When the going gets tough: a comparison of emergency provisions of three African constitutions

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1 Introduction

Desperate times, the proverb reads, call for desperate measures. In the face of disaster, whether of natural or human origin, human beings’ urge for survival may cause the ordinary rules guiding behaviour to be overlooked, even if only temporarily. Our legal systems provide for such eventualities. So, for example, criminal law allows for lawful self-defence against an unlawful attack. International law similarly provides for the legitimate implementation of extreme measures in times of desperation.

Article 4 of the International Covenant on Civil and Political Rights establishes binding substantive and procedural standards for the declaration of states of emergency and the derogations of rights thereunder. The article effectively permits governments to ‘act in self-defence’ when disaster strikes. Given the risks that accompany emergency rule, it is important to consider how countries have translated international standards into domestic law. In this paper I consider the international law standards, as amplified in international policy documents in relation to three African constitutions from three different generations of African constitutional democracy, namely Botswana, South Africa and Kenya.

Following World War II the colonial powers withdrew from the colonies, granting independence to former colonies. The Constitution of the Republic of Botswana is in essence the independence constitution of that country which came into operation in 1966. This Constitution has been amended a number of times but exists for the better part in its original form. It represents the older and first generation of constitutional democracy on

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1 This paper forms the basis of the presentation to be given at the ANCL’s annual conference in Rabat, Morocco (2-5 February 2011) and is to be treated as a draft. Criticism, comments and suggestions are welcomed. The author can be contacted at r.kruger@ru.ac.za.

2 The analogy between lawful self-defence in criminal law and the international law provision allowing the declaration of a state of emergency and assumption of additional power there under to avert a grave danger is taken from J Hatchard ‘Undermining the constitution by constitutional means; some thoughts on the new constitutions of South Africa’ (1995) CILSA 21 at 30.


the continent. The second generation is represented by the South African Constitution of 1996. Subsequent to the demise of communism in the USSR and the end of the Cold War, a wