regulation? With regard to parliamentary parties and churches, the answer, disquietingly, appears to be in the affirmative. While the State President is expressly denied authority to make regulations which have the effect of altering or suspending any law relating to the qualification or tenure of office of members of parliament or certain statutory representative bodies,[2] political parties are merely an informal part of the constitution, not expressly acknowledged in any of these laws. A prohibition or restriction on the activies of a registered political party does not, therefore, strictly speaking alter any law entrenched by s 3(3)(b) of the Public Safety Act. It is at least arguable, however, that parliament could never have countenanced direct action against associations without which its own constitution would in practice be rendered unworkable.

Trade unions do, however, enjoy a greater measure of protection under the Public Safety Act, which expressly denies the State President the power to make regulations whereby an action which may lawfully be performed under the Labour Relations Act[3] is rendered unlawful.[4] Registered and unregistered trade unions and federations of trade unions are recognised as legal *persona* in that Act, which also assigns them certain statutory functions. To prohibit a trade

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1 See GN 1112 of 1988.
2 Section 3(3)(b), discussed at 5.1 above.
3 Act 28 of 1956.
4 Section 3(3)(d).

union from, for example, organising a lawful strike or recruiting members would therefore be to render unlawful action which under the Labour Relations Act may be lawfully performed.[1]

The list of activities which Cosatu was forbidden to perform[2] is worth considering, since it demonstrates the kind of activities the Commissioner apparently had in mind when imposing blanket restrictions on the other organisations banned from performing all acts in June of 1988. It is a long and daunting one, and includes the organisation of publicity campaigns aimed at soliciting public support for the legalisation of banned organisations, the repeal of emergency restrictions imposed on itself and other organisations, the release of people detained without trial, the reduction of a sentence imposed on a person by a court of law, or the abolition of local authorities. The federation is also forbidden to foment public opposition to the system of emergency detention, the 'system of local government as applied in the Republic', and any proposed negotiations between the government and any other group 'regarding a new constitutional dispensation' for the country. It is also forbidden to encourage members of the public to 'commemorate or celebrate' the founding of an unlawful or restricted organisation, any protest march or incident of unrest that has taken place at any time, the death of 'a person or of persons belonging to some or other category of persons', or the observance of any day in honour of a prisoner or prisoners of a particular category. Any interference or 'meddling' by it with the affairs or functions of a local authority is also forbidden, as is the making of calls or the encouraging of disinvestment or sanctions, and the organising of gatherings at which any of the matters mentioned in the order were to be discussed, advocated or propagated.

Whether a prohibition on many of these activities can be said to be necessary for the safety of the public or the maintenance of public order is highly questionable. It is of interest to note that the Minister did not even trouble to state in the preamble to the order that he was of the required opinion that they were indeed necessary for these ends. It is submitted, that the nature of many of the prohibitions imposed — in particular, the fomenting of opposition (note opposition, not resistance) to 'the system of local government' and negotiations over a new constitutional dis-

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1 This limitation on the State President's powers certainly explains why the regulations prohibiting statements calculated to incite or encourage people to take part in strikes is so qualified as to exclude calls for legal strikes (see para a(v) of the the definition of 'subversive statement' in Proc R88 of 1989). It also explains why, unlike the other organisations against which the Minister acted in June 1988, the giant trade union federation Cosatu was not prohibited from performing 'any acts whatsoever', but rather from performing a host of specifically designated activities not immediately related to its statutory functions as a trade union federation under the Labour Relations Act (which, incidentally, itself forbids strikes organised for political purposes (see s 65 (1A)).

2. See Schedule 2 of GN 1112 of 1988, currently in force as GN 1220 of 1989.

pensation — warrant the inference that the Minister failed to apply his mind to the scope of the empowering regulation, or that he was using them for an unauthorised purpose.[1] Any other conclusion must rest on the incorrect assumption that the authorities are entitled to use emergency powers to stifle political expression and debate on government policy. A court would surely be entitled to assume that parliament could never have intended the extraordinary powers conferred by the Public Safety Act to be used for that purpose.

Once a restriction is imposed on an organisation, no other person may perform any act which the organisation is forbidden to perform on its behalf or in its name or participate in any act which the organisation performs in contravention of the order.[2] Moreover, no publication may be distributed containing an advertisement 'defending, praising or endevouring to justify' such organisation.[3]

6.7 Entry, Search and Seizure

The 'ordinary law' governing the power of the police to enter, search and where necessary seize property is governed by the Criminal Procedure Act,[4] which in most cases requires the prior issue of a search warrant by a magistrate of justice of the peace. A magistrate or justice may issue a warrant where he is satisfied on information given under oath that there are reasonable grounds for believing that an article reasonably believed to be concerned in the commission or intended commission of an offence, or which might afford evidence of the commission of an offence, is in the possession of a certain person or on certain premises.[5] Another, broader, provision [6] authorises a magistrate or justice to order a warrant for entry into premises if he is satisfied on evidence given under oath that there are reasonable grounds for believing that internal security or law and order are likely to be endangered by a gathering to be held on the premises or that an offence is being or is likely to be committed there. In such cases, the war-

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1 See *Visagie v State President* AD 1 June 1989 Case No 553/89, unreported, discussed at 6-3 above.
2 Reg 7(3)(a) of Proc R 97 of 1988 and Proc R88 of 1989. This prohibition was widely defied during 1989 by individuals participating in the Mass Democratic Movement's defiance campaign. The MDM is the *de facto* successor to the United Democratic Front, which was effectuvely banned in 1988.
3 See reg 3(2) of Proc R 99 of 1988 and Proc 88 of 1989.
4 Act 51 of 1977.
5 Section 21 read with s 20.
6 Section 25.

rant may empower the police to 'take such steps as they believe to be necessary to preserve internal security or law and order or to prevent the commission of an offence'. In certain cases, however, the police may conduct searches and seize property without warrant. They may, for example, do so in cases of urgency where they have reasonable grounds for believing that the circumstances would justify the issue of a warrant, but that the delay in obtaining one would defeat the objects of the search.[1] In addition, a host of other statutes too extensive to be described here convey authority to search without warrant.[2]

The power of the security forces to search for and seize articles has been gradually widened in successive emergencies. In that of 1960, a magistrate or commisioned police officer could search or authorise searches of any person or premises if he had reason to suspect that there was in the possession of such person or on such premises any document the seizure of which had been authorised by the regulations — that is, documents or books containing information 'capable of being used in any attempt to hamper the maintenance of public order or to endanger the safety of the public', or which related to a restricted organisation — or any article 'in respect of which an offence has been committed under any of these regulations or which may afford evidence of the commission of such offence'.[3] While the categories of articles which could be seized under this provision were very wide,[4] the use of the expression 'reason to suspect' would today allow a court to inquire into the factual basis of the officer's decision to authorise a search. If a court found that there was in fact no such reason, or that the reasons were patently inadequate, the search would be declared unlawful and the return ordered of any confiscated goods to their lawful owners.[5]

During the partial state of emergency in 1985, the entry search and seizure provision was also formulated in objective terms,[6] although authority to authorise or undertake searches was extended to *any* member of the security forces. Any article could be seized which was or was on

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1 Section 22.

2 Chief among these are the Arms and Ammunition Act 75 of 1969, s 41; the Liquor Act 87 of 1977, s 177(1); the Police Act 7 of 1958, s 6(4), which permits searches without warrant within 10 kilometres of any border with a foreign state; the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971, s 11.

3 Reg 7 of Proc 93 of 1960.

4 Including, for example, printing presses.

5 See, eg *Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D). In that case, the police had seized political pamphlets alleged to have furthered the aims of an unlawful organisation because they propagated black consciousness. The court held that this did not constitute a reasonable ground for the formation of the belief that an offence had been committed.

6 Reg 5(10) of Proc R 120 of 1985.

reasonable grounds believed to be intended to be used, or which might afford evidence of commission or suspected commission of an offence. The regulation did not, however, restrict searches or seizures which could be authorised under it to security or emergency- related matters and, though untested in court, was arguably *ultra vires* because it permitted the police to act for ends unrelated to those specified in the Public Safety Act. This defect was partially rectified in the regulations of the emergencies of 1986/7 and after, which extended the range of objects that could be seized to vehicles, vessels and aircraft, and shielded searches and seizures against judicial scrutiny by empowering 'a [ie any] member of a Force' to authorise or conduct a search or seizure 'if he was of the opinion that' the articles forming the object of the search were concerned or intended to be used in the commission of an offence or in 'public disturbance, disorder, riot or public violence'.[1] The 1986 regulations added a sweeping provision, retained in subsequent emergencies, authorising a member of the security forces to enter any premises or buildings without warrant 'in the performance of his functions under these regulations' and 'there to take such steps as he may deem necessary for the maintenance of public order or the safety of the public or the termination of the state of emergency'.[2] From 1988, a security official, once having entered premises with or without warrant, was empowered to 'take such steps which he is by a provision of these regulations or any other law authorised to take'.[3] In addition, the provisions of ss 27 and 29 of the Criminal Procedure Act 51 of 1977 were made applicable to the manner in which searches were to be conducted.[4]

It seems clear, therefore, that under emergency rule the security forces are armed with virtually unlimited power to invade private property at will and for purposes which may not be strictly related to the emergency. The massive house-to-house and roadblock searches that have been carried out by the police and army in many black townships provide examples of the use to which this power has been put. While it is arguable that the provisions of the Criminal Procedure Act do not license indiscriminate entry into and searches of *all* houses in an area because the police have reason to believe that criminals or security offenders might be present in some of them,[5] it seems that this argument would have little chance of success where the police to choose to act under the emergency regulations, or to justify *ex post facto* searches conducted without warrant by claiming that they had been acting in terms of emergency powers.

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1 Reg 5(2) of Proc R 109 of 1986.
2 Regs 5(1) of Procs R 109 of 1986 and R 96 of 1987.
3 Reg 5 of Procs R 97 of 1988 and R 86 of 1989.
4 Reg 5 (3) of Procs R 97 of 1988 and R 86 of 1989.
5 Mathews *Law, Order and Liberty* at 188.

6.8 Seizure of Publications

Over and above the general powers of seizure outlined in the preceeding paragraphs, special attention has been given to the confiscation of publications containing matter which meets with official disapproval.

The regulations of 1960 authorised the Minister of Justice, a magistrate or a commissioned police officer to institute searches for and removal of publications of a 'subversive nature'.[1] In addition, the Minister was authorised to order the confiscation and disposal of any publication or series of publications which he had declared to be subversive.[2] The regulations governing the partial state of emergency of 1985 contained no special provision for the seizure of publications, but those which followed in June 1986[3] authorised the Minister of Law and Order or any person authorised by him[4] to direct the seizure of any publication which 'in their opinion' contained a 'subversive statement' or any other information which was or might have been 'detrimental to the safety of the public, the maintenance of public order or the termination of the state of emergency',[5] and to seize all copies of a publication which the Minister was satisfied was 'of a subversive nature'.[6]

In *Natal Newspapers v State President*,[7] the court found these provisions fatally defective on several grounds. First, the State President had given no guidelines as to when the power should be exercised. The court noted that the provisions in fact rendered the fate of an edition of a major national newspaper or book dependant on the whim of the most junior officers of the security forces, who did not even need to be satisfied that the publication contained information which *was* detrimental to the public safety, etc, but merely that it *might* have this effect.[8] If their opinion should be wrong, the financial effects of the seizure in terms of lost sales and advertising would be irredeemable, and, unless the publisher could succeed in the all but impossible

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1 Regs 7 & 8 of Proc 93 of 1960.
2 Reg 9(5) read with regs 9(1) and (3) of Proc 93 of 1960.
3 Proc R 109 of 1986.
4 Later specified as any commissioned officer of the various branches of the security forces (see Proc R 140 of 1986).
5 Reg 11.
6 Reg 12.
7 1986 (4) SA 1109 (N), this aspect of which is discussed at 5.4 above.
8 At 1132D- E.

task of proving bad faith on the part of the responsible officer, the state would be indemnified against any action for compensation.[1] The regulations, said the court, were so vague as to make it impossible for any publisher to know how to avoid the drastic consequences of non-compliance.[2] Moreover, the Minister was entitled to authorise the seizure, not only of the particular publication which he deemed to be of a subversive nature, but of all other publications published by the same publisher, whether or not the Minister held any opinion regarding the other publications or whether or not he had even examined them.[3] Furthermore, the seizure of any or all copies of such a newspaper or publication could be ordered at any time once the Minister had declared an earlier edition to be of a subversive nature. The regulations contained no guidelines whatsoever for the assistance of the persons vested with the power to authorise seizure. In short, observed the court, the regulation was thoroughly bad and 'no-one should mourn its demise'.[4] No-one, of course, but the authorities. In direct response to the *Natal Newspapers* judgment, the government produced a separate and comprehensive set of media regulations a few months later[5], the seizure provision of which was on the face of it a singular improvement on its immediate predecessor. This provision was preserved without significant amendment in the media emergency regulations of 1987, 1988 and 1989.[6] The new provision limited the possibility of seizure to those publications which had contravened either of two prohibitory provisions in the regulations — ie by publishing a 'subversive statement' as defined or news or comment on a number of forbidden subjects.[7] The validity of a seizure therefore depended on objective proof, justiciable in a court of law, of the commission of the relevant offences. Furthermore, only such editions as contained the offending matter could be seized.

Although the authorities impounded several publications under this provision, only one seizure had by the time of writing been challenged in court. Copies of an edition of the *Weekly Mail*, one of the few if not the only 'alternative' newspapers in the country with a significant white readership, were seized and impounded throughout the country on 5 August 1988 by order of the Commissioner of Police acting under reg 9(1) of the 1988 media regulations.[8] The Commissioner claimed that the newspaper had contravened two provisions of the regulations by

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1 The state and its officials were indemnified against civil actions for damages caused by the *bona fide* exercise of emergency powers (see 3.6 above).
2 At 1132G-H.
3 At 1133I.
4 At 1133B.
5 Proc R 224 of 1986
6 Regs 6 of Proc R 97 of 1987 and 9 of Proc R 99 of 1988 and Proc 88 of 1989.
7 On which see 7.1 & 2 below.
8 Proc R 98 of 1988.

publishing news and/or comment on a 'security action' and statements which were 'subversive' in that they 'discredited or undermined' the 'system of compulsory military conscription'.

The court accepted in *WM Publications v Commissioner of Police*[1] that the only issue which had to be determined was whether the newspaper had contravened one of the provisions specified in the empowering regulation. In respect of the allegation that it had published details of a 'security action', applicant argued that the incident described in the report was not covered by the statutory definition of 'security action' in that, while police action was indeed described, it was not aimed at suppressing 'unrest', which was a requirement of the definition of 'security action'. The report at issue contained two versions of an incident in which police had opened fire on a large group of school pupils. According to the police, the shooting started after the crowd had begun stoning a delivery vehicle. Witness accounts printed by the newspaper said nothing of the alleged stoning. This discrepency was vital, because had the crowd been peaceful, the incident would not have amounted to 'unrest' and the police action consequently would not have been 'security action' as defined. The court found that, since applicant did not adduce any evidence, apart from the report itself, to support its claim that the behaviour of the crowd did not amount to 'unrest', it had failed to discharge the onus resting on it to prove the alleged absence of the jurisdictional precondition for the seizure order.[2]

Before the aforementioned challenge to the seizure of the *Weekly Mail*, however, the government apparently had second thoughts about the way in which it had limited its powers to seize newspapers. A new seizure provision appeared in the 1988 media regulations [3] which applied only to newspapers not registered under the Newspaper and Imprint Registration Act.[4] While registered newspapers could still only be seized if they had committed specified offences under the regulations, unregistered periodicals (which in effect meant those of the burgeoning community or 'alternative' press) could be seized and confiscated by the Minister of Home Affairs or the Commissioner of Police if they were of the opinion that their continued publication was calculated to promote, foment or 'stir up', among other things, 'revolutions or uprisings in the Republic' or 'other acts aimed at the overthrow of the Government otherwise than by constitutional means', 'unrest', the breaking down of public order or 'feelings of hatred and hostility towards a local authority or security force' or employees thereof or towards members of any

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1 WLD 8 August 1988 Case No 140974/88, unreported.
2 At 10-11 of the typewritten judgment. This case is dealt with in more detail at 6.12.2 below.
3 Proc R 99 of 1988, reg 9(2), repeated in the 1989 emergency regulations (reg 9(2) of Proc R88 of 1989).
4 Act 63 of 1971.

population group or section of the public.[1] It is hard to conceive of a set of criteria more nebulous and resistant to ojective assessment.

6.9 Control of Publications

The power to seize publications has not been the only administrative device adopted by the government to control the media of mass communications during states of emergency. Publication control was one of the main concerns of the authorities in all emergencies so far declared in South Africa, and the government has by regulation gone much further than it can under standing legislation towards arrogating to itself absolute power to control the flow of news and comment on matters which it feels should be kept from public circulation.

Under the ordinary law, publication control has been partly achieved by a mass of prohibitions on the publication of information and comment on a wide variety of topics.[2] This section is concerned with enabling legislation which empowers officers of the government further to circumscribe by administrative action the range of information which may lawfully be gathered and published.

Administrative controls over information may for convenience be classified into three categories: those empowering officials to curtail access to information, those empowering them to regulate what information or views may be published, and those enabling them to prescribe who may publish.[3] We shall deal with each of these aspects in turn.

6.9.1 Controls over access to information

The banning of individuals or organisations under the Internal Security Act effectively eliminates them as sources of information, and any journalist attending a prohibited gathering

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1 The 'decisional referents' of this regulation are set out in full at 7.2 below.

2 Many of these are contained in the Internal Security Act 74 of 1982. Other legislation of this nature is set out in 4.5 above. The way in which these prohibitions have been extended by emergency decree is discussed at 7.2 below

3 This framework is suggested in Grogan 'News Control by Decree: An Examination of the South African Government's Power to Control Information by Administrative Action' 1986 (103) *SALJ* 118 at 119, to which the reader is referred for a detailed exposition of the powers held by the government under statute law.

can be prosecuted.[1] Areas may be sealed from public scrutiny in terms of a number of statutes,[2] which create an almost limitless range of offences that can be committed by trying to gain information from or about restricted places. The police and officials of other departments also have wide powers to prohibit access to areas.

These formidable powers have been considerably extended under emergency rule. While the only offences which could be committed by a journalist trying to gather information during the state of emergency of 1960 were attendance at a prohibited gathering[3] or defiance of an order prohibiting access to an area,[4] after 11 December 1986 journalists found their movements singled out for special attention. From that date, they were specifically forbidden to be on the scene or at a place within sight of any 'unrest', restricted gathering or 'security action' without official approval.[5] The effect of this provision was to vest in the security authorities a wide discretion to exclude journalists not of their liking from the scene of almost any of their operations, and — equally significantly — to ensure that those who could be relied on to cover police action sympathetically were given exclusive access rights. This power to exclude journalists from areas and events where certain kinds of events are occurring is complemented by the Commissioner's power to demarcate and close of entry to areas.[6]

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1 Sec 57(1)(c).

2 The most significant of which are the National Key Points Act 102 of 1980 and the Protection of Information Act 84 of 1982.

3 Reg 2(2) of Proc 93 of 1960.

4 Reg 21.

5 Reg 2 of Proc R 224 of 1986, which further provided, in an apparent attempt to prevent the regulation from being struck down for unreasonableness, that any journalist who 'happened' to be on the scene of such events at its commencement would not commit an offence provided he immediately removed himself to a place where the action was 'out of sight'. Those at home or at their normal place of work were also exempt from prosecution (Reg 2(2)(a) and (b)). This regulation was struck down in *United Democratic Front v State President* 1987 (3) SA 296 (N) on the ground that the definitions of 'unrest' and 'security action' were void for vagueness (at 330A-B (reversed on appeal 1988 (4) SA 830 (A))). But they appeared again in identical form, with the definitional defects cured, in the 1987, 1988 and 1989 media emergency regulations (Proc R97 of 1987, R 99 of 1988 and R88 of 1989) See further at 7.2 below.

6 See 6.4 above.

6.9.2 Restrictions on what may be published

Emergency regulations have also significantly extended the powers of the government to control the content of the country's media of mass communication. This is achieved by two means. First, the publication of a wide range of information has been forbidden, on pain of criminal prosecution, subject to the proviso that such information may be published if officially released or confirmed. This power enables the authorities to ensure that only officially sanitised or glossed reports about their actions or the state of the nation reach the wider public through the news media. During the emergencies of 1986/7 and 1987/8 especially, the newly- established State Bureau for Information became virtually the sole permissible source of news of civil unrest and security operations.[1]

Until 1987, however, the Government refrained from resorting to the crassest form of information-control: advance censorship. From August of that year this deficiency was remedied by a regulation empowering the Minister of Home Affairs to allow the continued publication of any periodical which in his opinion qualified for an outright ban provided that 'the matter to be published in such issue and the way in which it was published' was approved in advance by a person designated by him.[2]

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1 The Minister of Home Affairs is given the power to make regulations governing the manner in which information is officially released (see reg 3(7) of Proc R88 of 1989 (the forerunner of which is reg 3(5) of Proc R 224 of 1986, which is discussed in *United Democratic Front v State President* 1987 (3) SA 296 (N)). In that case, the court rejected the contention that the Minister's failure to make rules nullified the provisions of reg 3(4)(i), which empowered a 'spokesman' of the government to authorise disclosure of prohibited information (see at 335C-336A).

2 See Regs 7A(3)(a) of Proc R 123 of 1987 and 7(3) of Procs R 99 of 1988 and R88 of 1989.

6.9.3 Banning of publications

Of all powers possessed by governments over the media of mass communication, that of outright banning is the most drastic and intimidatory. In South Africa even in 'normal' times, the Minister of Law and Order enjoys a virtually unfettered discretion to close down publications on wide and subjective grounds which are for all practical purposes beyond judicial scrutiny.[1] After a ban is imposed in terms of the Internal Security Act, the publisher may apply for review by the Chief Justice, who may set aside the order only if the Minister has exceeded his powers, acted *mala fide* or was influenced by considerations other than those mentioned in the Act.[2] The Chief Justice may not, however, consider the merits of the Minister's decision.[3]

The banning powers conferred on the government by emergency regulation are even wider. In the emergency of 1960 and the early part of that of 1986/87 the Minister could ban any newspaper if he was satisfied that it was systematically publishing matter which was, in his opinion, 'of a subversive character'.[4] The curious insertion of two subjective phrases into the single enabling clause apparently meant that the Minister had to be 'satisfied' that the publication of matter which he had opined to be 'subversive' was 'systematic'. Given the vagueness of

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1 The grounds are set out in s 5 of the Internal Security Act 74 of 1982, and, in summary, provide that the Minister can ban a publication permanently or for as long as he deems necessary if he is satisfied that it serves as a means for expressing views or conveying information which is in his opinion calculated, *inter alia*, to endanger the security of the state or the maintenance of law and order, to further the achievement of any of the aims of communism or the views of an unlawful organisation, or to foment feelings of hostility between different population groups.

2 Section 11(4).

3 Review on the merits was, however, possible under the Riotous Assemblies Act 17 of 1956, repealed by the predecessor to the current Internal Security Act. The Riotous Assemblies Act entitled a publisher to seek to prove that the documentary information on which the Minister's decision was based was not of such a nature as to cause the results specified (see s 3(3) and *Du Plessis v Minister of Justice* 1950 (3) SA 579 (W), in which a ban was set aside because the publication in question was found to have attacked the government and its policies, and not a particular section of the public). There have, by contrast, been no successful attacks on banning orders issued under later statutory provisions — although one enlightened judgment indicates that there is some possibility of doing so (see *The Free Press of Namibia v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA), in which the Minister had demanded a deposit of R40 000 from the publication concerned under s 15 of the Internal Security Act, which authorises him to demand such a deposit of an aspirant publisher whenever he is not satisfied that a prohibition under s 5 will not at some future stage become necessary).

4 Regs 9(3) read with 9(1) of Proc 167 of 1960, and 12 of Proc R 109 of 1986.

the definition of 'subversive statement' in the respective regulations,[1] the only objectively justiciable fact was whether the publication of matter which the Minister had decided was 'subversive' was 'systematic'. One transgression was not enough to give the Minister reason for exercising his power. The regulations, however, provided no further guidance for the Minister on how many transgressions were required, and at what intervals, before he could conclude that its publication was 'systematic'.

This regulation was was struck down in *Natal Newspapers v State President* [2] on grounds already discussed.[3] It was accordingly replaced in the ensuing set of regulations tailored specifically for the media [4] with a provision ostensibly designed to limit the grounds on which the Minister could ban a publication, and to improve the procedure in terms of which a ban could be imposed. The Minister could now only ban a publication for periods not exceeding three months if it was produced or imported in contravention of the penal provisions of the regulations — ie if it had published a 'subversive statement' or reports concerning 'unrest' or 'security actions', as defined.[5] Whether it had done so was an objective question, not dependent on the judgment of the Minister.[6] Before he could impose a ban, the Minister had, in addition, to publish a 'request' to its publisher to desist from the publication of such information or comment.[7] If and only if the publisher nevertheless did so once more,[8] the Minister could give notice in writing to the publisher that he was considering action against the publication, stating the grounds of the proposed action, and affording the publisher two weeks' opportunity to make written representations.[9] The publisher was not given the right to make representations disput-

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1 In any event, the validity of an order was not dependent on whether the publication had in fact published 'subversive statements', as defined, but on whether the Minister thought that it had. On the definition of 'subversive statement' see 7.2 below.

2 1986 (4) SA 1109 (N).

3 At 5.4 above.

4 Proc R 224 of 1986.

5 Reg 7(1) and (2).

6 See *WM Publications (Pty) Ltd v Commissioner of South African Police* (WLD 8 August Case No 14074/88 8 August 1988, unreported) on the analagous provisions of the seizure clause. The case is discussed at 6.8 above.

7 Reg 7(2)(b).

8 Reg 7(2)(c).

9 Reg 7(1)(d). The same regulation has appeared in all subsequent emergencies (see reg 7 of Proc R 97 of 1987 and reg 6 of Procs R 98 of 1988 and R 88 of 1989). The Minister was compelled to state only the *grounds* on which the action was being considered, and not his *reasons*. A mere recitation of the statutory provisions would, therefore, presumably be deemed sufficient to satisfy the duty of disclosure imposed by the regulation (see *Catholic Bishops Publishing Co Association Incorporation v State President and others* WLD 8 March 1988 Case No 00421/88, unreported, at 23 of the typed judgment).

ing the correctness of the Minister's opinion, but only 'in connection with *the proposed action*'.[1] Before a periodical could be banned under this provision it had, therefore, to be proved that the publisher had infringed the regulations at least twice. Whether he had done so was a question of fact, determinable by a court of law. Moreover, the new procedural provisions prevented the Minister from automatically renewing any ban on its expiration, and from banning other publications of the publisher concerned. He *was* authorised, however, to impose an immediate ban without hearing anybody on any publication which he was 'convinced' was a continuation of or substitution for the banned periodical.[2]

Although this provision appeared again in subsequent regulations, the self-imposed limitations on the government's power to ban publications was retrospectively nullified by an additional banning provision introduced by amendment in August 1987,[3] which completely restored to the Minister his subjective discretion to ban publications. After that date, the government could now choose between the provision just outlined and another, framed in terms which were effectively beyond judicial challenge. The new regulation empowered the Minister to ban a publication if he was of the opinion, solely on examination of a series of issues of a periodical, that it was responsible for a 'systematic or repeated publication of matter in a way which, in his opinion, has or is calculated' to have one or more specified effects. These effects are set out in terms so unique, from a legal point of view, as to justify their reproduction *verbatim*. In terms of this provision, the Minister was required to predict whether the publication would have the effect

> (i) of promoting or fomenting revolution or uprisings in the Republic or other acts aimed at the overthrow of the Government otherwise than by constitutional means;
>
> (ii) of promoting effecting or sparking the perpetration of acts referred to in...the definition of 'unrest';
>
> (iii) of promoting or fomenting the breaking down of public order in the Republic or in any area of the Republic or in any community;
>
> (iv) of stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority of a security force, or towards members or employees of a local authority or members of a security force, or towards members of any population group or section of the public;
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> (v) of promoting the public image or esteem of an organisation which is an unlawful organisation in terms of the Internal Security Act, 1982 (Act 74 of 1982), or in respect

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1 See regs 6(3) of Proc R 99 of 1988 and Proc R88 of 1989.
2 Reg 7(6) of Proc R224 of 1986.
3 Reg 4 of Proc R 123 of 1987, repeated as reg 7 of Proc R 99 of 1988 and Proc R88 of 1989.

> of which an order under regulation 7(1)(a) of the Security Emergency Regulations, 1988, is in force;
>
> (vi) of promoting the activities of structures referred to in paragraph (a) (vii) of the definition of "subversive statement"; or
>
> (vii) of promoting, fomenting or sparking...strikes or boycotts...; and
>
> (b) that the said effect of such systematic or repetitive publishing in his opinion has or is calculated to is causing (*sic*) a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency.'

The Minister may not act on any of these grounds, however, until he has issued at least one warning to the publisher concerned that the matter published is, in his opinion, causing a threat to the safety of the public or the maintenance of public order or is causing a delay in the termination of the state of emergency. The insertion of the phrase 'in his opinion' into this provision means that the warning is a *fait accompli*. Given the vagueness of the grounds on which the Minister can act, it is clearly impossible for any publisher to predict with anything like a reasonable degree of certainty whether the publication of information or comment even vaguely related to security action, civil unrest or popular opposition will evoke official disapproval, or to know how to alter his editorial policy once a warning is received.

The intolerable uncertainty created by this provision was held by the full bench of the Witwatersrand Local Division to be of no legal significance. In a case arising out of the banning of the Catholic Church's *New Nation*,[1] the court observed that uncertainty was inherent in a situation where wide discretionary powers were conferred on a politician. Applicant had based its attack on the banning in part on the vagueness of the criteria on which the Minister was required to form an opinion. The court held, however, that the Minister would have no difficulty in forming an opinion on the stated matters. The problem for the publisher was not that he was unable to understand the criteria upon which the Minister was required to exercise his judgment, but that he had no way of knowing what the opinion of the Minister would be.[2] It mattered not, said Curlewis J, that what was considered inflammatory by one person might not be considered so by others. Uncertainty arose 'out of the nature of censorship and the giving of the discretion that I have mentioned'.[3] The fact was that the Minister had been given the power to decide when material published in a newspaper was likely to have the effects specified and to stop the

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1 *Catholic Bishops Publishing Co Association Incorporation v State President and others* 3 March 1988 Case No 00421/88, unreported.

2 At 16 *in fine* of the typed judgment.

3 At 20.

publication of such matter by means of warnings, banning and/or censorship. Censorship was 'very like a guillotine' and, his lordship observed, 'there is very little use in growing honeysuckle over a guillotine'.[1] The difficulty of a publisher's position was further exacerbated by the fact that the regulations empowered the Minister to take into account issues of a periodical *before* the promulgation of the respective regulations when deciding whether a 'warning' was justified.[2]

The Minister is, moreover, empowered to take into account not only the *content* of the publication concerned, but also the way in which it is *presented.* The fact that the Minister is required to provide the 'grounds' for the proposed action when he issues a warning, and to wait for two weeks thereafter before imposing the banning order is therefore of small consolation to the publisher. Once the warning has been issued and the prescribed 14-day period has elapsed, the Minister may then either ban the publication outright for a period of three months (or, after June 1988 in the case of an unregistered periodical, six months), or require that the publisher submit further issues for official approval prior to publication.[3]

6.10 Control of Educational Institutions

6.10.1 Schools

One of the most significant developments of the period of turbulence after 1976 was the alienation and radicalisation of black youth, who became the focus of mobilisation drives by extra-constitutional political movements. Black schools became at once arenas of political organisation and the targets of black discontent. Police assumed an increasingly high profile in and around the schools. This, coupled with deep grievances about actual and perceived inequalities in the system of separate education among blacks, led to a nationwide boycott of

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1 At 24.

2 This provision in the 1987 amendment by which the regulation was first introduced was almost certainly *ultra vires* on grounds of unreasonableness, authorising as it did the punishment of a publisher for conduct which he could not at the time have been aware could lead to a banning. The retrospective operation of the regulation is all the more unreasonable in the light of the fact that hitherto the only banning provision in force had specified in objective terms the matter which should be avoided (see preceeding paragraphs).

3 Reg 7(3)(i) of Proc R 99 of 1988 and Proc R 88 of 1989 (see 6.9.2 above).

schools which had a seriously destabilising effect on black areas generally. A first priority of the government was, therefore, to ensure that the children returned to school and, once there, got down to orderly study of approved material.

The advocacy of school boycotts became a criminal offence in December 1986. [1] Before that, control of activities in the schools was effected by *ad hoc* police orders confining pupils to classrooms, prohibiting unsupervised activities and clearing school premises outside of school hours.[2] These were followed by a more comprehensive set of measures in mid-1986,[3] which, in brief, required all black pupils to re-register at their schools on the day after the proclamation was gazetted, and denied further education to those who failed to do so.[4] The Director-General: Education and Training or his nominees were also empowered to refuse registration to any pupil (without affording him a hearing) or to make his or her admission conditional.[5] Moreover, any official of the Department could override a school principal's decisions regarding the placement of pupils in particular classes or standards, and a pupil who refused to accept the decision of such an officer was to be regarded as having left the school voluntarily.[6] In sum, the new schools regulations drastically limited the autonomy normally enjoyed by school heads, and placed the future of individual black children squarely in the hands of government bureaucrats.

An attempt during 1986 to challenge these regulations in court was dismissed for absence of *locus standi*. In *National Education Crisis Committee v State President*[7] Spoelstra J remarked:

> '*In casu*, there is no question of the liberty of any person being threatened. Hence, there is no room for the issue of an *interdictum de homine libero exhibendo*, be it mandatory or prohibitory. The applicants sought to equate the rights of Black children to receive education which is untramelled by the provisions of the proclamation, as an aspect of their "liberty". If this approach is valid, the first applicant may possibly have *locus standi*. This kind of "liberty", however, is far removed from the kind protected by this remedy and as far as I could determine has never been said to be that kind of liberty which is protected by this interdict. It is something which belongs to the field of

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1 Reg 5 read with a(iii)(cc) of the definition of 'subversive statement' in Procs R 224 of 1986, R 97 of 1987, R 99 of 1988 and R 88 of 1989. The regulations of 1985 prohibited boycotts in general (see reg 10 read with reg 1(viii)(b)(ii) of Proc R 109 of 1986).

2 See eg GN 1798 of 1985 (Eastern Cape), GN 1850 of 1985 (Witwatersrand), para 2 of Schedule B of GN 2484 of 1985 (Western Cape), GN 1276 of 1986 (Eastern Cape), and GN 1517 of 1986 (Northern Natal).

3 Proc R 131 of 1986.

4 Regs 2 and 3(1).

5 Reg 3(2).

6 Reg 4.

7 WLD 9 September 1986 Case No 16736/86, unreported.

> politics and its particular jargon. The interdict is concerned with personal liberty and the unlawful physical constraints which are put upon it.'

It could be argued, however, that members of the applicant, their children at schools and teachers were at risk of arrest if they were accused of contravening the allegedly *ultra vires* regulations, and thus had an interest in the setting aside of the regulations.[1]

Several further proclamations followed which were aimed at controlling activities in the schools themselves.[2] These authorised the Director-General to issue orders prohibiting access to and use of school and hostel premises by specified persons (including pupils), the offering of syllabi, classes or courses not approved by his Department, the wearing, possession or display of specified articles of clothing, flags, pennants and posters, and the distribution in schools of specified literature. In addition, meetings convened by the National Education Crisis Committee in which it was proposed to discuss 'alternative' courses have been specifically prohibited by police order.[3]

6.10.2 Universities

The country's universities, which remained pockets of relatively free expression in the dour climate of emergency rule, were a more sensitive target than black schools. Although some campuses experienced police action and were not exempt from emergency controls over assembly, speech and association, students and lecturers still had wider scope than most for the expression of dissent. However, some universities became arenas for protest which the government was determined to eradicate. Initially, it attempted to do so by ordinary crowd control measures, including baton charges and mass arrests. In 1987, however, realising the harm that was done to the country's image by the dissemination of films of such scenes on international television networks,[4] the government decided to force the universities' governing bodies to do the job for them.

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1 See Cameron 'Legal Standing and the Emergency' in Haysom and Mangan (eds) *Emergency Law* 61 at 72-3.
2 Procs R 235 of 1986, R 98 of 1987, R 100 of 1988 and R 89 of 1989.
3 GN 116 of 1987.
4 The filming and transmission of which, incidentally, constituted an offence (see 7.2 below).

The instrument which it invoked for this purpose was not the Public Safety Act, but the ostensibly apolitical Universities Act,[1] s 25(1) of which conferred on the respective Ministers of Education and Culture authority to allocate subsidies to the various universities 'subject to such conditions as may, in respect of each university, be determined by the Minister with due regard to the requirements of each university in relation to the general requirements of higher education in the Republic.' [2] The teeth of Universities Act are, however, located in s 27, which empowers the Ministers to withold payment of the whole or a portion of any university's state subsidy if its council fails to comply with its provisions or a ministerial condition.

Using their power under the latter section as the lever, the Ministers proceeded to impose on university councils a set of *de facto* emergency regulations carefully tailored to ensure the elimination of dissent on campuses. The councils were instructed, on pain of financial ruin, to 'take steps' to ensure the prevention of interference with, intimidation of or discrimination against students or staff in connection with their normal activities, to ensure undisturbed teaching and research, to deter unlawful gatherings and class boycotts, and to prevent staff, students or other persons from using university supplies (including stationery), equipment (including vehicles and printing presses), buildings or land for various purposes. These included promoting the aims or 'public image' of any unlawful organisation, the promotion, organising or support for boycotts, stayaways or unlawful strikes, the printing or dissemination of banned material and, generally, the commission of 'any act which endangers or may endanger the safety of the public or the maintenance of public order'.[3] University councils were also required to ensure that disciplinary steps were taken against staff or students guilty of any of the conduct just outlined, and against staff members against whom proof was provided by the Minister that they had committed such acts at *any* place. All universities were furthermore instructed to refuse to register students expelled from another university for misconduct of the type specified for as long as the original exclusion remained in force.[4] Once any of the specified acts or events had been brought to the attention of a university, its council was required to notify the Minister and to explain what disciplinary and preventive steps, if any, it had taken or proposed to take.

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1 Act 61 of 1955.

2 The Universities Act further provides in s 25(2) that conditions imposed by the Minister may regulate the racial composition of universities and may differ from university to university.

3 The conditions were served on all universities in identically-worded letters from the respective Ministers, and are set out in full in *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives* 1988 (3) SA 203 (C) at 206J-208H. Earlier draft conditions circulated confidentially to the university councils made even more far-reaching demands, enjoining them *inter alia* to 'take steps towards controlling unlawful conduct of staff or students within a three kilometre radius of the campuses' (letter to Rhodes University dated 5 Augus 1987, in writer's possession).

4 The draft conditions excluded such students indefinitely.

For his part, the Minister undertook to notify the council of his 'finding' as to whether the conditions had been satisfied. If any condition was found not to have been met, the council concerned would be given 21 days to furnish the Minister with 'a submission relating to the finding'. Should this submission fail, the letter ended ominously, 'the formal procedure in terms of s 27 of the Universities Act 61 of 1955 will commence'. There can be no doubt that had university councils co-operated with these conditions they would have become *de facto* arms of the security forces. It is not suprising, therefore, that the conditions were challenged soon after they were imposed.

In *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* [1] the full bench of the Cape Provincial Division found the conditions fatally defective in three respects. The court found, in the first place, that if they were *ultra vires* in the strict sense of having transgressed the limits set by the provision under which the Ministers had purported to act. The finding was based on the submission by respondent's counsel that the conditions were to be regarded as *intra vires* if they were related to the provision and expenditure of funds for the advancement of higher education and, more specifically, 'to achieve optimal use, or to avoid unnecessary waste, of subsidy moneys'.[2] The court found, however, that the object of protecting the public purse and promoting the better functioning of universities was not the sole motivation behind the conditions. In addition, said the court, it was apparent from the nature of the conditions and from what the Minister had said in justifying them [3] that a dominant objective was the combating of lawlessnes and 'revolutionary' conduct on the campuses.[4] Conditions aimed at achieving such an objective were, in the court's view, not sanc-

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1 1988 (3) SA 203 (C).

2 At 212E.

3 The then Minister of National Education, Mr F W de Klerk, had said: '[R]esponsible academic freedom is being threatened....Freedom of speech at our universities is being threatened....The right of all students to study and to be taught without threat or interference is being threatened....I would like to say that the very existence of the university as institution (*sic*) is at stake....Simultaneously, the present situation [on the campuses] poses a potential threat towards the maintenance of law and order in general. In the atmosphere of the existing state of emergency throughout South Africa, whether you agree with it or not, and where the Government has been forced to take strong steps in many spheres, there has been a shift towards our campuses amongst those behind the revolutionary onslaught.' The text of the Minister's address to university authorities is quoted at 211J-212E.

4 At 212C.

tioned by s 25.[1] The second basis on which the court found the conditions to be bad in law was that they were so vague that university councils could not possibly know what to do in order to comply with them. In particular, the court found that no ascertainable meaning could be attributed to the requirement that councils should 'take steps towards' preventing or discouraging the conduct or events specified in the conditions.[2] The court refused to accept the argument that because of their expertise in running the institutions under their control, university councils should be taken to know what was necessary to achieve the stipulated ends. On the contrary, it held, many of the objectives they were enjoined to 'take steps towards' discouraging or preventing required the knowledge, not of educational administrators, but of 'experienced and well-staffed law enforcement agencies'.[3] Third, the court found the conditions to be unreasonable in the sense in which that word was used in *Kruse v Johnson.*[4] This was so not because the ultimate effect of the conditions would constitute an unconscienable invasion of academic freedom, but because their imposition would or could pervert the universities' disciplinary procedures. In particular, the court noted, they were so phrased as to require a council to ensure that adequate disciplinary steps were taken against any person who had been found by the university's normal disciplinary body to have performed one or more of the acts specified in the conditions. This meant that a council could be compelled to dictate to the disciplinary body to ensure that it imposed a penalty, not necessarily suited to the misconduct or circumstances of the 'accused', but of sufficient severity to satisfy the Minister that adequate 'steps' had been taken. The court noted:

> 'Placing the university disciplinary tribunals under pressure to pass or sanction sentences that may or may not, depending on their severity, stave off withdrawal of the university's subsidy is not only an unwarranted intrusion upon a council's powers to administer discipline but an intolerable interference with its duty, and the accused's right, to have those powers exercise freely and fairly.'[5]

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1 At 212G.

2 At 213E-H: 'Putting it plainly, nothing in the conditions lays down the quality or number of "steps" to be taken, the accuracy or efficacy with which they must be "directed" or how far "towards" the required goals they must go. Consequently, nothing expressed in the conditions provides a pointer as to what the intended meaning was or assists in determining where to draw the line which separates compliance from non-compliance.'

3 At 214C-E.

4 [1998] 2 QB 91 at 99-100, discussed at 2.4.8 and 5.6 above.

5 At 217B-C.

After this judicial admonition, the authorities did not pursue their attempt to intrude directly into the universities' affairs, contenting themselves instead with detaining and deporting individual student leaders and lecturers and banning campus organisations.

6.11 The Use of Force

In the final analysis, emergency rule rests on force. The scale of violence used by the state will depend, of course, on the degree to which people are prepared voluntarily or through fear to comply with the regulations and orders which have been discussed in these pages. State violence can manifest itself in many forms,[1] including arrest, detention without trial and prosecution in the courts. This section is concerned only with the use of physical force, including deadly force, by law enforcement officers for the purposes of what is commonly known as 'crowd control'.

Under the ordinary law, law enforcement officials are empowered to use deadly force on three grounds.[2] The first is to protect the person or property of themselves or others. A policeman acting on this ground enjoys virtually the same powers as ordinary citizens, except that he has a duty to act, while the private citizen may generally withdraw.[3] The same principles are applied,

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1 See J D Van der Vyver 'State Sponsored Terror Violence' (1988) 4 *SAJHR* 55.

2 These are set forth in detail by Haysom ('Licence to Kill, Part 1' (1987) 3 *SAJHR* 3) and are merely summarised here.

3 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597E-598A.

however, in both cases.[1] Broadly-speaking, a person who has used violence against another must show that the other has acted unlawfully and that the force used was necessary to ward off the threatened danger.[2] A policeman may also use lethal force against a person who attempts to resist arrest or to flee. This power, which is again available to private citizens, derives from the Criminal Procedure Act.[3] In order to justify the killing of a person in these circumstances, the following requirements must be met: there must have been reasonable grounds for suspecting that a Schedule 1 offence had been committed by the escaping person,[4] the killer must have intended to bring the person to court,[5] the suspect must have known that an attempt was being made to arrest him,[6] where possible other means of apprehending the suspect should have been tried before resort was had to firearms,[7] and adequate warning should have been given.[8] Finally, the police may use deadly force to disperse unlawful gatherings in terms of s 49 of the Internal Security Act.[9]

In the state of emergency of 1960, which was ushered in by the shooting at Sharpeville, some attempt was made to control the use of force by members of the security forces acting under emergency powers. Provision was made for the use of force only to disperse gatherings or processions, and then only after such action was authorised by a magistrate or commissioned

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1 See, generally, Burchell and Hunt *Criminal Law and Procedure* vol 1 at 322-35.

2 The leading case on what is known as 'private defence' is *Ex Parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A); see also *Chetty v Minister of Police* 1976 (2) SA 450 (N), in which it was held that the unleashing of unmuzzled dogs to control an unruly crowd was excessive (this finding was overruled on appeal (1977 (2) SA 885 (A)).

3 Act 51 of 1977, s 49(2) of which reads: 'Where the person concerned is to be arrested for an offence referred to in schedule 1, or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorised under this Act to arrest or assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.'

4 *Wiesner v Moloto* 1983 (3) SA 151 (A) at 151.

5 *Macu v Du Toit* 1983 (4) SA 629 (A) at 647.

6 *S v Barnard* 1986 (3) SA 1 (A).

7 *R v Labuschagne* 1960 (1) SA 632 (A).

8 *Matlou v Makhubedu* 1978 (1) SA 946 (A).

9 Act 74 of 1982. In this provision, the legislature has gone to considerable lengths to ensure that firearms are used on such occasions only as a last resort. Section 49 provides that non-lethal weapons should where possible be used first, and firearms or other lethal weapons be deployed only if the gathering fails to disperse after due warning or if its participants show a manifest intention of attacking persons or valuable property. In *S v Turrell* 1973 (1) SA 248 (C) the court, dealing with the analagous provision of the earlier Riotous Assemblies Act 17 of 1956 (s 7) emphasized that the police should give the crowd the opportunity of considering the order to disperse and enabling them to comply. The court further stressed that force should only be used against those who are manifestly unwilling to disperse.

police officer who had thrice instructed the people assembled to disperse.[1] The relevant regulation further expressly stipulated that the degree of force used should be 'limited to the achievement of the objects for which it is applied' and that no firearms or other weapons likely to cause serious bodily injury should be used unless in the opinion of the magistrate or authorised officer their use was 'essential in the public interest or for the protection of life or property'.[2] This provision provided some scope for objective assessment of the necessity of the force deployed, as it was clearly open to a court to inquire into the 'proportionality' of the force used in relation to the circumstances and the objectives it was intended to serve.

The regulations of the emergencies of the 1980s, however, freed members of the security forces from virtually all legal constraints insofar as the use of force was concerned. The regulations authorising the use of force were worded identically in all emergency regulations issued after 1985.[3] They read:

> **'Maintenance of order'**
>
> '2.(1) Whenever a member of a security force is of the opinion that the presence or conduct of any person or persons at any place in the Republic endangers of may endanger the safety of the public or the maintenance of public order, he shall in a loud voice and in each of the official languages order such person or persons to proceed to a place indicated by him, or to desist from such conduct, and shall warn such person or persons that force will be used if the order is not obeyed immediately.
>
> '(2) If an order referred to in subregulation (1), is not obeyed immediately, such member of a security force may apply, or order the application of, such force as he under the circumstances may deem necessary in order to ward off or prevent the danger existing in his opinion.'

These provisions have several disturbing features. First, the decision as to the use and amount of force to be applied is left entirely to the subjective judgment of all members of the security forces. Furthermore, the force may be used against persons whose conduct need not necessarily constitute a danger to the public, but is nevertheless judged to constitute such a danger by the

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1 Reg 2 of Proc R 93 of 1960.

2 The disjunctive coupling of 'public interest' and 'the protection of life or property' is puzzling. This writer cannot conceive of any situation in which the use of lethal force can be deemed *essential* where it is not aimed at protecting life or valuable property.

3 See regs (2) of Procs R 120 of 1985, R 109 of 1986, R 96 of 1987, R 97 of 1988 and R 86 of 1989.

law enforcement officer concerned. To make matters worse, the order to use force may be given *immediately* after the required warning is given.[1] So open a licence for the use of force is particularly disquieting in the climate of ungoing confrontation between security forces and residents which existed in many of the country's black areas during the periods of emergency rule. Security force personnel, including inadequately trained and inexperienced national servicemen and 'kitskonstabels',[2] were often issued with semi-automatic combat rifles and shotguns charged with heavy-calibre SSG shot.[3] Many security officers serve long hours and are subject to considerable provocation and nervous strain. In addition, they are required to enforce many unpopular decrees prohibiting normal community activities.

In these circumstances it is hardly surprising that police and army personnel have sometimes shown little restraint in the use of firearms. Given the general prohibition on the reporting of 'security actions',[4] occasions on which members of the security forces opened fire on people in the country's black townships have not always been recorded. Where they have been, reports are invariably issued by the Bureau for Information or Police headquarters in Pretoria, and typically claim that police had been 'forced to open fire when they were attacked by mobs with stones and petrol bombs'.[5]

Only one incident will be referred to here to illustrate the tragic consequences that can flow from inadequate control on the use of firearms by security personnel charged with the task of enforcing emergency decrees. Exactly 25 years after the fatal Sharpeville shootings, police opened fire on a crowd marching from the township of Langa near Uitenhage to attend a banned funeral at the nearby township of Kwa Nobuhle. Twenty men, women and children were killed and scores injured. At the subsequent judicial commission of inquiry headed by Mr

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1 Mathews points out in addition that a warning in English and Afrikaans may not always be understood in an area populated by blacks (Mathews *Freedom* at 212).

2 Literally, 'instant constables', so named because of the brief period of training given to members of this specially-created black auxilliary force before their deployment in black townships.

3 See Report of the *Commission Appointed to Inquire into the Incident which Occurred on 21 March 1985 at Uitenhage* RP 74/85, hereafter the *Kannemeyer Commission.*

4 See 7.2 below.

5 For attempts to compile lists of fatal clashes between police and the public see the Lawyers' Committee for Human Rights *The War Against Children: South Africa's Youngest Victims* (1986) and the Various 'Human Rights Indices' in the *SAJHR* 1985 to date.

Justice Kannemeyer of the Eastern Cape Division of the Supreme Court,[1] it was found that the police had fabricated their original descriptions of the extent to which the crowd was armed and of its threatening posture. The commission also found that the police should not have solicited the prohibition on the funeral in the first place. [2] Evidence was led that the police had attempted to fabricate evidence of a stone attack, and that the order to fire had been given almost immediately after a warning shot was fired.[3] The police had been refused non-lethal equipment such as teargas, rubber bullets and birdshot, which refusal the commission found to have been deliberate policy of the police commanders and 'a cause for grave concern'.[4] A policeman's claim in evidence that birdshot was not suitable because it could not 'put a person out of action' at a range of more than 50 metres was found to be 'disturbing', and the commissioner asked pertinently: '[S]urely when one has to deal with a large mob of rioters, the aim should be to cause the crowd to disperse and not to render the members thereof incapable by shooting them with ammunition such as SSG.' [5] Most of the victims had been shot in the back or the side.[6] In spite of this evidence, the commission accepted that the commanding officer was entitled to give the order to fire when the crowd approached the armoured vehicles in which he and his men were sitting and when, according to the same officer, one person produced a petrol bomb.

Tragedies like that at Langa are exceptional only in their scale. The evidence that came to light at the inquiry indicated, however, that they are incipient in any confrontation between security forces and large crowds gathered in defiance of the general prohibition on gatherings.

The only contribution which can be made by the courts to inhibit excessive violence by the security forces is to award damages against the state and convict those guilty of using excessive force. It is submitted that the courts should not automatically allow law enforcement officers to shelter behind subjectively-phrased enabling regulations or indemnity clauses when called upon to demonstrate the lawfulness of their actions, but should test their *bona fides* against the

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1 The Kannemeyer Commission *supra*.
2 *Report of the Kannemeyer Comission* at 158-62.
3 *Op cit* at 56.
4 *Op cit* at 164-5. A copy was produced of a telex from the Senior Deputy Commissioner of Police dated 19 March 1985 (three days before the shooting) which read: 'When acid or petrol bombs are thrown at police or private vehicles and/or buildings an attempt must be made under all circumstances to eliminate the suspects.'
5 *Op cit* at 112.
6 Only one,a 16-year- old boy, had been wounded in the front (*op cit* at 89).

proven facts.[1] Where the use of force is clearly shown to have been excessive in relation to the circumstances, the responsible officers should be held both criminally and civilly liable, the indemnity provisions in the regulations notwithstanding.[2]

1 This was being done at the time of writing in the 'Trojan Horse' case, in which relatives of those killed when police officers fired from a civilian vehicle in which they had hidden instituted a private prosecution against the officers allegedly concerned.

2 An argument in support of this contention is spelled out at 3.7 above.

7: Emergency Crimes

One of the notable features of the history of emergency rule in South Africa has been the criminalising by regulation of an ever-widening range of conduct, much of it not of a violent nature, but written or verbal. Space does not permit a complete analysis of the entire corpus of emergency crimes. In this chapter, an attempt is made merely to describe the salient features of some of the main offences which have been created by emergency decree in the various states of emergency since 1960, and to highlight especially how the criminal law has been used to curtail or eliminate political activity.[1]

7.1 Subversion

The key to the control of extra-parliamentary opposition movements and protest politics is the prohibition of 'subversive statements', the definition of which has steadily expanded during successive states of emergency to embrace debate and political propaganda going far beyond that which is generally understood to be 'subversive'.

All emergency regulations since 1960, with the exception of those of 1985, have made it an offence to utter, print, distribute, display and (for a stage) even to possess statements 'calculated or likely' to have certain effects. In 1960, these effects included the subversion of the authority of the government or of the legislature, the engendering or aggravation of feelings of hostility among the public towards 'any section of the public or person or class of persons', the incitement of the public to 'resist or oppose' the government or any official in connection with any

1 It should be noted that transgressions of the criminal prohibitions contained in emergency regulations results in prosecution before the ordinary courts. Since 1985, no prosecution could be launched except with the approval of the attorney-general having jurisdiction (see eg reg 14 of Proc R 86 of 1989 (security regulations) and reg 12 of Proc R 88 of 1989 (media regulations)). All earlier regulations contained identically- worded provisions. No special courts have been created for the prosecution of emergency crimes. The authorities are, however, free to use their administrative powers against individuals or organisations who have committed offences, and they are not bound to prosecute those against whom administrative powers have been deployed.

measure 'relating to the safety of the public, the maintenance of law and order or the application of the law', or the causing of 'panic, alarm or fear among the public or the weakening of the confidence of the public in the successful termination of the state of emergency', unless the latter category of statements was proved to be 'a true and complete narrative'.[1] From June 1986, this list was gradually extended to include statements calculated to have the effect of inciting or encouraging people to 'promote any object' of any unlawful organisation,[2] to take part in unlawful strikes, boycotts, prohibited and restricted gatherings, civil disobedience or to discredit or undermine the system of compulsory military service.[3] It was also an offence during 1986/7 to make a statement 'encouraging or promoting disinvestment or the application of sanctions or foreign action' against South Africa[4] and to publish statements calculated or likely to have the effect of inciting or encouraging people to take part in 'unrest' as defined, boycott actions against a particular firm or class of firms,[5] products or educational institutions. 'Civil disobedience' was, after 1986, specifically defined as, *inter alia*, a refusal to comply with the provisions of any law or with any obligation towards a local authority in respect of rent or a municipal service. After 1985, the truth of a 'subversive statement' could no longer be raised as a defence.

Several new forms of 'subversive statement' appeared during and after 1986, including those likely to encourage people to attend restricted gatherings, to 'exert power and authority in specific areas by way of structures purporting to be structures of local government and acting as such in an unlawful manner' or to prosecute, try or punish persons 'by way of unlawful structures, procedures or methods'.[6] From June 1987, the list was extended to include statements

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1 Reg 1 (x) of Proc 93 of 1960.

2 Reg 1 (viii) of Proc R 109 of 1986, struck down as void for vagueness in *Metal and Allied Workers Union v State President* 1986 (4) SA 58 (D) at 369B-370C (see 5.5 above).

3 The latter provision, which first appeared in Proc R 109 of 1986, did not initially prohibit the making of statements which *in themselves* had the effect of discrediting or undermining the system of compulsory military conscription, but only the making of statements which were calculated or likely *to incite others* to make such statements. This was later amended to make the act of discrediting or undermining an offence in itself (see para (b) of the current definition of 'subversive statement' in Proc R 88 of 1989).

4 Proc R 109 of 1986. This provision did not appear in the regulations after June 1987.

5 Either by not making purchases from those firms or by doing business with other firms. The latter provision appears to be so wide as potentially to hit *bona fide* commercial advertising.

6 The latter provisions were aimed at the establishment in many black townships of so-called 'street committees' to replace the widely-rejected black town councils, and of 'people's courts' aimed at enforcing a rough brand of community discipline.

likely to encourage people to support or take part in the activities of unlawful organisations,[1] not to take part in an election of members of a local authority or to commit any act whereby such an election was impeded.[2] In addition, from 1986, the Commissioner of Police was empowered to extend the list of prohibited statements by 'indentifying' further acts, the incitement or encouragement of which would be deemed 'subversive'.[3]

Even this brief summary of the offence of uttering or publishing subversive statements should be enough to indicate the dominant motive behind its development. This is patently to deter by threat of heavy sanctions [4] any attempts to encourage protest, and thus systematically to criminalise the strategies adopted by the extra-parliamentary opposition during the emergencies.

There was no reported judicial challenge to the prohibition of 'subversive statements' in the state of emergency of 1960.[5] A number of components of the definition were, however, successfully challenged early in the states of emergency declared after 1986. In *Metal and Allied Workers Union v State President*,[6] the full bench of the Durban and Coastal Local Division found that it could attach no meaning to the notions of 'promoting the objects of an unlawful organisation',[7] encouraging 'foreign action' against the Republic,[8] and 'weakening or undermining the confidence of the public or any section of the public in the termination of the state of emergency'.[9] In *Natal Newspapers v State President*,[10] although in the light of the *Metal & Allied Workers Union* judgment the court was not called on to consider the definition itself, it was held that the offence of merely possessing literature containing a subversive statement, even in

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1 Para (vii) of the definition of 'subversive statement' in Proc R 97 of 1987.
2 Para (x) of the definition of 'subversive statement' in Proc R 99 of 1988, repeated in Proc R 88 of 1989 (for comment on this provision see 5.3 above).
3 Paragraph (a)(ix) of the definition of 'subversive statement'in Proc R 224 of 1986, repeated in all subsequent regulations. The courts' treatment of this provision is discussed at 5.4 above.
4 A fine of up to R20 000 or 10 years imprisonment, or both, as well as confiscation at the court's discretion of equipment used for its dissemination.
5 There was, however, one recorded conviction — that of the editor of the *Evening Post*, Mr J G Sutherland, the unsuccessful appeal against which is reported in *R v Sutherland* 1961 (2) SA 806 (A).
6 1986 (4) SA 358 (D).
7 At 669A-370C.
8 At 372I- 373B.
9 At 372H. See further at 5.5 above.
10 1986 (4) SA 1109 (N).

the strictest sense of that term, was 'so far-reaching and horrendous' in its consequences that it could never have been contemplated by parliament.[1]

The definition of 'subversive statement' was promptly redrafted to remove the defects struck down by the courts in these two cases.[2] But the full bench of the Natal Provincial Division found in *United Democratic Front v State President* [3] that two additional elements which were added to the definition were bad in law. One was a prohibition on the incitement or encouragement of people to attend restricted gatherings, which the court held could not conceivably be related to the purposes for which the State President was empowered to make regulations.[4] The other was a provision empowering the Commissioner of Police to identify acts, the incitement or encouragement of which was thereby rendered subversive.[5] A broader attack on the definition as a whole was, however, rejected by the court. It was argued that the concept of 'encouraging' members of the public to do the acts specified was void for vagueness, alternatively, unreasonable. The court held that the notion of 'encouraging', though wider than that of 'inciting', had an ascertainable meaning, and that since the conduct which people were forbidden to encourage could conceivably endanger the public order, it was 'by no means unthinkable that parliament could have contemplated the making of regulations which forbade the encouragement of such conduct by means falling short of incitement'.[6]

Appeals and cross-appeals were immediately noted against the Natal court's judgment in the *United Democratic Front* case, but the provisions which had been struck down by the court *a quo* were re-enacted in two subsequent sets of regulations [7] before the judgment of the senior court was delivered almost 18 months later. In *Staatspresident v United Democratic Front*,[8] the Appellate Division upheld both aspects of the definition which were struck down by the court

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1 At 1131B-E. Possession of 'subversive statements' was not listed as an offence in subsequent regulations.
2 The new definition appeared in the first comprehensive set of 'media' emergency regulations (Proc R 224 of 1986).
3 1987 (3) SA 296 (N).
4 At 325H-J. See further at 5.3 above.
5 At 327G-328C. The *United Democratic Front* case is discussed at 5.3 and 5.4 above.
6 At 325H-J.
7 Those of June 1987 and 1988 (Procs R97 of 1987 and R99 of 1988.
8 1988 (4) SA 830 (A) (discussed at 5.2, 5.3 and 5.4 above).

below, effectively nullifying in the process the grounds on which other aspects of earlier definitions were struck down in the *Metal & Allied Workers Union* and *Natal Newspapers* judgments.[1]

Another appeal decided on the same day as the *United Democratic Front* case, *Staatpresident en andere v Release Mandela Campaign en andere*,[2] indicates that attacks on police orders 'identifying' matters the incitement of which is to be deemed subversive are almost as invulnerable as the regulations of the State President.[3] One of the orders issued by the Commissioner under that provision [4] 'identified' as 'subversive' any statement whereby members of the public were incited or encouraged to participate in any 'campaign, project or action' aimed at securing the release of persons detained without trial under ss 28 or 29 of the Internal Security Act 74 of 1982 or the emergency regulations insofar as such campaign project or action entailed, *inter alia*, the signing of, subsciption to, or 'any other act' in support of a document in which the government was called upon to release a detainee, or which protested or disapproved a detention, the wearing of a sticker or clothing which expressed such disapproval, the attending of a gathering held in protest against the detention of persons or 'in honour of' such persons, or 'the performance of any act as a symbolic token of solidarity with or in honour of' detainees.

This order was declared bad in law by the the Durban and Coastal Local Division [5] because the empowering provision under which the Commissioner had purported to act had been struck down by the full bench of the Natal Provincial Division in the *United Democratic Front* case. Leon J did not therefore consider it necessary to give reasons for his ruling. On appeal, however, respondent's main argument that the empowering regulation was void could not be sustained in the light of the senior court's decision in the *United Democratic Front* case. It did, however, remain open to them to pursue three alternative arguments, namely, that the order was itself void for vagueness, that it was unreasonable in the sense in which that word was used in *Kruse v Johnson*,[6] and that it extended further than the Commissioner himself intended, insofar

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1 In particular, by the finding that s 5B of the Act (the new ouster clause) precluded the courts from striking down the State President's regulations on the grounds that they were vague or incomprehensible. The Appellate Division's ruling all but precludes further judicial challenge to the prohibition of 'subversive statement' in its present form (see 3.2 above). The definition of 'subversive statement' currently in force (reg 1 of Proc R 88 of 1989) is the same as that struck down by the court *a quo* in the *United Democratic Front* case.

2 1988 (4) SA 903 (A).

3 The Commissioner still enjoys this power (see para (xi) of the definition of 'subversive statement' in Proc R 88 of 1989).

4 R 873 *GG* 10713 of 10 April 1987 (*Reg Gaz* 4075).

5 *Release Mandela Campaign v State President* 1988 (1) SA 201 (N).

6 [1898] 2 QB 91.

as his intention could be gleaned from an explanatory press statement issued just after the order was promulgated.[1]

It is difficult to conceive of a provision which could draw the dividing line between the conduct which it prohibited and that which remained lawful in a more tortuous fashion. The order, when read with the definition of 'subversive statement' of which it formed a part, compelled people to decide before uttering them whether words which had any bearing on detainees were likely to incite or encourage others to perform acts described in words of mind-boggling generality (eg 'any other act', 'symbolic token', 'in honour of', 'symbolic token of solidarity' and the like). Yet the majority in the court of appeal rejected the contention that the order was void for vagueness.[2] In its view, the examples cited by respondent's counsel to illustrate the ludicrous lengths to which the order potentially extended (eg criminalising a lawyer's advice to his client to write to the government to request the release of a detained child, or a priest's prayers 'in solidarity with' a detained congregant) rested on an incorrect interpretation of the words of the order. The lawyer would not commit an offence, said Rabie ACJ, because he was not encouraging his client to take part in an 'action' which, his lordship held, meant 'organised collective action'.[3] The priest of the example would also not infringe the order because, although his advice might encourage others to join in collective prayer for the detainee's release, he had not intended his prayers to have this effect.[4]

That the order could be so construed as to avoid covering the extreme examples cited in argument was enough to satisfy the majority in the *Release Mandela* case that it was sufficiently clear to pass muster. It should be noted, however, that the conclusion drawn by the court that the order did not cover the two hypothetical examples rested on a strict construction of the order. Before the court authoritatively pronounced on the limits of the order, however, the ordinary citizen was in no position to discern where the line would be drawn. Had it been considering a criminal prosecution, the court would, of course, have been right restrictively to construe the words of subordinate legislation affecting the ordinary rights of the subject. But when testing the validity of subordinate legislation, it is debatable whether a court should go to such lengths to cut down the scope of blanket provisions. There can be no doubt that the order at issue in the *Release Mandela* case was of so sweeping a nature as to cause reasonable doubts as to whether conduct of a wholly innocuous nature, such as holding church services or sending

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1 At 908F.
2 At 909G.
3 At 908H-909B
4 At 909F-G.

Christmas cards remembering detainees, remained lawful. If there was no need for clarification, it may well be asked why the Commissioner found it necessary to issue a special press statement explaining that the order was not intended to prohibit, *inter alia*, prayers for the release of a detainee at a '*bona fide* religious gathering' or a person at a '*bona fide* gathering during an election campaign from adopting a standpoint in regard to the release of detainees'.[1]

Even had the Appellate Division not found that emergency regulations were immune from attack on the ground of vagueness, the *Release Mandela* case shows that a person seeking to impugn them on that ground would in any event have faced an almost hopeless task. It is of interest to note, however, that the court did not see fit to spare itself the task of justifying the provision by simply pointing to the ouster provision. For it is arguable that the matters 'identified' by the Commissioner as forms of 'subversive statement' became part of the principal regulation, which the court had declared *intra vires* in the *United Democratic Front* case. It is of interest to note, too, that Van Heerden JA again dissented completely,[2] thus refraining from acknowledging the prior ruling by the majority in the *United Democratic Front* appeal.

One further point arises from the *Release Mandela* case. It is respectfully submitted that the court too readily dismissed the contention that the Commissioner had used his powers in a manner not contemplated by parliament. It may well be, as the Appellate Division has tirelessly pointed out,[3] that the State President has authority to make such laws as he considers necessary or expedient for the protection of public safety and order or the termination of the emergency and to this end to delegate law-making powers to others. It does not follow, however, that a person to whom such powers have been delegated has necessarily used them in a manner contemplated by parliament. In the *Release Madela* case, the court could well have considered the question whether the orderly petitioning of the government to release a detainee could conceivably be related to the maintenance of public order or safety, or the termination of an emergency. It is submitted that to encourage people to do so cannot be said to serve these purposes, and that the relevant portions of the order, being severable, were *ultra vires* on that ground. Be that as it may, *Release Mandela* provides another example of the Appellate Division's reluctance to countenance judicial interference with the exercise of emergency powers.

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1 See at 910E-G.
2 See *Staatspresident v Release Mandela Campaign* 1988 (4) SA 903 (A) at 912C-D.
3 Again *in casu* at 901I.

7.2 Offences relating to the publication of information

Periods of emergency rule have afforded the government an admirable opportunity to extend official controls over information to lengths far beyond those to which it has already proceeded through parliamentary enactment. The statute book bristles with provisions which criminalise the publication of information or comment on a wide range of state activities and alternative points of view.[1] But even this battery of legislation leaves some loopholes through which news and views can percolate which may be damaging to the reformist image the government is trying to project or expressive of ideas of which the authorities disapprove. The government has steadily deployed emergency powers to close as many of them as possible.

In 1960, the press was left relatively free to report on matters relating to the emergency within the parameters of the ordinary law, as it then stood. It was forbidden only to publish 'subversive statements' as then defined,[2] and the names of people detained under the regulations before they were officially disclosed.[3] But statements calculated or likely to cause 'panic, alarm or fear' among members of the public or sections thereof were deemed not to be subversive if they were proved to be 'true and complete narratives'.[4] For the rest, however, the press could lawfully send reporters and photographers to, and publish their reports and pictures of police actions and civil unrest — unless, of course, the area in which they were happening had been closed to the public by police order.

No special attention was given to the press and other mass media in the regulations governing the state of emergency of 1985, except that they were once more forbidden to disclose 'subversive statements' and the names of detainees before their names or identities were officially released.[5]. In that of 1986/7, however, appeared the first decree aimed specifically at the news media [6]. This prohibited the making, taking or publication of drawings, sound recordings, films or photographs of any 'public disturbance, disorder, riot, public violence, strike or boycott' or any damaging of any property or assault on or killing of a person or any person present thereat'.

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1 These statutes are listed at 4.5 above.
2 See 7.2 above.
3 Reg 23(1)(h) of Proc 93 of 1960.
4 Reg 1(xi)(d) of Proc 93 of 1960.
5 Reg 8(d) of Proc R 121 of 1985.
6 Reg 9 of Proc R 109 of 1986.

The taking or publishing of films, photographs, etc of the 'conduct of a Force' or one of its members 'in regard to the maintenance of the safety of the public or the public order or the termination of the state of emergency' were also forbidden. This provision left the media free to publish pictures of the aftermath of civil violence, an omission later rectified by casting the phrase relating to the damaging or property or the killing of persons in the pluperfect tense.[1] The amended regulation survived attack in the *Natal Newspapers* case.[2] Applicants argued that the provision was too widely cast in that it covered photographs of public violence of all kinds, including that not connected with the emergency, as well as those of violence which occurred in the distant past.[3] The court ruled, however, that the conduct specified in the regulation could all be related to the purposes for which the State President was empowered to make regulations, and that the regulation was accordingly within his powers. [4] This conclusion is, however, open to criticism. The State President is indeed empowered by s 3(1)(a) of the Public Safety Act to make such regulations as appear to him to be necessary or expedient for the prevention of civil violence of the types specified in the regulation. But it does not follow automatically that the recording on film, audiotape or drawing paper of such acts, and their *subsequent* publication as part of the public record, can be said to be related to those purposes.[5] It is submitted that the court also failed to apply the test for vagueness with sufficient rigour. Although it found that some of the conduct specified in the regulation had more precise meaning than others, and acknowledged that 'in certain instances it may prove difficult to decide whether a particular set of facts is aptly described in the words of the provision', the court held that the words *themselves* were not uncertain or vague. This may be so. But had the court tried to put itself in the position of those at whom the regulation was aimed, it could well have come to another conclusion. How, for example, does one photograph or make a sound recording of a 'boycott'? And how is an editor to know whether a picture of a person which he wishes to publish was not taken when that person was 'present' at the scene of disorder, a boycott or a strike? The clarity of a provision depends not merely on whether a reasonably ascertainable meaning can be given to the words themselves, but also on whether they can be applied with reasonable certainty to

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1 Reg 4(1)(b) of Proc R 224 of 1986. The effect of this amendment, as the court noted in *Natal Newspapers v State President* 1986 (4) SA 1109 (N) at 1129I, was also to limit the scope of the provision to damage caused during civil disturbances. Before the amendment, the provision would have covered pictures of damage caused by any form of human violence, including a boisterous rugby match or a motor accident.

2 *Supra.*

3 The examples cited were the 1922 miners' strike and the fall of the Bastille (see 1130F)!

4 At 1130B-C.

5 The only basis on which the prohibition could be said to related to the said purposes is that the publication of photographs or film footage of violence could inspire more violence. This is a popular theory among the authorities, but the court did not apparently consider it.

given fact- complexes. The difficulty of recognising when the 'conduct' of members of a 'Force' is indeed related to the maintenance of the safety of the public, the public order or the termination of the state of emergency is as insuperable. The court, however, also upheld the prohibition on photographs etc of such conduct.[1]

The prohibition on visual depictions of what subsequently came to be formally defined as 'security action' was extended to written comment and news by police order in late 1986.[2] At the same time, journalists or other persons gathering news material for the media were also prohibited from being on the scene of or within sight of 'unrest' as defined.[3] The prohibition contained in the police order just mentioned was incorporated into the first set of presidential regulations aimed expressly at the media of mass communication and their personnel,[4] and, with minor technical amendments necessitated by the judgment of the court *a quo* in *United Democratic Front v State President*,[5] have been repeated in all succeeding sets of 'media' emergency regulations.[6]

Since December 1986, therefore, the media have been forbidden to publish without authorisation news or comment on virtually all incidents of civil conflict and the actions taken to suppress it.[7] Not only were they prohibited from reporting on or discussing 'security actions', but also the deployment of men, vehicles or equipment in preparation for it. 'Security action' was defined so widely as to include all police action other than that manifestly related to ordinary crime prevention, and to cover police intervention in the most minor public disturbance. Follow-up actions in the wake of 'security action' was also rendered secret,[8] as was the use of

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1 At 1130H-1131A.

2 GN 1881 *GG* 10429 of 3 September 1986. In that order, the Commissioner stated simply that he was acting under the powers vested in him by reg 7(1) of Proc R109 of 1986. That regulation consisted, however, of four sections and 11 sub-sections. One is therefore left to guess as to which provision he was acting under.

3 Sub-regulation 3 of Proc R 109 of 1986. In this case, it is altogether unclear under which paragraph of the empowering regulation he was acting. It could not have been 7(1)(a), since the powers to control movement conferred by that provision could be applied only to specific areas. He must, therefore, have been acting under reg 7(1)(d), which conferred upon the Commissioner power to issue orders relating to 'any other matter'. This order had been struck down by the Natal Court (see *Natal Newspapers* case *supra* at 1126J-1128B).

4 Proc R 224 of 1986.

5 1987 (1) SA 296 (N).

6 Procs R 97 of 1987, R 99 of 1988 and R 88 of 1989. The amendment, rendered unnecessary by the judgment in the appeal against that decision (see 1988 (4) SA 380 (A), entailed the excision of the words 'which to a reasonable bystander' from the definition of 'unrest' (see 5.5 above). It is questionable, however, whether this alteration made the provision any clearer).

7 It should be noted, however, that the media were not precluded from *reporting* on 'unrest' if there was no security force involvement. Only the presence of journalists at and photographs of 'unrest' *per se* were forbidden.

8 A journalist has no means of gauging when such follow-up action is over, even if he can recognise it in the first place.

force by security officials after a warning to any person whose conduct was regarded by some policeman or soldier as a danger to the public safety or order. The activities of law-enforcement officers were further sealed from public scrutiny by a provision forbidding the publication of details of actions leading to the arrest of any person on charges of an offence under the regulations or committed during 'unrest' as defined.

The scope of the prohibition on publication of news or comment on 'security action' was analysed in *WM Publications (Pty) Ltd v Commissioner of Police*.[1] The judgment in that case provided little solace for the journalist trying to report on civil conflict. Since it was the only case in which to the time of writing an alleged transgression of a penal emergency regulation had come before a division of the Supreme Court, it is worth considering this aspect of the judgment in some detail.

Reg 3(6) of the 1988 emergency media regulations,[2] prohibited news or comment on 'security actions', subject to the proviso that such news or comment could be published 'insofar as particulars of such a matter are disclosed, announced or released, or authorised for publication' by a 'spokesman for the government'. Sometime in August 1988 police opened fire on a group of blacks in Soweto, after which the police liaison office in Pretoria issued the following typically laconic report:

> 'At Soweto a group of blacks stoned a delivery vehicle. Security force members used shotgun fire to disperse the group.' [3]

The *Weekly Mail* produced the following report on the incident:

> **'CHILD DIES IN TRUCK SHOOTING**
>
> Municipal police escorting a Coca Cola delivery truck in Soweto this week allegedly shot at Soweto pupils, killing one and injuring two others.
>
> Clement Gwiji, a Std 6 pupil at Meadowland's Lamola High School, died instantly after the municipal police allegedly opened fire on more than 900 students at Zone 5, Meadowlands.
>
> The injured are Quintin Nyathela, 15, a Std 7 pupil who was shot in the neck, and Martin Hlayise, 16, whose hand was grazed by a bullet.
>
> A member of the school's SRC said: "We were approaching the four- way intersection at which the Coca Cola delivery van had stopped, when I saw this man aiming his gun in our direction.

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1 WLD, 8 August 1989 Case No 14074/88, unreported.
2 Proc R 99 of 1988.
3 Cited at 8 of the typed judgment.

"He had alighted from the truck, standing on the passenger side of the vehicle, when he fired three shots."

A police unrest report said security force members used shotgun fire to disperse a group which stoned a delivery vehicle in Soweto, and two people were injured.

Captain V R Bloomberg, of the South African Police press liaison division, confirmed the report.

Resident (*sic*) living near the intersection confirmed the pupil's version. A witness said the truck had moved from where it had stopped and then turned. He said the municipal policemen ran to the waiting truck after firing the three shots.

The pupils said the shooting occurred when they were returning to school after visiting the Zone 10, Meadowlands, home of a fellow student, Zwai Sixolo, who was killed last week, allegedly by thugs.

Gwiji, 14, was certified dead on arrival at Baragwanath Hospital while Nyathela was on Wednesday in a critical condition, according to the parents of the deceased and the SRC member. Hlayise was discharged after being treated at the Phomolong Clinic.

On Wednesday about 970 pupil (sic) assembled at Gqiji's home to pay tribute. They later marched through the streets to Sixolo's home where they were dispersed by security force members.

Neither Majors Noel Hartwell nor Fanyane Zwane of the Soweto divisional headquarters were available for comment.'

Apart from denying that the incident involved 'security action' as defined,[1] the *Weekly Mail* argued that the article had in fact been 'authorised' in that particulars thereof had been dislosed in an official release. The court was unimpressed with this submission. It pointed out that the article went much further than the release and indeed contradicted it in several material respects, saying 'not that the police acted in defence of life or property which was under attack from a group of people, but tell[ing] of police who wantonly shot at 900 scholars who were innocently returning from [*sc*: to] school'. Defensive measures were thus 'pictured as murder...of innocent youngsters'.[2] The court pointed out that the regulation authorised news or comment on security action only '*insofar as particulars*' of the incident were disclosed, announced or released, and found the words to be clearly to the effect that the news may go no further than the release.[3] With respect, however, the regulation is equally amenable to the construction contended for by the newspaper. The words 'in connection with' and the entitlement to 'comment on' such particulars as were officially disclosed suggest that the regulation permitted newspapers to add some detail to the bare bones of official communiques. Had he wished the

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1 On this aspect of the judgment see 6.8 above.

2 At 9 of the typed judgment. This is an interesting observation, as the report quotes the police version in full and does not explicitly suggest that there was no reason for the shooting.

3 At 11 *in fine*-12.

regulation to bear the restricted meaning accepted by the court, the State President could have expressed himself in terms less ambiguous.[1] The court, however, supported the restrictive interpretation of the exception by examining the object of the regulations as a whole, which it saw as encompassing prevention of 'actions inspired by inflamed feelings which are aroused by allegations under the name of "journalism" which claim what never existed and say what is not true'.[2] This may indeed have been one of the motivations behind the prohibition on the reporting of security force actions. But the regulation made no attempt to distinguish true from false reporting.[3] The principal ratio for the prohibition of reports on 'security actions' was almost certainly to prevent public dissemination of complete *factual* accounts of police repression, in all its ugliness, and to ensure that what detail was disclosed came in the kind of bland and exculpatory 'officialese' used in the statement at issue in the *WM Publications* case. If the reasoning of the court in that case is accepted, it will render criminal any attempt by the media to contradict even blatant lies by police spokesmen as to the cause and extent of incidents of violence in which the police were involved. Proof of the truth of any detail not contained in the official handout would constitute no defence.

The prohibition of news relating to detainees also warrants mention in this context. Until June 1988, it was an offence to publish the names or identities of emergency detainees until they had been officially disclosed.[4] This prohibition, coupled with the denial to anybody of the right to 'official information' relating to detainees, meant that a person could effectively be made to 'disappear' until such time as their names were tabled in parliament in compliance with s 3(4) of the Public Safety Act.[5] After 1986, it became an offence to publish information or comment on 'the circumstances of, or treatment in' detention of any person. [6] This offence, unlike that created by s 44(1)(f) of the Prisons Act,[7] is committed by the publication of a *true* account, however horrendous the details may be.

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1 By saying, for example, that the prohibitions did not prevent publication of news or comment on 'such particulars of the prohibited matters as are officially disclosed, announced or released'.

2 At 12.

3 The 1960 emergency regulations, by contrast, excepted 'true and complete narratives' from the prohibition on statements calculated to foment feelings of hostility between race groups. It is in fact arguable that the publisher of a wholly fictional description of police action purporting to be a true account could escape conviction under reg 3(1) of the current media regulations because such a report could not be said to relate to a security action. This presumably explains why the State President added to the category of 'subversive statements' those likely to engender hatred or feelings of hostility towards the security forces.

4 See reg 13(d) of Proc R 109 of 1986 and reg 9(e) of Proc R 96 of 1987.

5 This prohibition did not appear in the regulations of the 1988/9 or 1989/90 states of emergencies, during which it was an offence only to publish news relating to the *release* of detainees.

6 Regs 3(1)(g) of Procs R 224 of 1986, R 97 of 1987, R 99 of 1988 and R 88 of 1989.

7 Act 8 of 1959.

Given the enormous powers entrusted to the security forces,[1] the blanket cast over their actions by the provisions just discussed is especially disquieting. Such powers render more acute the need for public surveillance of the kind of measures and policies adopted by the police and other armed forces. Although there is nothing to prevent the media from bringing to the attention of the public *illegal* conduct by members of the security forces,[2] few editors would be prepared to risk assuming that violence by security personnel, however gratuitous it may seem in the heat of the moment, falls outside their extensive emergency powers. One result of the prohibition of news on 'security actions' has undoubtedly been to prevent most whites from learning of the extent and methods of repression in the country's black areas and townships. The few reports on police excesses that have from time to time surfaced in the news media invariably emanate from court cases or commissions of inquiry held months after their occurrence.[3] Some of the facts that have come to light in this way indicate chillingly what can happen when ordinary policeman are freed from public accountability.

Care has also been taken to prevent the public from learning of the degree of popular resistance to the authority of the state, or the extra- constitutional means used to express it. Publication of the details of planned restricted gatherings is forbidden, as is the reporting of any 'speech, statement or remark' of a person 'performing' at the gathering in contravention of a condition imposed.[4]

No reports may be published on strikes or boycotts insofar as they disclose particulars of the extent to which they are successful or the manner in which members of the public are 'intimidated, incited or encouraged' to take part in or support such action.[5] Also proscribed are reports on the manner in which people are likewise induced to support or submit to 'street committees' or 'people's courts'.[6] Finally, the effectiveness of restriction orders against individuals is complemented by a prohibition on reports of any speech, statement or remark of a

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1 On which see 6.11 above.

2 This submission is based on the presumption that reference to conduct in legislation is reference to lawful conduct.

3 A notable exception, however, was the disclosure by a police officer of allegations of police brutality in Cape Town on the night of the general election in September 1989. His allegations were under official investigation at the time of writing.

4 Regs 3(c) of Proc R 97 of 1987, R 98 of 1988 and R 88 of 1989. The former part of this regulation was struck down by the court *a quo* in the *United Democratic Front* case 1987 (3) SA 296 (N), but reinstated on appeal 1988 (4) SA 830 (A). It was, however, never removed from the regulations.

5 Reg 3(1)(d).

6 Reg 3(1)(e).

person upon whom a restriction has been imposed to the extent that their words 'have the effect of or are calculated to have the effect of threatening the safety of the public, the maintenance of public order or of delaying the state of emergency'.[1] Since the executive authorities are the ultimate arbiters of when conduct can be said to constitute such a threat, it is difficult to imagine how an ordinary journalist (or anyone else) is to determine when an utterance is intended or calculated to have these effects. *Mens rea* in the form of negligence is expressly declared sufficient to establish guilt in the offences of publishing prohibited matter.[2]

It may be mentioned in passing that an effect of the above-mentioned prohibitions is to confer considerable power on the authorities to control the news. Their power to sanction publication of details of events which are otherwise forbidden can and has been used to engineer, by selective reporting, how the issues are presented to the public.

7.3 Miscellaneous offences

A special emergency crime of threatening any person with 'harm, hurt or loss' has also been created by emergency regulation.[3] While this provision clearly hits conduct catered for by the Intimidation Act,[4] it also extends much further. The emergency offence is created by uttering a threat *per se*, irrespective of the purpose for which it was made. The statutory offence at least requires a threat to be uttered with the object of inducing someone to act or refrain from acting, or to assume or abandon a particular standpoint, and that the threat be of physical harm. The emergency regulation, however, may be broad enough to encompass harm or hurt of a non-physical nature (eg pure economic loss) and covers threats directed at the relatives of the person addressed. The emergency offence is committed not only by the person who utters or writes the threat, but also by those who in any way assist in its dissemination or transmission. Finally, the regulations also make it a crime to disobey police orders or instructions or to hinder officials in the performance of their emergency duties.[5]

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1 Regs 3(1)(f).
2 See regs 8(b) of Proc R 87 of 1987 and 12 (b) of Proc R 99 of 1988 and Proc R 88 of 1989.
3 Regs 6 of Proc 93 of 1960, and 4 of Procs R 121 of 1985, R 109 of 1986, R 97 of 1987, R 98 of 1988 and R86 of 1989.
4 Act 72 of 1982.
5 The current regulation is reg 12(d) of Proc R 86 of 1989.

8: Conclusion

It is now time to return to the question posed at the beginning of this work:[1] to what extent have the courts been able to protect individual rights and freedoms against the depredations of executive power during periods of emergency rule in South Africa? Analysts and practitioners who have addressed this question have given uniformly dismissal answers,[2] the gravaman of which are captured by the words of Mr Justice Didcott in the following remarkably frank extra-curial statement uttered towards the end of 1988.

> 'The legislature, not a democratic one in the first place because it does not speak for the large majority of South Africans, has statutorily delegated to the executive the power to make laws by regulation and decree. This the executive has done voraciously, intensifying the evil of imprisonment without trial, restricting wholesale our freedom of speech, assembly, movement and association and the freedom of the press, and often entrusting to mere underlings decisions with the same consequences. Judicial endevours have been made to keep the process under some sort of control by the law and to harmonise its working with the law's requirements, as far as that could be managed. And this has been attempted by no wild unorthodoxy, by no splurge of adventurism, but by invoking and applying tried and trusted rules of administrative law common to our legal system and others, rules developed with the very object of safeguarding the rule of law in such a situation. Sad to say, these efforts have proved to be largely in vain, the Appellate Division in its wisdom having decided in case after case that has come before it during the past couple of years that the capacity of the

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1 At p 4 above.

2 See eg Corder 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) 5 *SAJHR* 1 at 16-17: 'There can be little doubt that the balance has swung in favour of a return to the hands- off approach of the 1960s...[T]he message from the highest court in the land is that, in the dominant 'security' area at least, the courts are not prepared — indeed, it is not their function — to guard the interests of the individual.' Mureinik ('Pursuing Principle: The Appellate Division and Review under the State of Emergency (1989) 5 *SAJHR* 60) comments in like vein (at 61): 'What is clear now is that we expected too much of the Appellate Division. We over-estimated its concern for the principles of the law, and we under-estimated its determination to suppress progressive developments in the junior divisions....' He concludes (at 72): 'We are now witness, I fear, to a growing failure of sympathy on the part of our highest court with the fundamental principles it is charged to protect.' See also Forsyth 'The Sleep of Reason: Security Cases before the Appellate Division' (1988) 105 *SALJ* 679; Grogan 'The Appellate Division and the Emergency: Another Step Backward' (1989) 106 *SALJ* 14 and 'Unfettering Discretion' (1989) 106 *SALJ* 443; Corder and Davis 'A Long March: Administrative Law in the Appellate Division' (1988) 3 *SAJHR* 281; Haysom and Plasket 'The War Against Law: Judicial Activism and the State of Emergency' (1988) 3 *SAJHR* 303. The first outpouring of scholastic gloom was unleashed by *Omar v Minister of Law and Order, Fani Minster of Law and Order, State Presdient v Bill* 1987 (3) SA 859 (A): see Dugard 'Omar: Support for Wacks's Ideas on the Judicial Process?'; Rabie 'Failure of the Brakes of Justice: *Omar v Minister of Law and Order* 1987 (3) SA 859 (A); Mathews '*Omar* v The Oumas'; McQuoid-Mason 'Omar, Fani and Bill — Judicial Restraint Restrained: A New Dark Age?'; Davis 'Omar: A Retreat to the Sixties?'; Van der Leeuw 'The Audi Alteram Partem Rule and the Validity of Emergency Regulation 3(3)'; Van der Vyver 'Judicial Self-Sufficiency in *Omar*', all in 1987 (3) *SAJHR* 295-377.

courts to assert and protect the Rule of Law in that situation is so attenuated as to be, for all practical purposes, insignificant.'[1]

That this sense of powerlessness has filtered through to the provincial divisions of the Supreme Court is apparent from the words which Friedman J chose to inform the applicants in *Natal Indian Congress v State President*[2] with 'regret' that their attempt to challenge some of the State President's regulations could not succeed. The learned judge said:

> 'I use the word "regret" advisedly. In general one of the traditional roles of the court is to act as a watch-dog against what I might term executive excesses in the field of subordinate legislation. It fulfils its role by measuring that legislation against long and well-established legal principles. It is therefore a matter of regret that in the field of security legislation, the legislature should have seen to fit to remove from the court the role which, as I have said, is traditionally one entrusted to it, of fairly and without favour or prejudice, safeguarding the interests both of the state and its officers on the one hand and those of its citizens on the other. Secondly and in particular, many of the regulations under consideration in this case were the target of trenchant and well-directed criticism by Mr Mohamed. Whether or not these criticisms went to the extent of showing that any or all of the regulations in question in this application, are so unreasonable that they could not have been contemplated by the legislature, or even if they are void for uncertainty, is something in respect of which I have not in the result applied my mind. I cannot express an opinion on them, since to do so is not now required of me. This too, to my mind, is something to be regretted.' 3

Must one conclude, then, that the courts are no longer capable of preserving some reasonable balance between executive power and individual rights under emergency rule? There can be no doubt that the interpretation by the Appellate Division of the powers conferred by the Public Safety Act has drastically limited the reach of the principles of administrative law into the emergency regime. Cases like *State President v Tsenoli/Kerchhoff v Minister of Law and Order,*[4] *Omar v Minister of Law and Order, Fani v Minister of Law and Order, State President v Bill*[5] and *Staatspresident v United Democratic Front* [6]. have seemingly rendered the State President unchallengable master of the emergency regime. *Staatspresident v Release Mandela*

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1 'Salvaging the Law', being the second Ernie Wentzel Memorial Lecture, delivered at Johannesburg on 4 October 1988, extracts of which are published in (1988) 4 *SAJHR* 355. The above passage appears at 358-9.
2 D & CLD 16 September 1988 Case No 3864/88, unreported.
3 Quoted in Haysom & Plasket supra at 330.
4 1986 (4) SA 1150 (A).
5 1987 (3) SA 859 (A).
6 1988 (4) SA 830 (A)

Campaign,[1] *Ngqumba/Damons NO/Jooste v Staatspresident*[2] and *Minister of Law and Order v Dempsey*[3] have also done much to reduce the judicial role spelled out by Goldstone J when he remarked [4] that:

> 'I consider it most desirable that if members of "a force" act beyond their already vast powers under the emergency regulations, or if they do not use them in a legitimate or *bona fide* manner, that they should be brought to account before the courts. It is wholesome and desirable that they should be made aware of the nature and limits of their powers and that they should know that if they abuse them, or use them unlawfully, there are the ordinary courts of the land before which they may be summoned to explain and answer for their actions.'

The highest court, therefore, has raised serious obstacles before those seeking to challenge the exercise of emergency powers. And the provincial courts have been bound to follow suit.[5]

In the address cited above, Judge Didcott attributed the demise of judicial control to

> 'the enabling legislation passed in the first place, which, according to the construction placed on it by the Appellate Division, ousts the jurisdiction of the courts from most of these matters and gives the executive virtual carte blanche.'[6]

It is true that the relative impotence of the courts to control the exercise of emergency powers is to be explained in part by the generosity of the statutory mandate which parliament has seen fit to confer on the executive. The reader will have observed how large a section of this work was devoted to analysing the devices used by the legislature to limit or oust the jurisdiction of

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1 1988 (4) SA 903 (A).
2 1988 (4) SA 224 (A).
3 1988 (4) SA 18 (A).
4 In *Radebe v Minister of Law and Order* 1987 (1) SA 586 (W) at 593I.
5 Many of the principles on which some provincial courts relied to strike down emergency legislation or actions have not survived the Appellate Division judgments. Counsel in *Mbeki v State President* (ECD 13 October 1988 Case No 427/88, unreported) waggishly, but not without some measure of justification, described the fettering principles emanating from the Appellate Division as 'binding but not persuasive'. The degree of abstentionism which has been encouraged in the provincial courts by the system of precedent is well illustrated by the judgment in the *Natal Indian Congress* case *supra*. How far it has been taken is perhaps most dramatically illustrated by the case of *Catholic Bishops' Publishing Co v The State President and others* WLD 8 March 1988 Case No 00421/88, unreported, discussed at pp 151-2 and 278-9 above.
6 (1988) 4 *SAJHR* at 359.

the courts. Given this legislative onslaught on their jurisdiction, it would have been naïve to have expected the courts to challenge the fundamental structures of the emergency regime.[1] Similarly, it would be unfair to criticise them with hindsight for their manifest failure so to do. The truly disquieting feature of the Appellate Division's performance in emergency cases during the 1980s is not, however, that it did not challenge the legitimacy of emergency rule itself after the manner in which its predecessor confronted parliament over the removal of the 'coloured' vote in the 1950s. It is to be taken to task, rather, for its refusal to countenance even tentative judicial interference with the *incidentalia* of administrative action under emergency rule. Indeed, the observer might be forgiven for viewing the opening succession of appeal judgments on emergency matters as a calculated strategy to undo what few points had been invoked by the provincial courts to set limits on the exercise of emergency powers. Thus vagueness was eliminated as a ground of review of emergency legislation,[2] the onus of proof was effectively reversed in cases of emergency detention,[3] the executive was freed from the duty to provide reasons for its actions,[4] the non-justiciability of 'subjectively-phrased' enabling legislation was taken to new heights,[5] and — most serious — the courts were told that the doctrine of *ultra vires* should not be used as an excuse for imposing limits on statutory powers in terms of common law principles which were not to be read into the enabling legislation.[6]

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1 That observers did not in fact expect them to do so perhaps explains the lack of comment on the first Appellate Division case dealing with emergency powers, *State President v Tsenoli supra*, in which the court overruled a decision by the full bench of the Durban & Coastal Local Division on a ground which went to the heart of the debate over the legitimate purpose of emergency powers. The case is discussed at 5.3 above. See also comment by Mureinik in his 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* at 65-6.

2 See at 3.2 and 3.5 above.

3 See at 6.2.6 above.

4 See at 3.4 above.

5 See at 3.3 above.

6 This was the message of the judgment of Hefer JA in *Staatspresident v United Democratic Front supra*, on which see pp 164-7 above.

The Appellate Division cases in which these developments occurred are disturbing not because they are demonstrably wrong — although, as the foregoing pages have sought to show, many are highly debatable – but because all of them dealt with issues which were logically and legally amenable to resolution in favour of the liberty of the subject.[1] The court did not *have* to find, for example, that the ouster clause precluded the striking down of emergency legislation on the ground of vagueness,[2] just as no ineluctable legal principle compelled it to rule that the denial to detainees of the right to a hearing or to consult a lawyer without official permission or to incite people to attend restricted gatherings or to petition for the release of detainees all fell within the purposes for which the authorities were empowered to make emergency regulations. Similarly, no binding legal or logical principle forced it to decide that security officers were not bound to show that they had considered the alternative of action under the 'ordinary law' before resorting to emergency powers, or that an empowering provision framed in apparently objective terms was not objectively justiciable.[3] The element of choice inherent in the cases in which these matters fell to be decided is demonstrated both by the cogency of the reasons given by the courts of first instance in which contrary conclusions were reached and by the occasional strong dissent from the ranks of the appeal bench itself.[4] In several cases, these stand in strong contrast to the paucity and *ex cathedra* quality of the reasons provided by the majority of the appeal

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1 As such, they provide excellent examples of the essentially subjective and value- laden nature of the interpretive process, to which attention was drawn at the beginning of this work (see 2.5 above). The cases also provided an opportunity, which sadly went unheeded, for the courts to follow Professor Dworkin's exhortation to interpret ambiguous legislation in the manner best reconcilable with fundamental principles of justice (this thesis is propounded in Dworkin *Taking Rights Seriously*. For an attempt to apply Dworkin's ideas to the South African situation see Mureinik 'Dworkin and Apartheid' in Corder (ed) *Law and Social Practice*, ch 7).

2 See 3.2 and 5.5 above.

3 As it did in *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A), on which see 3.3 and 6.5 above.

4 And, it may be added, by the creative and thorough argument of counsel for the applicants in many of these cases, some of the heads of which ran to more pages than the judgments themselves (see, for example, *Omar's* case *supra*).

court,[1] or to its outmoded approach to the principles of judicial review as developed in recent decades in South Africa and other jurisdictions.[2]

Why, then, did the highest court adopt this abstentionist approach towards the control of executive action under emergency rule? Explanations of the judicial behaviour of the courts under emergency rule in the peculiar circumstances of South Africa must necessarily be advanced with the utmost circumspection. It is tempting, perhaps, to seek answers to this question in the realms of the general and unprovable, such as the theory of incorrigible collusion between the institutions of the capitalist-apartheid state. But such sweeping answers are of doubtful value. Personality factors and the ideological propensities of individual judges are also not enough to explain the direction taken by the courts. It is, however, worthy of note that, from the start of the emergencies of the 1980s until his retirement in 1988, the overwhelming majority of emergency judgments were written by Rabie ACJ, who also sat on the bench and concurred in most cases in which majority judgments were given by other judges of the Appellate Division.[3] Hefer JA, a relative newcomer to the Appellate Division, sat in no fewer than nine cases during this period, and delivered the majority judgments in three. Other members of the Bench, senior to Hefer JA, such as Corbett JA, as he then was, Van Heerden, Hoexter and Jansen JJA have

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1 Of which, again, *Omar* serves as the prime example.

2 Of which *Staatspresident v United Democratic Front* and *Van der Westhuizen's* case *supra* stand supreme.

3 The benches which heard the 11 emergency decisions decided by the Rabie court were constituted as follows (in the chronological order in which they are reported): *State President v Tsenoli/Kerchhoff v Minister of Law and Order* 1986 (4) SA 1150 (A): *Per* Rabie CJ (Jansen, Corbett, Joubert, Viljoen JJA concurring); *Omar v Minister of Law and Order, Fani v Minister of Law and Order, State President v Bill* 1987 (3) SA 859 (A): *Per* Rabie ACJ (Joubert, Viljoen JJA and Boshoff AJA concurring, Hoexter JA partially diss.); *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A): *Per* Hefer JA (Rabie ACJ, Joubert, Viljoen, Nestadt JJA concurring (Nestadt JA for different reasons)); *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A): *Per* Vivier JA (Rabie ACJ, Van Heerden, Hefer, Grosskopf JJA concurring); *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A): *Per* Rabie ACJ (Joubert, Viljoen, Hefer, Vivier JJA concurring); *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A): *Per* Rabie ACJ (Hefer and Vivier JJA concurring, Grosskopff JA partially diss., Van Heerden JA diss.); *Staatspresident v Release Mandela Campaign* 1988 (4) SA 903 (A): Per Rabie ACJ (Hefer, Grosskopf, Vivier concurring, Van Heerden JA diss.); *Apleni/Lamani v Minister of Law and Order* 1989 (1) SA 195 (A): *Per* Vivier JA (Rabie ACJ, Viljoen, Hefer, Grosskopf JJA concurring); *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A): *Per* Hefer JA (Rabie ACJ, Joubert, Eksteen JJA and Viljoen AJA concurring); *Minister of Law and Order v Swart* 1989 (1) SA 295 (A): *Per* Hefer JA (Joubert, Vivier, MT Steyn JJA, Viljoen AJA concurring); *Minister of Law and Order v Parker* 1989 (2) SA 633 (A): *Per* Joubert JA (Hefer, Vivier, MT Steyn, Viljoen JJA concurring).

appeared in only a few emergency cases — in two of which Hoexter and Van Heerden registered dissents.[1] The first emergency judgment delivered after Rabie ACJ's retirement, *Visagie v State President*,[2] was the first in which Hoexter JA wrote a majority judgment, and the first in which an emergency act of a legislative nature was set aside, and in which unreasonableness and unauthorised purpose were invoked as grounds of review by that court.

To explain the development of an important section of a nation's jurisprudence in terms of the inclinations of a few individuals would, of course, be an oversimplification. The judgments of Rabie CJ and Hefer AJ can in fact be viewed as a continuation of a strong tradition of judicial abstentionism in the security realm.[3] Added to this is the natural tendency of judiciaries in countries the world over to close ranks with the the executive in times when the state is perceived to be in mortal danger. Many may dispute that this was the case in the South Africa of the 1980s, and believe that what was under threat was merely the bankrupt policy of the government of the day. But it may be assumed that the view of the situation committed to the record by M T Steyn J, as he then was, in *Bloem v State President*[4] was shared by at least some of his brother judges.[5] It is doubtless not without significance that the first appeals against emergency judgments reached the highest court at a time when the security situation had seriously deteriorated in large parts of the country and when most whites were rallying to the

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1 The total talley of appearances by each of the judges who sat on these cases is as follows (in alphabetical order): Boshoff AJA, 1; Corbett JA, 1; Eksteen JA, 1; Grosskopf JA, 4; Hefer JA, 9; Hoexter JA, 1 (partial dissent); Jansen JA, 1; Joubert JA, 8; Nestadt JA, 1; Rabie CJ, then ACJ, 9; Steyn MT JA, 3; Van Heerden JA, 3 (two dissents); Viljoen JA (after his retirement, AJA), 9; Vivier JA, 8.

2 AD 1 June 1989 Case No 553/89, unreported.

3 A tradition which has often been remarked upon in legal literature (see, in particular, Corder *Judges at Work* and Forsyth, *In Danger for their Talents* and their more recent updates of these works, respectively, Corder 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) 5 *SAJHR* 1 and Forsyth 'The Sleep of Reason: Security Cases Before the Appellate Division' (1988) 105 *SALJ* 679.

4 1986 (4) SA 1064 (O), the relevant excerpts from which are set out at p 84 above.

5 See, for example, Davis 'The Chief Justice and the Total Onslaught' (1987) 3 *SAJHR* 229, in which the comments of Mr Justice Rabie in a newspaper interview (the *Sunday Star* of 3 May 1987) are quoted. They include the following: 'As far as the court is concerned, there is no question of conflict (between security legislation and the rights guaranteed by the common law). Once Parliament says this is law, it is the law....We must be realistic. We have strangers coming across the borders with bombs and mines. There is nothing in the common law to deal with a situation like that. The ordinary law of criminal procedure would require that the man be charged within 48 hours and that you can't question him any more after that. We must get information from people we arrest, especially when they are carrying weapons from the Soviet bloc, otherwise we can't defend ourselves....The situation in the country is pretty near that of a civil war. It is naive to think you can quell it by bringing people to court.'

government's 'total onslaught' propaganda.[1] Under these circumstances, it is not surprising that the court should have considered precedent set by the cases concerning the wartime successors to the Public Safety Act as relevant guides to the review of statutory emergency powers.

There is, however, a significant difference between the part played by the courts in the 1940s and that which it was called upon to perform during the states of emergency of 1960 and the 1980s. This is to be found in the moral basis on which the government's claims to exercise special emergency powers was founded during these periods of crisis. In a time of international war against an aggressor nation, the state authorities' claim to be acting to protect the survival of the state was difficult to contest. The states of emergency, however, were a response to internal conflict occasioned by the widespread rejection of a discriminatory policy which enjoys no support internationally, and which has purportedly been jettisoned even by the governing party. In this context, one might expect the courts to display a more active role in imposing the values which they are charged to uphold.[2] Their failure to do so has therefore inevitably come to be viewed by many as evidence of tacit support of a morally bankrupt policy.

Although it is not known how widely the views of Didcott and Friedman JJ, expressed in the passages quoted at the beginning of this chapter, are shared among their brethren on the bench, it cannot be doubted that the consequences of this unfortunate linking of the courts and apartheid is understood and regretted by many members of the judiciary. It may well be, therefore, that the short-lived display of judicial activism — modest, to be sure, but activism, nonetheless — displayed by some provincial courts before the Rabie court showed its restraining hand was the result of a determination by the judges concerned to demonstrate that the courts were still an instrument on which ordinary people, in particular the voteless, could rely for protection from state power which enjoyed no moral legitimacy. The uncertainty displayed by the government was particularly marked during the early stages of the emergencies of 1985 and after. The Appellate Division's subsequent pro-executive moves could well have been encouraged in part by a new-found confidence in the short-term success of emergency measures during the period 1986-7. By 1989, however, with the change in leadership style of the governing party, uncertainty had again manifested itself. The government's decision to allow protest marches and meetings for the first time in many years, to turn a blind eye to open defiance of the emergency

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1 Witness the results of the May 1987 general elections.

2 This was indeed the basis on which Mureinik predicated his view, expressed in 1986, that the courts would play a more activist role in the defence of human rights; the moral authority of the law would expand to fill the space vacated by the moral decline of the legislature and executive (see Mureinik 'Administrative Law in South Africa' 1986 (103) *SALJ* 615).

regulations, and to release detainees and security prisoners must give pause for reflection on the futility of many of its earlier actions. In this climate, one may reasonably predict a change of judicial mood in cases involving the exercise of emergency powers.

An important question, however, is whether the emergency cases already decided by the Appellate Division have so fettered the courts that a change of direction has become legally impossible without their doing violence to the doctrine of *stare decisis*. It is submitted that this question can be answered in the negative. As far as the Appellate Division's judgments may have gone towards freeing the executive from meaningful judicial control under states of emergency, Professor Baxter's description of *Omar's* case as a 'judicial declaration of martial law' was, in my view, somewhat premature. The pronouncements of the highest court may indeed have created the impression that it had come to regard statutory states of emergency, like martial law, as inaugurating a situation which freed the executive entirely from legal control.[2] But strong as this impression may be, it would be dangerously wrong for lawyers to conclude that the law has been entirely eliminated from the emergency arena.

It is true that the declaration of a state of emergency creates a distinct legal system, with its own *grundnorm*, standards and characteristics. What must be remembered, however, is the fact that the emergency regime exists within the larger legal system, and is permeable by the values and principles which form the foundation of that larger system. The emergency regime still remains subject to judicial supervision, and the courts are charged with the duty of establishing a legal basis for the exercise of their supervisory function. That basis, it is suggested, is to be found in the repeated affirmation by the Appellate Division — an affirmation to be found even in its most 'pro-executive' judgments — that the exercise of powers under the Public Safety Act may be challenged on the grounds of review laid down by Innes CJ in *Shidiack v Union Government (Minister of the Interior)*,[3] namely, *mala fides*, failure to apply the mind, and disregard of the express provisions of the enabling legislation. Bad faith, mindlessness and improper purpose are notions flexible enough to be turned into powerful checks on irrational, arbitrary or gratuitously unjust action by the administration. Not even in its most abstentionist mood has the Appellate Division gone so far as to suggest that the courts should sit by with folded arms if the executive were to use emergency powers entirely irrationally or in bad faith.

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1 See Baxter 'A Judicial Declaration of Martial Law' (1987) 3 *SAJHR* 317 .

2 In particular by statements such as that in *Omar*, in which it was stated that the courts could not hold an emergency regulation invalid 'because the State President could, in its opinion, have dealt with the matter in another, less harsh way' (see at 892B-G, discussed at 3.3 above).

3 1912 AD 651.

The abstentionist judgments merely refused to recognise the presence of bad faith or improper purpose in particular cases. These grounds of review therefore remain to be exploited, should the court in future decide to subject emergency action to more rigorous standards of rationality, morality and purposiveness than it has seen fit to set in the past.[1] Indeed, as already suggested, the tentative beginnings of this trend may be evident in *Visagie v State President*,[2] in which a part of a ministerial restriction order was set aside on the ground of improper purpose.

Even before *Visagie*, however, there were signs that the Appellate Division was not prepared to be shouldered entirely out of the emergency regime. In the *Nkwentsha* and *Apeleni cases* it was decided, for example, that the Supreme Court retained its discretion to call before it emergency detainees for the purpose of giving oral evidence, a power which to the writer's knowledge has been exercised on at least one occasion.[3] In *Minister of Law and Order v Swart*,[4] a detainee was released because he had never been told that he was being held under the emergency regulations. And principles regarding the proper exercise of the power of detention have been laid down in several provincial division judgments which have not been overruled.[5] These cases were, admittedly, small victories for justice in a system constructed for its elimination. But, as statements of judicial intent, they are of immense importance. Emergency detention represents in classic form the executive's claim to rule without law. By insisting on their right to supervise how that power is exercised, the courts have demonstrated that they do not view the emergency as a kind of Gulag,[6] the inmates of which have passed beyond the reach of their protection. This controverts the idea that the emergency regime stands autonomous from the principles of the surrounding legal system.

The preservation of the idea that emergency powers remain in principle subject to control by the law is perhaps the most important contribution that can be made by the courts under crisis rule. When that idea dies, the emergency regime tends to assume its own momentum, voraciously consuming the legal system of which it began as a subsidiary and temporary part — and finally displacing it entirely. At this point, the rule of law is replaced by that of naked power,

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1 See further Grogan 'Unfettering Discretion' (1989) 106 *SALJ* 443.
2 AD 1 June 1989 Case No 553/88, unreported.
3 *Papyane v Minister of Law and Order* D & CLD 6 October 1989 Case No 6302/89, unreported.
4 1989 (1) SA 295 (A).
5 In particular, *Swart v Minister of Law and Order* 1987 (4) SA 452 (C), discussed at 6.2.5 above.
6 The word used to describe the system of forced penal labour described by Alexander Solzhenitsyn *The Gulag Archipelago.*

and the *rechtstaat* becomes the dictatorship. South Africa appeared to have come perilously close to that point during the period in which this work was in preparation. Attempts by the provincial courts to set limits on the exercise of emergency regulations were treated by the executive as nothing more than lessons in how to render their successors more 'judge-proof'. At times, the government, confident of the prospects of appeal, simply repromulgated regulations which had been struck down by provincial courts.[1] For a period, the ingenuity shown by the State President's legislative draftsmen in preparing novel forms of restrictions on the freedoms of the citizen seemed to know no bounds. Penal prohibitions of ever-widening reach and enabling regulations of an increasingly amorphous and hence untestable nature flowed steadily from the presses of the Government Printer. For this, the Appellate Division must undoubtedly accept a share of responsibility. But a close examination of the performance of the Supreme Court as a whole shows that it did not surrender its supervisory function entirely during the emergencies of the 1980s. In the final analysis, those aspects of the judgments in which the right of review was endorsed in principle may prove to be of more enduring significance than those in which the courts upheld some particular infringement of rights.

As pointed out at the outset, this study was embarked on as an exercise in 'special' as opposed to 'general' administrative law.[2] The question arises whether the special rules of emergency administrative law — if they can be so called — which have been evolved during the adjudication of emergency action will have any lasting effect on the evolution of the general principles of administrative law applicable in the 'non-emergency' realm. There can be no doubt that the Appellate Division's pronouncements on the legal consequences of subjectively-phrased emergency legislation will be relied upon in cases entailing similarly-phrased enabling statutes in other areas. So, too, will its ruling in *Staatspresident v United Democratic Front*[3] on the effect of ouster clauses. For the most part, however, Appellate Division pronouncements on the 'unfettered' nature of the discretion conferred by the Public Safety Act and regulations issued thereunder were justified, not simply by the verbal structure of the enabling legislation, but also by the fact that the Act and the regulations were emergency measures.[4] It is submitted, therefore, that the courts should be slow to apply precedent laid down in emergency cases to those involving the exercise of administrative powers under the 'ordinary law'.

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1 One was the power of the Commissioner of Police to 'identify' matters the incitement of which would constitute a crime (see 5.4 above).

2 See p 3 above.

3 *Supra.*

4 This point was made no fewer than three times by Rabie ACJ in *Omar's* case *supra* (at 891J, 893D and 893G).

As this work is concluded, there are encouraging signs that the executive itself appears to have perceived that emergency rule can afford no lasting solution to the fundamental social and political malaise to which it is a response. If the professed commitment of the new administration to negotiation leads to a greater measure of tolerance — which has already been reflected in the authorising of mass protests on a scale unimaginable under its predecessor, and the release of political prisoners — there is reason to hope that the country might move away from emergency rule. On the other hand, the government might follow the Gaullist option of reform coupled with selective repression. Whatever happens, however, it is clearly time to reconsider the methods of emergency government which have been employed during the past four years before they do greater damage to the socio-political fabric of South Africa and the soul of its legal system. This the courts can still do for as long as they are called upon to adjudicate between the conflicting claims of state and citizen in the emergency context.

Appendix A

PUBLIC SAFETY ACT
NO. 3 OF 1953

[ASSENTED TO 24 FEBRUARY, 1953] [DATE OF COMMENCEMENT: 4 MARCH, 1953]

(*Afrikaans text signed by the Governor-General*)

as amended by

General Law Amendment Act, No. 62 of 1955
[with effect from 6 July, 1955—see title GENERAL LAW AMENDMENT ACTS]
General Law Amendment Act, No. 76 of 1962
[with effect from 27 June, 1962—see title GENERAL LAW AMENDMENT ACTS]
Internal Security Amendment Act, No. 79 of 1976
Public Safety Amendment Act, No. 67 of 1986

ACT

To make provision for the safety of the public and the maintenance of public order in cases of emergency or internal unrest and for matters connected therewith.

[Long title substituted by s. 5 of Act No. 67 of 1986.]

1. Definitions.—In this Act, unless the context otherwise indicates—

"**Minister**" means the Minister of Law and Order;

[Definition of "Minister" inserted by s. 1 (*b*) of Act No. 67 of 1986.]

"**the Territory**" means the territory of South-West Africa;

"**Union**" includes the Territory;

"**unrest area**" means an area in respect of which a declaration under section 5A (1) or (2) is in force.

[S. 1 amended by s. 1 (*a*) of Act No. 67 of 1986. Definition of "unrest area" inserted by s. 1 (*c*) of Act No. 67 of 1986.]

2. The Governor-General may declare the existence of a state of emergency in any area.—(1) If in the opinion of the Governor-General it at any time appears that—

(*a*) any action or threatened action by any persons or body of persons in the Union or any area within the Union is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or

(*b*) circumstances have arisen in the Union or any area within the Union which seriously threaten the safety of the public, or the maintenance of public order; and

(*c*) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order,

he may, by proclamation in the *Gazette*, declare that as from a date mentioned in the proclamation, which date may be a date not more than four days earlier than the date of the proclamation, a state of emergency exists within the Union or within such area, as the case may be.

(2) No proclamation issued under sub-section (1) shall remain in force for more than twelve months: Provided that nothing in this sub-section contained shall be construed as precluding the issue of another proclamation in respect of the same area at or before the expiration of the said period of twelve months.

(3) The Governor-General may at any time and in like manner withdraw any proclamation issued under sub-section (1).

3. Emergency regulations.—(1) (*a*) The Governor-General may in any area in which the existence of a state of emergency has been declared under section *two*, and for as long as the proclamation declaring the existence of such emergency remains in force, by proclamation in the *Gazette*, 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.

(*b*) Any such regulation may, to such extent and subject to such modifications as may be specified in the relevant proclamation or in any subsequent proclamation by the State President in the *Gazette*, be declared to apply also outside the said area in so far as he may deem it to be necessary in order to deal with the state of emergency.

[Para. (*b*) added by s. 16 of Act No. 76 of 1962.]

(2) Without prejudice to the generality of the powers conferred by this section—

(*a*) such regulations may provide for—

(i) the empowering of such persons or bodies as may be specified therein to make orders, rules and by-laws for any of the purposes for which the Governor-General is by this section authorized to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or by-laws;

(ii) the imposition of penalties specified therein for any contravention of or failure to comply with any provisions of the regulations or any directions issued or conditions prescribed by or under the regulations, which penalties may include the confiscation of any goods, property or instruments by means of which or in connection with which the offence has been committed;

(*b*) such regulations may be made with retrospective effect from the date from which it has under section *two* been declared that a state of emergency exists within the Union or the area concerned, as the case may be: Provided that no such regulation shall make punishable any act or omission which was not punishable at the time when it was committed; and

(*c*) different regulations may be made for different areas in the Union and for different classes of persons in the Union.

(3) Nothing in this section contained shall authorize the making of any regulations whereby—

(*a*) is imposed any liability to render compulsory military service other than that provided for in the South Africa Defence Act, 1912 (Act No. 13 of 1912); or

(*b*) .....

[Para. (*b*) deleted by s. 10 of Act No. 79 of 1976.]

(*c*) any law relating to the qualifications, nomination, election or tenure of office of members of the President's Council or Parliament or a provincial council or the Legislative Assembly of the Territory, or to the holding of sessions of the President's Council or Parliament or a provincial council or the said Assembly, or to the powers, privileges or immunities of the President's Council or Parliament or a provincial council or the said Assembly or of the members or committees thereof, is altered or suspended; or

[Para. (*c*) substituted by s. 2 (*a*) of Act No. 67 of 1986.]

(*d*) any action relating to a matter dealt with under the Industrial Conciliation Act, 1937 (Act No. 36 of 1937), or section *twenty-five* of the Railways and Harbours Service Act, 1925 (Act No. 23 of 1925), which may, at the date when such regulations are promulgated, be lawfully taken, is rendered unlawful:

Provided that—

(i) for the purposes of section *seventy-nine* of the South Africa Defence Act, 1912 (Act No. 13 of 1912), the Territory shall be deemed to be a part of the Union;

(ii) in regard to any matter dealt with under the Industrial Conciliation Act, 1937, the provisions of the said Act, or such portions of the said provisions as may in the opinion of the Governor-General be necessary or adequate, may be applied to the Territory by regulation with such modifications as may be required for the purposes of such application;

(iii) no regulation may be applied to the Territory which could, in terms of paragraph (*c*), not be applied to the Union, exclusive of the Territory.

(4) Whenever any regulation made under sub-section (1) provides for the summary arrest and detention of any person, and any person is, in pursuance of such a regulation detained for a period of longer than thirty days, the Minister shall, within fourteen days of the expiration of such period of thirty days, if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session, lay the name of such person on the Tables of both Houses of Parliament.

(4)*bis* Whenever any regulation made under sub-section (1) provides for the summary arrest and detention of any person, and any person has been arrested in pursuance of such a regulation, he may be detained under that regulation at any place within the Union, whether such place be within or outside the area in which the existence of the state of emergency has been declared under section *two*, and any regulation made under subsection (1) of this section and any order, rule or by-law made under any such regulation and which relates to the detention of any person arrested in the said area or to the place of detention of such a person, shall in relation to the detention of such a person at a place outside the aforesaid area, apply at and in relation to the place where such person is detained as if that place were within the aforesaid area.

[Sub-s. (4)*bis* inserted by s. 31 of Act No. 62 of 1955.]

(5) Any regulation made under subsection (1) shall be laid on the Tables of the respective Houses of Parliament within fourteen days after promulgation thereof if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session.

[Sub-s. (5) substituted by s. 2 (*b*) of Act No. 67 of 1986.]

(6) (*a*) A regulation referred to in subsection (5) or any provision thereof may be annulled by Parliament by resolution passed during the same session during which it was tabled, and if the regulation or provision thereof has been so annulled, that regulation or provision thereof shall cease to be of force and effect from the date on which it was annulled by the last of the three Houses of Parliament.

[Para. (*a*) substituted by s. 2 (*c*) of Act No. 67 of 1986.]

(*b*) The provisions of paragraph (*a*) are without prejudice to the validity of anything done in terms of such regulation or any provision thereof up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such regulation or such provision thereof.

4. Powers of State President may be exercised by Minister in urgent cases.—(1) Whenever owing to special circumstances it is in the opinion of the Minister urgently necessary to do so, he may, in respect of any area within the Republic (other than the Territory) in respect of which no proclamation issued under this Act is in force, by notice in the *Gazette* exercise any of the powers which the State President may exercise by proclamation under this Act.

(2) A notice issued under subsection (1) shall have the same force and effect as a proclamation issued by the State President under this Act and shall remain in force until a proclamation is issued in respect of the area in respect of which the notice has been issued, but in no case for more than ten days.

[S. 4 substituted by s. 3 of Act No. 67 of 1986.]

5. Application of Act to South-West Africa.—(1) This Act shall apply also in the Territory, including for all purposes the portion of the Territory, known as the "Rehoboth Gebiet", and defined in the First Schedule to Proclamation by the Administrator of the Territory No. 28 of 1923.

(2) The Administrator of the Territory shall, in respect of the Territory, have and exercise *mutatis mutandis* the powers conferred under section *four* on the Minister of Justice in respect of the Union (exclusive of the Territory).

(3) The provisions of sub-section (2) of section *four* shall apply also in respect of any notice issued by the Administrator of the Territory under sub-section (2) of this section.

(4) Notwithstanding anything to the contrary in any other law contained, any proclamation, regulation, notice, order, rule or by-law, issued under this Act, which relates only to the Territory, or any portion of the Territory, shall be sufficiently promulgated if published in the *Official Gazette* of the Territory.

5A. Declaration of area to be unrest area.—(1) Whenever the Minister is of the opinion that public disturbance, disorder, riot or public violence is occurring or threatening in any area and that measures additional to the ordinary law of the land are necessary to enable the Government or any governmental institution to ensure the safety of the public or the maintenance of public order or to combat or prevent such public disturbance, disorder, riot or public violence, he may, by notice in the *Gazette*, declare such an area to be an unrest area.

(2) The declaration of an area to be an unrest area shall remain in force for a period of three months, unless the Minister withdraws that declaration by notice in the *Gazette* before the expiry of such period: Provided that the Minister may, with the approval of the State President, from time to time by like notice extend that declaration before the expiry of such period or any extension thereof.

(3) The Minister shall lay upon the Tables of the respective Houses of Parliament a copy of each notice in the *Gazette* referred to in subsection (1) or (2), within fourteen days of the date of publication of such notice in the *Gazette*, if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session.

(4) The Minister may, with relation to an unrest area, by notice in the *Gazette* make such regulations as appear to him to be necessary or expedient for providing for the combating or prevention of public disturbance, disorder, riot or public violence or the maintenance or restoration of public order and for making adequate provision for terminating such public disturbance, disorder, riot or public violence or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such public disturbance, disorder, riot or public violence or the combating or prevention thereof.

(5) Any regulation made under subsection (4) may, to such extent and subject to such modifications as may be specified in the relevant notice or in any subsequent notice by the Minister in the *Gazette*, be declared to apply also outside the said unrest area in so far as he may deem it to be necessary in order to act with respect to that unrest area.

(6) Without prejudice to the generality of the powers conferred by this section—

(*a*) such regulations may provide for—

(i) the empowering of such persons or bodies as may be specified therein to make orders, rules and by-laws for any of the purposes for which the Minister is by this section authorized to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or by-laws;

(ii) the imposition of penalties specified therein for any contravention of or failure to comply with any provisions of the regulations or any directions issued or conditions prescribed by or under the regulations, which penalties may include the confiscation of any goods, property or instruments by means of which or in connection with which the offence has been committed; and

(*b*) different regulations may be made for different unrest areas in the Republic and for different classes of persons in the Republic.

(7) Whenever any regulation made under subsection (4) provides for the summary arrest and detention of any person, and any person is, in pursuance of such a regulation, detained for a period of longer than thirty days, the Minister shall, within fourteen days of the expiration of such period of thirty days, if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session, lay the name of such person on the Tables of the respective Houses of Parliament.

(8) Whenever any regulation made under subsection (4) provides for the summary arrest and detention of any person, and any person has been arrested in pursuance of such a regulation, he may be detained under that regulation at any place within the Republic, whether such place be within or outside the unrest area concerned, and any regulation made under subsection (4) and any order, rule or by-law made under any such regulation and which relates to the detention of any person arrested in the unrest area concerned or to the place of detention of such a person, shall in relation to the detention of such a person at a place outside the unrest area concerned, apply at and in relation to the place where such person is detained as if that place were within the unrest area concerned.

(9) The provisions of section 3 (3), (5) and (6) shall *mutatis mutandis* apply in respect of any regulation made under subsection (4).

[S. 5A inserted by s. 4 of Act No. 67 of 1986.]

5B. Validity of action by State President or Minister.—No interdict or other process shall issue for the staying or setting aside of any proclamation issued by the State President under section 2, any regulation made under section 3, any notice issued by the Minister under section 4 or 5A (1) or (2) or any regulation made under section 5A (4), and no court shall be competent to inquire into or give judgment on the validity of any such proclamation, notice or regulation.

[S. 5B inserted by s. 4 of Act No. 67 of 1986.]

6. **Short title.**—This Act shall be called the Public Safety Act, 1953.

Appendix B

Security Emergency Regulations, 1989

PROCLAMATION

by the

State President of the Republic of South Africa

No. R. 86, 1989

PUBLIC SAFETY ACT, 1953

SECURITY EMERGENCY REGULATIONS

Under the powers vested in me by section 3 of the Public Safety Act, 1953 (Act No. 3 of 1953), I hereby make the regulations contained in the Schedule with effect from 9 June 1989.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Eighth day of June, One thousand Nine hundred and Eighty-nine.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

A. J. VLOK,
Minister of the Cabinet.

SCHEDULE

Definitions

1. (1) In these regulations, unless the context otherwise indicates—

"Act" means the Public Safety Act, 1953 (Act No. 3 of 1953);

"Commissioner" means the Commissioner of the South African Police, and for the purposes of the application of a provision of these regulations in or in respect of—

(a) a division as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), the said Commissioner or the Divisional Commissioner designated under that Act for that division; or

(b) a self-governing territory, the said Commissioner or the Commissioner or other officer in charge of the police force of the Government of that self-governing territory;

"gathering" means any gathering, concourse or procession of any number of persons;

"Minister" means the Minister of Law and Order;

"office-bearer", in relation to an organization, means a member of the governing or executive body of—

(a) the organization; or

(b) a branch or division of the organization;

"officer" means a person in the service of the State, and also a member of a security force who is not otherwise in the service of the State;

"organization" includes any association or body of persons irrespective of whether or not any such association or body has been incorporated and whether or not it has been established or registered in accordance with any law;

"print" means to produce by printing, typing or by any other method of reproduction;

"prison" means a prison referred to in section 20 (1) of the Prisons Act, 1959 (Act No. 8 of 1959), and also a police cell or lock-up;

"security force" means—

(a) the South African Police referred to in the definition of "the Force" in section 1 of the Police Act, 1958 (Act No. 7 of 1958);

(b) any part of the said South African Police of which the control, organisation and administration have been transferred to the Government of a self-governing territory;

(c) any police force established by or under a law of a self-governing territory;

(d) the South African Defence Force referred to in section 5 of the Defence Act, 1957 (Act No. 44 of 1957); or

(e) the Prisons Service established by section 2 of the Prisons Act, 1959 (Act No. 8 of 1959),

and also any part of a force referred to in paragraph (a) to (e) or any combination of two or more of such forces or of parts of such forces;

"self-governing territory" means a territory declared under section 26 of the National States Constitution Act, 1971 (Act No. 21 of 1971), to be a self-governing territory within the Republic;

"writing" includes any mode of representing or depicting letters, figures, signs or symbols in visible form.

(2) No provision of these regulations conferring a power on an authority specified in such provision, shall be construed as purporting to authorize such authority to exercise the relevant power in conflict with section 3 (3) of the Act.

Maintenance of order

2. (1) Whenever a member of a security force is of the opinion that the presence or conduct of any person or persons at any place in the Republic endangers or may endanger the safety of the public or the maintenance of public order, he shall in a loud voice in each of the official languages order such person or persons to proceed to a place indicated by him, or to desist from such conduct, and shall warn such person or persons that force will be used if the order is not obeyed immediately.

(2) If an order referred to in subregulation (1), is not obeyed immediately, such member of a security force may apply, or order the application of, such force as he under the circumstances may deem necessary in order to ward off or prevent the danger existing in his opinion.

(3) If a member of a security force is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may summarily order a person present in a particular area and who is not normally resident therein, to leave that area immediately, and if that person fails to leave the area in question immediately, that member may arrest the person concerned or cause him to be arrested and may remove him from such area or cause him to be so removed.

Arrest and detention of persons

3. (1) A member of a security force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the safety of the public or the maintenance of public order or for the termination of the state of emergency, and may, under a written order signed by any member of a security force, detain or cause to be detained any such person in custody in a prison.

(2) No person shall be detained in terms of subregulation (1) for a period exceeding 30 days from the date of his arrest, unless that period is extended by the Minister under subregulation (3).

(3) The Minister may, without notice to any person and without hearing any person, by notice signed by him and addressed to the head of a prison, order that a person arrested and detained in terms of subregulation (1), be further detained, and in that prison, for the period specified in the notice or for as long as these regulations remain in force.

(4) A written, printed, telegraphic or similar communication purporting to be from the Minister or an officer acting under his authority, stating that a notice has been issued under subregulation (3) in respect of a particular person, shall have the effect of the said notice: Provided that if such a written, printed, telegraphic or similar communication is used in lieu of the notice in question, the Minister or the said officer shall as soon as possible forward the notice to the head of the prison referred to in subregulation (3) where the person to whom the notice applies is to be detained under such notice.

(5) A person detained in a prison in terms of this regulation may, if the Minister or a commissioned officer, as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), or the head of that prison, in writing so directs, be removed in custody from that prison for detention in any other prison, or for any other purposes mentioned in such direction.

(6) A member of a security force may, with a view to the safety of the public or the maintenace of public order or the termination of the state of emergency, interrogate any person arrested or who is detained in terms of this regulation.

(7) No person, other than the Minister or a person acting by virtue of his office in the service of the State or of the Government of a self-governing territory—

(a) shall have access to a person detained in terms of this regulation except with the consent of and subject to such conditions as may be determined by the Minister or a person authorized thereto by him; or

(b) shall be entitled to any official information relating to such person, or to any other information of whatever nature obtained from or in respect of such person.

(8) (a) The Minister may, subject to paragraph (b), at any time by notice signed by him, order that a person who is detained in terms of this regulation be released from detention.

(b) The Minister may if he is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, and without prior notice to any person and without hearing any person—

(i) subject the release under paragraph (a) of a person to such conditions as may be specified in a notice signed by him and addressed to that person;

(ii) at any time after the release of such a person, by further notice signed by him and addressed to such person, revoke or amend any condition imposed under subparagraph (i) or impose any new condition as may be specified in such notice.

(c) A condition imposed under paragraph (b) shall be of force for such period as may be specified in the relevant notice or, if no period has been so specified, for as long as these regulations remain in force.

(d) A condition imposed in respect of a person under paragraph (b) of regulation 3 (8) of the Security Emergency Regulations, 1988, and which, by virtue of the express terms of the notice through which the condition was imposed or the operation of the provisions of paragraph (c) of the said regulation 3 (8), was still in force on the day preceding the commencement of these regulations, shall be deemed to have been imposed at such commencement in respect of the said person under paragraph (b) of this subregulation and shall, notwithstanding the express terms of the said notice or the operation of the said provisions or the fact that the Security Emergency Regulations, 1988, have lapsed, but subject to paragraph (b) (ii) of this subregulation, continue in force for as long as these regulations remain in force.

Threats of harm, hurt or loss

4. No person shall—

(a) by word or conduct threaten to inflict upon any other person, or upon any of such person's relatives or dependants, any harm, hurt or loss, whether to his or their person or property or in any other way; or

(b) prepare, compile, print, publish, transmit, possess or disseminate, or assist in the preparation, compilation, printing, publication, transmission or dissemination of any writing which threatens the infliction upon any other person, or upon any of such person's relatives or dependants, of any harm, hurt or loss, whether to his or their person or property or in any other way.

Power of entry, search and seizure

5. (1) If a member of a security force is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may without warrant but subject to subregulation (3)—

(a) enter any premises, building, vehicle, vessel or aircraft and thereon or therein take any steps which he is by a provision of these regulations or any other law authorized to take;

(b) search any person or any premises, building, vehicle, vessel or aircraft or any receptacle, object or other article; or

(c) seize any vehicle, vessel or aircraft or any receptable, object or other article—

(i) which is concerned or intended to be used, or believed by such member to be concerned or intended to be used, in the commission or suspected commission of an offence; or

(ii) which may be used as evidence in criminal proceedings.

(2) Anything seized under subregulation (1) (c) shall be dealt with in accordance with the direction of the Minister which may be issued by him at his discretion with a view to the safety of the public, the maintenance of public order or the termination of the state of emergency, either generally or with reference to a particular seizure.

(3) The provisions of sections 27 and 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), with reference to the search or entry of premises and the search of persons by a police official, shall apply *mutatis mutandis* to any search or entry under this regulation by a member of a security force.

Request for name and address of a person

6. A member of a security force may in the exercise of any power or the carrying out of any duty conferred or imposed by, under or pursuant to these regulations, request any person to furnish such member with his full name and address.

Restrictions on activities or acts of organizations

7. (1) If the Minister is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may, without prior notice to any person and without hearing any person, issue an order by notice in the *Gazette* prohibiting an organization specified in the order, subject to subregulation (4), from carrying on or performing—

(a) any activities or acts whatsoever;

(b) an activity or act specified in the order; or

(c) activities or acts of a nature, class or kind specified in the order.

(2) An order issued under subregulation (1) shall be of force for such period as may be specified in the order or, if no period is so specified, until the order is withdrawn or until the declaration that a state of emergency exists in the Republic is withdrawn or expires, whichever occurs first.

(3) No person shall while an order under subregulation (1), read with subregulation (4), is of force in respect of an organization—

(a) on behalf or in the name, or in a capacity as office-bearer, of that organization carry on an activity or perform an act which the organization is prohibited by the said order from carrying on or performing; or

(b) participate in an activity or act of that organization which the organization is carrying on or performing in contravention of the said order.

(4) An order under subregulation (1) shall not be construed as prohibiting the organization in respect of which it is of force from—

(a) preserving its assets;

(b) keeping up to date its books and records and performing administrative functions in connection therewith;

(c) complying with an obligation imposed on it by or under any law or by a court of law;

(d) taking legal advise or judicial steps; or

(e) carrying on such activities or performing such acts as the Minister may have consented to, in so far as such activities are carried on or such acts are performed in accordance with any conditions subject to which the Minister has granted such consent.

(5) (a) No consent contemplated in subregulation (4) (e) shall be granted by the Minister unless he is convinced that the granting of such consent will not result in the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed.

(b) Each consent granted by the Minister under subregulation (4) (e) shall be made known by the Minister by notice in the *Gazette.*

Restrictions on activities or acts of natural persons

8. (1) If the Minister is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may, without prior notice to any person and without hearing any person, issue an order under his hand whereby a person specified in the order is prohibited, or is prohibited without the written consent of the Minister or the Commissioner, from—

(a) carrying on an activity or performing an act specified in the order;

(b) carrying on activities or performing acts of a nature, class or kind specified in the order;

(c) being, at any time or during the hours specified in the order, outside the boundaries of an area likewise specified; or

(d) being, during the hours specified in the order, outside the boundaries of the premises where he lives.

(2) An order issued under subregulation (1) shall be of force for such period as may be specified in the order, or if no period is so specified, until the order is withdrawn or until the declaration that a state of emergency exists in the Republic is withdrawn or expires, whichever occurs first.

(3) (a) A consent contemplated in subregulation (1) may be granted by the Minister or the Commissioner on such conditions as he may determine.

(b) No consent contemplated in subregulation (1) shall be granted by the Minister or the Commissioner unless the Minister or the Commissioner, as the case may be, is convinced that the granting of such consent will not result in the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed.

(4) The provisions of regulation 10 (4) shall *mutatis mutandis* apply in respect of an order issued under subregulation (1), and in any such application a reference in the said provisions to the Commissioner shall be construed as a reference to the Minister.

(5) Any order issued in respect of a person under subregulation (1) shall be made known by the Minister to that person—

(a) by publishing the order in the *Government Gazette* or, where applicable, in the *Official Gazette* of a self-governing territory; or

(b) by handing or tendering such order, or a copy thereof, to that person or by causing such order or copy to be handed or tendered to that person by a member of a security force.

(6) A person in respect of whom an order has been issued under subregulation (1) (c) or (d) and who—

(a) at the time when the order, or a copy thereof, is handed or tendered to him in accordance with subregulation (5) (b), happens to be at a place outside the boundaries of the area of premises to which he is restricted in terms of the order; or

(b) at any time after the order has in accordance with subregulation (5) (a) been published in the *Government Gazette* or in the *Official Gazette* of a self-governing territory or after the order, or a copy thereof, has in accordance with subregulation (5) (b), been handed or tendered to him, is found by a member of a security force at a place outside the boundaries of the area or premises to which he is restricted in terms of the order and his presence outside the boundaries of the said area or premises is in contravention of the order,

may without a warrant be arrested by a member of a security force and be removed in custody to within the boundaries of the said area or premises, as the case may be, and such a person may pending his removal be detained in custody.

Prohibition of particular activities or acts

9. (1) If the Minister is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may, without prior notice to any person and without hearing any person, issue an order by notice in the *Gazette* whereby persons in general or persons belonging to a category of persons specified in the order are prohibited, or are prohibited without the written consent of the Minister or the Commissioner, from—

(a) carrying on an activity or performing an act specified in the order;

(b) carrying on activities or performing acts of a nature, class or kind specified in the order; or

(c) (i) having with or on them a thing specified in the order; or

(ii) being clothed in apparel specified in the order,

at a place or in an area or in circumstances likewise specified.

(2) An order issued under subregulation (1) shall be of force for such period as may be specified in the order or, if no period is so specified, until the order is withdrawn or until the declaration that a state of emergency exists in the Republic is withdrawn or expires, whichever occurs first.

(3) (a) A consent contemplated in subregulation (1) may be granted by the Minister or the Commissioner on such conditions as he may determine.

(b) No consent contemplated in subregulation (1) shall be granted by the Minister or the Commissioner unless the Minister or the Commissioner, as the case may be, is convinced that the granting of such consent will not result in the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed.

Orders by Commissioner

10. (1) The Commissioner may for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency, and without prior notice to any person and without hearing any person, issue orders not inconsistent with these regulations—

(a) relating to—

(i) the demarcation of areas;

(ii) the closing off of a particular area or part of such area in order to control entry to or departure from such area or part thereof;

(iii) the control of entry to or departure from a particular area or part of such area;

(iv) the control of traffic;

(v) the temporary closing of any public or private place or any business or industrial undertaking; or

(vi) the control of any essential services and the security and safety of any installation or works connected therewith;

(b) whereby any person is prohibited, or is prohibited without the consent of the Commissioner, from—

(i) bringing into a praticular area any object or article specified in the order or being in possession thereof in such an area;

(ii) performing any act or carrying on any activity specified in the order in a particular area;

(iii) being outside the boundaries of a particular area at any time;

(iv) being outside the boundaries of his residential premises in a particular area at any time;

(v) putting in motion or driving or being in or upon a vehicle that is in motion in a particular area, at any time; or

(vi) entering a particular area if he is not normally resident in that area;

(c) whereby a particular gathering, or any gathering of a particular nature, class or kind, is prohibited at a place or in an area specified in the order; or

(d) (i) prohibiting the holding of a particular gathering, or any gathering of a particular nature, class or kind, in an area specified in the order otherwise than in accordance with conditions likewise specified, which conditions may include conditions requiring the Commissioner's prior approval for the time, date and place of the gathering, prescribing the hours of the day or the days of the week during which the gathering may or may not take place, limiting the number of persons who may attend the gathering and prohibiting persons not belonging to a specified category of persons from making speeches at the gathering;

(ii) prohibiting persons from committing at a gathering referred to in subparagraph (i) acts specified in the order, or from attending, or from remaining present at, a gathering in respect of which a condition specified in the order has not been or is not being complied with;

(iii) requiring, in the case of a gathering which takes the form of a procession or a funeral procession, that the procession or funeral procession shall not proceed along a route other than the route determined by the Commissioner or that the persons forming the procession or funeral procession shall proceed in vehicles only.

(2) An order issued under subregulation (1)—

(a) may be of force generally or relate to a person specified in the order, or to a category of persons specified in the order, or to any person or persons not belonging to a particular category specified in the order; and

(b) shall be of force during a period specified in the order or, if no period is so specified, until the order is withdrawn or until the declaration that a state of emergency exists in the Republic is withdrawn or expires, whichever occurs first.

(3) (a) A consent contemplated in subregulation (1) (b) may be granted by the Commissioner on such conditions as he may determine.

(b) No consent contemplated in subregulation (1) (b) shall be granted by the Commissioner unless he is convinced that the granting of such consent will not result in the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed.

(4) In any proceedings before a court of law in which it is relevant whether or not the Commissioner has issued a particular order, a copy of the order certified under the Commisioner's hand shall be accepted as conclusive proof of the issuing and contents of the order concerned.

Promulgation of orders

11. Any order issued under regulation 10 shall be promulgated—

(a) by publishing the order by notice in the *Government Gazette* or, where applicable, the *Official Gazette* of a self-governing territory;

(b) by publishing the order in a newspaper circulating in the area in respect of which the order applies;

(c) by making the order known by means of radio or television;

(d) by distributing the order in a written form among members of the public and by affixing it on public buildings or at prominent public places in the area concerned;

(e) where the order is directed to a particular person, by handing or tendering it or causing it to be handed or tendered in a written form to that person; or

(f) by oral announcement to any particular person, or to members of the public in general, in the area concerned in a manner deemed fit by the Commissioner whenever, due to the urgency thereof or for any other reason whatsoever, it can, in the opinion of the Commissioner, not be published, made known, distributed or announced in accordance with the provisions of paragraph (a), (b), (c), (d) or (e).

Offences

12. Any person who—

(a) contravenes or fails to comply with any order, direction or request under a provision of these regulations;

(b) contravenes or fails to comply with any condition imposed in respect of him under regulation 3 (8), 7 (4) (e), 8 (3), 9 (3) or 10 (3);

(c) contravenes a provision of regulation 4 or 7 (3);

(d) hinders any other person in the carrying out of any duty or the exercise of any power or the performance of any function imposed or conferred by, under or pursuant to any provision of these regulations; or

(e) destroys, defaces or falsifies any notice or other writing issued or purporting to have been issued under these regulations,

shall be guilty of an offence.

Penalties

13. Any person convicted of an offence under these regulations shall be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding ten years or to such imprisonment without the option of a fine, and the court convicting him may declare any goods, property or instrument by means of which or in connection with which the offence was committed, to be forfeited to the State.

Direction of Attorney-General required for prosecution

14. No prosecution for an offence under these regulations shall be instituted except by the express direction of the Attorney-General having jurisdiction in respect of that prosecution.

Limitation of liability

15. (1) No civil or criminal proceedings shall be instituted or continued in any court of law against—

(a) the State or the Government of a self-governing territory;

(b) the State President;

(c) any member of the Cabinet or a Ministers' Council or the Cabinet of a self-governing territory;

(d) any member of a security force;

(e) any person in the service of the State or of the Government of a self-governing territory; or

(f) any person acting by direction or with the approval of any member or person referred to in the preceding paragraphs of this subregulation,

by reason of any act in good faith advised, commanded, ordered, directed or performed by any person in the carrying out of his duties or the exercise of his powers or the performance of his functions in terms of these regulations or any other regulations made under the Act, with intent to ensure the safety of the public, the maintenance of public order or the termination of the state of emergency or in order to deal with circumstances which have arisen or are likely to arise as a result of the said state of emergency.

(2) (a) Whenever the court in which any proceedings have been instituted, is of the opinion that by virtue of subregulation (1) the proceedings may not be continued, the court shall make a finding to that effect.

(b) Whenever the court has made such a finding, such proceedings shall lapse and be deemed to be void.

(3) No interdict or other process shall issue for the staying or setting aside of any order, rule or notice made or issued under these regulations or any other regulations made under the Act or any condition determined thereunder, and no such order, rule, notice or condition shall be stayed on the grounds of an appeal against a conviction under these or such other regulations.

(4) If in any proceedings instituted against any member or person referred to in subregulation (1), or the State, or the Government of a self-governing territory, the question arises whether any act advised, commanded, ordered, directed or performed by any person was advised, commanded, ordered, directed or performed by him in good faith, it shall be presumed, until the contrary is proved, that such act was advised, commanded, ordered, directed or performed by him in good faith.

(5) The provisions of this regulation shall apply also in respect of any default by any person or member referred to in subregulation (1) in complying with any provision of any law in connection with advising, commanding, ordering, directing or performing any such act aforesaid.

Short title

16. These regulations shall be called the Security Emergency Regulations, 1989.

Appendix C

Media Emergency Regulations, 1989

PROCLAMATION

by the

State President of the Republic of South Africa

No. R. 88, 1989

PUBLIC SAFETY ACT, 1953

MEDIA EMERGENCY REGULATIONS

Under the powers vested in me by section 3 of the Public Safety Act, 1953 (Act No. 3 of 1953), I hereby make the regulations contained in the Schedule with effect from 9 June 1989.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Eighth day of June, One thousand Nine hundred and Eighty-nine.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

J. C. G. BOTHA,
Minister of the Cabinet.

SCHEDULE

Definitions

1. In these regulations, unless the context otherwise indicates—

"Commissioner" means the Commissioner of the South African Police, and for the purposes of the application of a provision of these regulations in or in respect of—

(a) a division as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), means the said Commissioner or the Divisional Commissioner designated under that Act for that division; or

(b) a self-governing territory, means the said Commissioner or the Commissioner or other officer in charge of the police force of the Government of that self-governing territory;

"film recording" means any substance, film, magnetic tape or any other material on which the visual images (with or without an associated sound track) of a film as defined in section 47 of the Publications Act, 1974 (Act No. 42 of 1974), are recorded;

"firm" includes a State controlled or financed or other public undertaking;

"gathering" means a gathering, concourse or procession of any number of persons;

"local authority" means—

(a) an institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act No. 32 of 1961);

(b) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act No. 102 of 1982);

(c) a regional services council established under the Regional Services Councils Act, 1985 (Act No. 109 of 1985);

(d) a local government body established or deemed to be established under section 30 of the Black Administration Act, 1927 (Act No. 38 of 1927); or

(e) a board of management as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987);

"Minister" for the purpose of the application of—

(a) a provision of regulation 3 or 9, means the Minister of Law and Order; or

(b) any other provision of these regulations, means the Minister of Home Affairs;

"office-bearer", in relation to an organisation, means a member of the governing or executive body of—

(a) the organisation; or

(b) a branch or division of the organisation;

"organisation" includes any association or body of persons irrespective of whether or not any such association or body has been incorporated and whether or not it has been established or registered in accordance with any law;

"periodical" means a publication issued either at regular or irregular intervals;

"previous media regulations" means the regulations published by Proclamation No. R. 97 of 1987, as amended by Proclamations Nos. R. 123 of 1987 and R. 7 of 1988;

"publication" means a newspaper, book, magazine, pamphlet, news letter, brochure, poster, handbill or sticker or part thereof or addendum thereto;

"public place" includes—

(a) any premises occupied by the State, a local authority or an educational institution or the controlling body of an educational institution; or

(b) any premises or place to which members of the public ordinarily or at specific times have access, irrespective of whether or not the right of admission to such premises or place is reserved and whether or not payment for such admission is required;

"publish", in relation to a publication, television recording, film recording or sound recording, means any act whereby the publication or the television, film or sound recording—

(a) is sold or leased, or is provided or made available free of charge, to a member of the public or is offered for sale, for hire or free of charge to such a member;

(b) is sent through the post to a member of the public, irrespective of whether or not that member has subscribed thereto; or

(c) is taken personally or is sent by post or courier out of the Republic or is transmitted or sent from the Republic by whatever means of telecommunication,

and further includes, in relation to—

(i) a publication, any act whereby such publication is posted up, exhibited, handed out or scattered at or in a public place or is displayed in such a way as to be visible from a public place;

(ii) a television or sound recording, any act whereby such television or sound recording—

(aa) is shown or played at or in a public place or is shown or played in such a way as to be visible or audible from a public place; or

(bb) is broadcast in a way which enables a member of the public to receive it by means of a radio or television set;

(iii) a film recording, any act whereby such film recording is shown at or in a public place or is shown in such a way as to be visible from a public place;

"registered periodical" means a periodical registered in terms of the Newspaper and Imprint Registration Act, 1971 (Act No. 63 of 1971);

"restricted gathering" means a gathering in respect of which a condition has been determined under section 46 (1) (ii) of the Internal Security Act, 1982 (Act No. 74 of 1982), or in respect of which a condition, prohibition or requirement has been imposed or is in force under regulation 10 (1) (d) of the Security Emergency Regulations, 1989;

"security action" means any of the following actions by a security force or a member of a security force, namely—

(a) any action to terminate any unrest;

(b) any action to protect life or property in consequence of any unrest;

(c) any follow-up action after any unrest has been terminated or has ended;

(d) any action under regulation 2 of the Security Emergency Regulations, 1989; or

(e) any action whereby a person is arrested—

(i) on a charge for an offence under these regulations or any other regulations made under the Public Safety Act, 1953 (Act No. 3 of 1953);

(ii) on a charge for an offence mentioned in the definition of "unrest" or committed in the course of any unrest or of any incident arising from unrest or connected therewith; or

(iii) under regulation 3 (1) of the Security Emergency Regulations, 1989;

"security force" means—

(a) the South African Police referred to in the definition of "the Force" in section 1 of the Police Act, 1958 (Act No. 7 of 1958);

(b) a part of the said South African Police of which the control, organisation and administration have been transferred to the Government of a self-governing territory;

(c) a police force established by or under a law of a self-governing territory;

(d) the South African Defence Force referred to in section 5 of the Defence Act, 1957 (Act No. 44 of 1957);

(e) the Prisons Service established by section 2 of the Prisons Act, 1959 (Act No. 8 of 1959); or

(f) a police force under the control of a local authority,

and also any part of a force referred to in paragraph (a) to (f) or any combination of two or more of such forces or of parts of such forces;

"self-governing territory" means a territory declared under section 26 of the National States Constitution Act, 1971 (Act No. 21 of 1971), to be a self-governing territory within the Republic;

"series of issues", in relation to—

(a) a periodical which is a daily newspaper, means at least six, or in the case of regulation 7 (3) or (4) at least two, different issues of that newspaper whether or not issued on consecutive days;

(b) a periodical, other than a daily newspaper, which is ordinarily issued at intervals of 10 days or less, means at least three, or in the case of regulation 7 (3) or (4) at least two, different issues of that periodical whether or not issued during consecutive intervals;

(c) a periodical which is ordinarily issued at intervals in excess of 10 days, means at least two different issues of that periodical whether or not issued during consecutive intervals;

"sound recording" means a disc, cassette, tape, perforated roll or other device in or on which sounds are embodied so as to be capable of being reproduced therefrom;

"subversive statement" means a statement—

(a) 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—

(i) to take part in an activity or to commit an act mentioned in paragraph (a), (b) or (c) of the definition of "unrest";

(ii) to resist or oppose a member of the Cabinet, or of a Ministers' Council, or another member of the Government or an official of the Republic or a member of the Government of a self-governing territory or an official of a self-governing territory or a member of a security force in the exercise or performance by such a member or official of a power or function in terms of a provision of a regulation made under the Public Safety Act, 1953 (Act No. 3 of 1953), or of a law regulating the safety of the public or the maintenance of public order;

(iii) to take part in a boycott action—

(aa) against a particular firm or against firms of a particular nature, class or kind, either by not making purchases at or doing other business with or making use of services rendered by that particular firm or any firms of that particular nature, class or kind or by making purchases only at or doing other business only with or making use only of services rendered by firms other than that particular firm or other than firms of that particular nature, class or kind;

(bb) against a particular product or article or against products or articles of a particular nature, class or kind, by not purchasing that particular product or article or any products or articles of that particular nature, class or kind; or

(cc) against a particular educational institution or against educational institutions of a particular nature, class or kind, by refusing to attend classes or to participate in other activities at that particular institution or at any institutions of that particular nature, class or kind;

(iv) to take part in an act of civil disobedience—

(aa) by refusing to comply with a provision of, or requirement under, any law or by contravening such a provision or requirement; or

(bb) by refusing to comply with an obligation towards a local authority in respect of rent or a municipal service;

(v) to stay away from work or to strike in contravention of the provisions of any law, or to support such a stayaway action or strike;

(vi) to attend or to take part in a restricted gathering;

(vii) to take part in any activities of or to join or to support an organisation which is an unlawful organisation in terms of the Internal Security Act, 1982 (Act No. 74 of 1982), or to take part in, or to support, any of such an organisation's campaigns, projects, programmes or actions of violence or resistance against, or subversion of, the authority of the State or any local authorities, or of violence against, or intimidation of, any persons or persons belonging to a particular category of persons;

(viii) to exert power and authority in specific areas by way of structures purporting to be structures of local government and acting as such in an unlawful manner, or to establish such structures, or to support such structures, or to subject themselves to the authority of such structures, or to make payments which are due to local authorities to such structures;

(ix) to prosecute, to try or to punish persons by way of unlawful structures, procedures or methods purporting to be judicial structures, procedures or methods, or to support such structures, procedures or methods, or to subject themselves to the authority of such structures, procedures or methods;

(x) to boycott or not to take part in an election of members of a local authority or to commit any act whereby such an election is prevented, frustrated or impeded: Provided that this subparagraph shall not prevent a political party registered under section 36 of the Electoral Act, 1979 (Act No. 45 of 1979), or an organisation, whether it is a political party or not, having candidates representing such organisation in such an election, from encouraging its supporters not to vote in such election or in any particular electoral division thereof; or

(xi) to commit any other act or omission identified by the Commissioner by notice in the *Gazette* as an act or omission which has the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency; or

(b) by which the system of compulsory military service is discredited or undermined;

"television recording" means a cassette, tape or other device in or on which visual images (with or without an associated sound track) are embodied in such a way so as to be capable of being reproduced on a television set and, in so far as a film recording is capable of being used for television broadcasts, also a film recording;

"unrest" means—

(a) any gathering in contravention of an order under regulation 10 (1) (c) or (d) of the Security Emergency Regulations, 1989, or of a provision of another law or of any prohibition, direction or other requirement under such an order or provision;

(b) any physical attack by a group of persons on a security force or on a member of a security force or on a member of a local authority or on the house or family of a member of a security force or local authority; or

(c) any conduct which constitutes sedition, public violence or a contravention of section 1 (1) (a) of the Intimidation Act, 1982 (Act No. 72 of 1982).

Presence of journalists etc., at unrest, restricted gatherings or security actions

2. (1) Subject to subregulation (2) no journalist, news reporter, news commentator, news correspondent, newspaper or magazine photographer, operator of a television or other camera or of any television, sound, film or other recording equipment, person carrying or assisting in the conveyance or operation of such camera or equipment, or other person covering events for the purpose of gathering news material for the distribution or publication thereof in the Republic or elsewhere, shall, without the prior consent of the Commissioner or of a member of a security force who serves as a commissioned officer in that force, be at the scene of any unrest, restricted gathering or security action or at a place from where any unrest, restricted gathering or security action is within sight.

(2) The provisions of subregulation (1)—

(a) shall not apply to a person mentioned therein who—

(i) at the commencement of any unrest, restricted gathering or security action happens to be at the scene of that unrest, gathering or action or at a place from where that unrest, gathering or action is within sight; or

(ii) after the commencement of any unrest, restricted gathering or security action happens to arrive at the scene of that unrest, gathering or action, or at a place from where that unrest, gathering or action is within sight, for a reason other than to cover that unrest, gathering or action for the gathering of news material,

provided such a person immediately leaves the scene of that unrest, gathering or action or the said place and removes himself within such time as is reasonably required under the circumstances to a place where that unrest, gathering or action is out of sight; or

(b) shall not prevent a person mentioned therein from being in his residence or on the premises where he ordinarily works or on his way to or from his residence or any such premises.

Publication of certain material prohibited

3. (1) Subject to subregulation (6) no person shall publish or cause to be published any publication, television recording, film recording or sound recording containing any news, comment or advertisement on or in connection with—

(a) any security action, including any security action referred to in regulation 3 (1) (a) of the previous media regulations or in regulation 3 (1) (a) of the Media Emergency Regulations, 1988;

(b) any deployment of a security force, or of vehicles, armaments, equipment or other appliances, for the purpose of security action;

(c) any restricted gathering, in so far as such news, comment or advertisement discloses at any time before the gathering takes place the time, date, place and purpose of such gathering, or gives an account of a speech, statement or remark of a speaker who performed at the gathering in contravention of a condition, prohibition or requirement determined or imposed under a law mentioned in the definition of "restricted gathering";

(d) any action, strike or boycott by members of the public which is an action, strike or boycott referred to in paragraph (a) (iii), (iv) or (v) of the definition of "subversive statement", in so far as such news, comment or advertisement discloses particulars of the extent to which such action, strike or boycott is successful or of the manner in which members of the public are intimidated, incited or encouraged to take part in or to support such action, strike or boycott or gives an account of any incidents in connection with such intimidation, incitement or encouragement;

(e) any structures referred to in paragraph (a) (viii) or (ix) of the definition of "subversive statement", in so far as such news, comment or advertisement discloses particulars of the manner in which members of the public are intimidated, incited or encouraged to support such structures or to subject themselves to the authority of such structures;

(f) any speech, statement or remark of a person in respect of whom steps under a provision of Chapter 3 of the Internal Security Act, 1982 (Act No. 74 of 1982), or regulation 3 (8) (b) or 8 of the Security Emergency Regulations, 1989, are in force or of a person intimating or of whom it is commonly known that he is an office-bearer or spokesman of an organisation which is an unlawful organisation in terms of the said Act or in respect of which an order under regulation 7 (1) (a) of the said Security Emergency Regulations is in force, in so far as any such speech, statement or remark has the effect, or is calculated to have the effect, of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency;

(g) the circumstances of, or treatment in, detention of a person, who is or was detained under regulation 3 of the Security Emergency Regulations, 1989, or who at any time prior to the commencement of these regulations was detained under a regulation made under the Public Safety Act, 1953 (Act No. 3 of 1953); or

(h) the release of a person who is detained under the said regulation 3 of the Security Emergency Regulations, 1989.

(2) No person shall publish or cause to be published a publication containing an advertisement on or in connection with an organisation which is an unlawful organisation in terms of the Internal Security Act, 1982, or in respect of which an order under regulation 7 (1) (a) of the Security Emergency Regulations, 1989, is in force, defending, praising or endeavouring to justify such organisation or any of such organisation's campaigns, projects, programmes, actions or policies of violence or resistance against, or of subversion of, the authority of the State or any local authorities, or of violence against, or of intimidation of, any persons or persons belonging to a particular category of persons.

(3) (a) The Commissioner may, for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency, and without prior notice to any person and without hearing any person, issue an order not inconsistent with a provision of these regulations, prohibiting a publication, television recording, film recording or sound recording containing any news, comment or advertisement on or in connection with a matter specified in the order, to be published.

(b) For the purposes of paragraph (a) the provisions of regulations 10 (2) and (4) and 11 of the Security Emergency Regulations, 1989, shall *mutatis mutandis* apply.

(4) Subject to subregulation (6) no person shall broadcast any news, comment or advertisement on or in connection with a matter specified in subregulation (1) live on any television or radio service.

(5) No person shall publish or cause to be published a publication—

(a) in which any blank space or any obliteration, deletion or indication of an omission of part of the text of a report or of a photograph or part of a photograph appears if that blank space, obliteration, deletion or indication of an omission, as may appear from an express statement or a sign or symbol in that publication or from the specific context in which that blank space, obliteration, deletion or indication of an ommission appears, is intended to be understood as a reference to the effect of these regulations; or

(b) in which any material appears which, as may appear from an express statement or a sign or symbol in that publication or from the specific context in which that material appears, is intended to be understood as material which would have been published by another publication if it were not for the fact that an order under regulation 7 (3) (i) or (ii) was published in respect of that other publication.

(6) The provisions of this regulation shall not prevent—

(a) a person from publishing a publication or a television, film or sound recording containing any news, comment or advertisement on or in connection with a matter specified in subregulation (1) in so far as particulars of such a matter—

(i) are disclosed, announced or released, or authorised for publication, by a member of the Cabinet or of a Ministers' Council, a Deputy Minister or a spokesman of the Government;

(ii) appear from debates, documents or proceedings of Parliament or the President's Council; or

(iii) appear from judicial proceedings, excluding proceedings in which evidence was submitted or given, whether by way of affidavit or *viva voce,* relating to the circumstances or manner of arrest or the circumstances of, or the treatment in, detention of a person who is or was detained under regulation 3 of the Security Emergency Regulations, 1989, or who at any time prior to the commencement of these regulations was detained under a regulation made under the Public Safety Act, 1953, and in which the court concerned has not yet given a final judgment; or

(b) a *bona fide* library from lending to a member of the public in the normal course of its activities a publication containing any news, comment or advertisement on or in connection with any such matter.

(7) The Minister may make rules prescribing the procedure by which and the authority or person through whom any authorisation referred to in subregulation (6) (a) (i) may be obtained.

(8) For the purposes of subregulations (4) and (6) a reference therein to a matter specified in subregulation (1) shall be construed as a reference also to a matter specified in an order under subregulation (3) (a).

Taking of photographs, etc., of unrest or security actions

4. (1) No person shall without the prior consent of the Commisioner or of a member of a security force serving as a commissioned officer in that force take any photograph or make or produce any television recording, film recording, drawing or other depiction—

(a) of any unrest or security action or of any incident occurring in the course thereof, including the damaging or destruction of property or the injuring or killing of persons; or

(b) of any damaged or destroyed property or injured or dead persons or other visible signs of violence at the scene where unrest or security action is taking or has taken place or of any injuries sustained by any person in or during unrest or security action.

(2) No person shall without the prior consent of the Commissioner or of a member of a security force serving as a commissioned officer in that force make any sound recording of any unrest or security action or of any incident occurring in the course thereof, including the damaging or destruction of property or the injuring or killing of persons.

(3) No person shall publish—

(a) a publication containing any photograph, drawing or other depiction; or

(b) a television, film or sound recording,

taken, made or produced in contravention of a provision of subregulation (1) or (2) of this regulation or of a provision of a regulation made under the Public Safety Act, 1953 (Act No. 3 of 1953), which was in force at any time during the period 12 June 1986 until immediately prior to the commencement of these regulations.

Making, publishing, etc., of subversive statements

5. No person shall—

(a) whether orally or in writing make a subversive statement or cause such a statement to be made;

(b) produce a publication in which a subversive statement appears or cause such a publication to be produced;

(c) produce a television, film or sound recording in which a subversive statement is recorded or cause such a television, film or sound recording to be produced; or

(d) publish or import into the Republic a publication or a television, film or sound recording containing a subversive statement or cause such a publication or such a television, film or sound recording to be published or imported into the Republic.

Prohibition of production, importation or publishing of certain periodicals

6. (1) If the Minister is of the opinion that it is necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency, he may, subject to subregulation (2), issue an order by notice in the *Gazette* prohibiting the production, importation into the Republic or publishing of all further issues of a periodical specified in the order for such period as may be specified in the order, but not exceeding three months at a time, in the case of a registered periodical, or six months at a time, in the case of any other periodical.

(2) No order under subregulation (1) shall be issued in respect of a periodical unless—

(a) an issue of that periodical was produced, imported or published in contravention of a provision of regulation 3 (1) or (2), 4 (3) or 5 (b) or (d), or of a provision of an order under regulation 3 (3); and

(b) the Minister has by notice in the *Gazette* requested all persons concerned in the production, importation or publishing of that periodical to ensure that no further issue of that periodical is produced, imported or published in contravention of any such provision; and

(c) a further issue of that periodical was produced, imported or published in contravention of any such provision after the publication of the notice referred to in paragraph (b); and

(d) the Minister, after a further issue referred to in paragraph (c) was produced, imported or published in contravention of any such provision—

(i) has given notice in writing to the publisher or importer of that periodical of the fact that action under subregulation (1) is being considered, stating the grounds for the proposed action; and

(ii) has given that publisher or importer the opportunity of submitting to him in writing, within a period of two weeks, representations in connection with the proposed action.

(3) The provisions of subregulations (1) and (2) may be applied irrespective of whether an issue referred to in paragraph (a) or (c) of the said subregulation (2) has been seized under regulation 9 (1) and irrespective of whether any person is prosecuted in consequence of the production, importation or publishing of such an issue.

(4) Compliance with an order issued under subregulation (1) shall not affect the continuation of the registration (if any) of the periodical concerned as a newspaper in terms of the Newspaper and Imprint Registration Act, 1971 (Act No. 63 of 1971).

Systematic or repetitive publishing of subversive propaganda

7. (1) If the Minister is in respect of a periodical which has not previously been the subject of a warning under this subregulation, regulation 7A (1) of the previous media regulations or regulation 7 (1) (a) of the Media Emergency Regulations, 1988, or of an order under subregulation (3) of this regulation, regulation 7A (3) of the previous media regulations or regulation 7 (3) of the Media Emergency Regulations, 1988, of the opinion, solely on examination of a series of issues of that periodical—

(a) that there is in that periodical a systematic or repetitive publishing of matter, or a systematic or repetitive publishing of matter in a way, which, in his opinion, has, or is calculated to have, the effect—

(i) of promoting or fomenting revolution or uprisings in the Republic or other acts aimed at the overthrow of the Government otherwise than by constitutional means;

(ii) of promoting, fomenting or sparking the perpetration of acts referred to in paragraph (b) or (c) of the definition of "unrest";

(iii) of promoting or fomenting the breaking down of public order in the Republic or in any area of the Republic or in any community;

(iv) of stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority or a security force, or towards members or employees of a local authority or members of a security force, or towards members of any population group or section of the public;

(v) of promoting the public image or esteem of an organisation which is an unlawful organisation in terms of the Internal Security Act, 1982 (Act No. 74 of 1982), or in respect of which an order under regulation 7 (1) (a) of the Security Emergency Regulations, 1989, is in force;

(vi) of promoting the establishment or activities of structures referred to in paragraph (a) (viii) or (ix) of the definition of "subversive statement"; or

(vii) of promoting, fomenting or sparking actions, strikes or boycotts referred to in paragraph (a) (iii), (iv), (v) or (x) of the definition of "subversive statement"; and

(b) that the said effect which such systematic or repetitive publishing in his opinion has, or is calculated to have, is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency,

he may, by notice in the *Gazette*, issue a warning to persons concerned in the production, importation, compilation or publishing of issues of that periodical that the matter published in that periodical or the way in which matter is published in that periodical, in his opinion, is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency.

(2) In an examination under subregulation (1) of a series of issues of a periodical, such series may include any issue of that periodical published before the commencement of these regulations but after 11 April 1989.

(3) If the Minister is in respect of a periodical which previously, whether under its present or any previous name, was the subject of—

(a) a warning under subregulation (1) of this regulation;

(b) a warning under regulation 7A (1) of the previous media regulations or regulation 7 (1) of the Media Emergency Regulations, 1988;

(c) an order under this subregulation; or

(d) an order under regulation 7A (3) of the previous media regulations or regulation 7 (3) of the Media Emergency Regulations, 1988,

of the opinion, solely on examination of a series of issues of that periodical, that there is in that periodical a systematic or repetitive publishing of matter, or a systematic or repetitive publishing of matter in a way, which, in his opinion, has, or is calculated to have, an effect described in paragraph (a) of subregulation (1) of this regulation, and that the said effect which such systematic or repetitive publishing, in his opinion, has, or is calculated to have, is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency, he may, by notice in the *Gazette*, issue an order—

(i) whereby the publishing, during such period as may be specified in the order (but not exceeding three months at a time, in the case of a registered periodical, or six months at a time, in the case of any other periodical), of all further issues of that periodical is prohibited unless the matter to be published therein and the way in which it is to be published therein has previously been approved for publication by a person specified in the order; or

(ii) whereby the production, importation into the Republic or publishing, during such period as may be specified in the order (but not exceeding three months at a time, in the case of a registered periodical, or six months at a time, in the case of any other periodical), of all further issues of that periodical is totally prohibited.

(4) No issue of a periodical shall, for the purposes of an examination under subregulation (3) of a series of issues of that periodical, be included in such a series unless such issue was—

(a) in the case of a periodical contemplated in paragraph (a) of the said subregulation (3), published after publication of the warning referred to in that paragraph;

(b) in the case of a periodical contemplated in paragraph (b) of the said subregulation (3), published after the commencement of these regulations;

(c) in the case of a periodical contemplated in paragraph (c) of the said subregulation (3), published after the termination of the period for which the order referred to in that paragraph was issued; or

(d) in the case of a periodical contemplated in paragraph (d) of the said subregulation (3), published after the commencement of these regulations.

(5) No warning under subregulation (1) and no order under subregulation (3) shall be published unless the Minister—

(a) has given notice in writing to the publisher or importer of the periodical concerned of the fact that an examination under subregulation (1) or (3), as the case may be, is being conducted in respect of that periodical, stating the grounds of such examination; and

(b) has given that publisher or importer the opportunity of submitting to him in writing, within a period of two weeks, representations in connection with such examination.

(6) Subregulation (5) (a), in so far as the Minister is in terms of that subregulation required to state the grounds of any examination in respect of a periodical to the publisher or importer of that periodical, shall not be construed as if the Minister is obliged to disclose to such publisher or importer anything other than the following, namely—

(a) a list indicating the reports, comments, articles, photographs, drawings, depictions, advertisements, letters and other items published in that periodical and which are being taken into account against the periodical by the Minister in such examination for the purpose of establishing whether, in his opinion, there is in that periodical a systematic or repetitive publishing of matter, or a systematic or repetitive publishing of matter in a way, which, in his opinion, has, or is calculated to have, an effect described in paragraph (a) of subregulation (1); and

(b) an indication why each such item is being taken into account for such purpose.

(7) Save in so far as is required in subregulation (5), read with subregulation (6), the Minister shall not be obliged to give notice to any person of any examination, or any proposed action, under this regulation or to give any person a hearing when conducting such an examination or considering any such proposed action.

(8) The provisions of regulation 6 (4) shall *mutatis mutandis* apply in respect of a periodical in respect of which an order under subregulation (3) (ii) of this regulation has been issued.

Continuation of prohibited periodicals

8. If the Minister is of the opinion that a periodical, whether or not under another name, is a continuation of or substitution for any periodical the production, importation into the Republic or publishing of which was prohibited under regulation 6 (1) or 7 (3) (ii), he may, without prior notice to any person and without hearing any person, issue an order by notice in the *Gazette* prohibiting the production, importation or publishing of all further issues of the first-mentioned periodical for such period as may be specified in the order, but not exceeding a period equal to the remaining portion of the period for which the last-mentioned periodical was prohibited under the said regulation.

Seizure of certain publications or recordings

9. (1) If a publication or a television, film or sound recording is produced, published or imported into the Republic in contravention of a provision of regulation 3 (1) or (2), 4 (3) or 5 (b), (c) or (d) or of a provision of an order under regulation 3 (3), 6 (1), 7 (3) or 8, the Minister or the Commissioner may, without prior notice to any person and without hearing any person, issue an order under his hand ordering the seizure of that publication or television, film or sound recording.

(2) If the Minister or the Commissioner is of the opinion—

(a) that the publishing of a publication (excluding a registered periodical) or a television, film or sound recording has, or is calculated to have, the effect—

(i) of promoting or fomenting revolution or uprisings in the Republic or other acts aimed at the overthrow of the Government otherwise than by constitutional means;

(ii) of promoting, fomenting or sparking the perpetration of acts referred to in paragraph (b) or (c) of the definition of "unrest";

(iii) of promoting or fomenting the breaking down of public order in the Republic or in any area of the Republic or in any community;

(iv) of stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority or a security force, or towards members or employees of a local authority or members of a security force, or towards members of any population group or section of the public;

(v) of promoting the public image or esteem of an organisation which is an unlawful organisation in terms of the Internal Security Act, 1982 (Act No. 74 of 1982), or in respect of which an order under regulation 7 (1) (a) of the Security Emergency Regulations, 1989, is in force;

(vi) of promoting the establishment or activities of structures referred to in paragraph (a) (viii) or (ix) of the definition of "subversive statement"; or

(vii) of promoting, fomenting or sparking actions, strikes or boycotts referred to in paragraph (a) (iii), (iv), (v) or (x) of the definition of "subversive statement"; and

(b) that the said effect which the publishing of such publication or television, film or sound recording has, or is calculated to have, is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency,

he may, without prior notice to any person and without hearing any person, issue an order under his hand ordering the seizure of that publication or television, film or sound recording.

(3) An order under subregulation (1) or (2) shall, unless otherwise specified in the order, be carried out in respect of all copies or reproductions of the publication or television, film or sound recording to which the order relates.

(4) An order under subregulation (1) or (2) shall be carried out by a member of a security force in possession of a document being or purporting to be such an order or a copy or reproduction thereof, and such a member may for the purposes of such seizure—

(a) enter any vehicle, vessel, aircraft or premises in or on which the publication or recording, or copy or reproduction thereof, to which the order relates, is or is suspected by him to be found; and

(b) in or on that vehicle, vessel or aircraft or those premises do all such things as are reasonably necessary to carry out the order.

(5) A document referred to in subregulation (4) shall be produced to a person affected thereby, at his request.

(6) A publication or recording, or any copies or reproductions thereof, seized under this regulation shall be dealt with in accordance with the direction of the Minister which may be issued by him at his discretion with a view to the safety of the public, the maintenance of public order or the termination of the state of emergency, either generally or with reference to a particular seizure.

(7) The provisions of this regulation may be applied irrespective of whether any person is prosecuted in consequence of the production, publishing or importation of a publication or a television, film or sound recording in contravention of a provision referred to in subregulation (1).

Compulsory deposit of periodicals

10. (1) If the Minister is of the opinion that it is necessary for the proper administration of a provision of these regulations he may, by order under his hand, direct the publisher or importer of a periodical to supply an official of the Department of Home Affairs, and at an address, specified in the order, free of charge with one copy of each issue of that periodical which is published in the Republic during a period specified in the order.

(2) A copy of an issue of a periodical which in pursuance of an order under subregulation (1) is required to be supplied to the said official, shall be sent to him within one day of the day on which that issue is published in the Republic.

(3) In this regulation "issue", in relation to a periodical issuing different editions on the same day, means each edition of that periodical which is so issued.

Offences and penalties

11. (1) Any person who—

(a) wilfully contravenes a provision of regulation 2 (1), 3 (4) or (5), 4 (1) or (2) or 5 or a provision of an order under regulation 6 (1), 7 (3) or 8; or

(b) either wilfully or negligently contravenes a provision of regulation 3 (1) or (2) or 4 (3) or a provision of an order under regulation 3 (3); or

(c) wilfully hinders or obstructs a member of a security force in the performance of his functions in terms of regulation 9 (4),

shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to that imprisonment without the option of a fine.

(2) Any person who either wilfully or negligently fails to comply with an order under regulation 10 (1), shall be guilty of an offence and on conviction be liable to a fine not exceeding R500.

Direction of Attorney-General

12. No prosecution for an offence under these regulations shall be instituted except by the express direction of the Attorney-General having jurisdiction in respect of that prosecution.

Short title

13. These regulations shall be called the Media Emergency Regulations, 1989.

Index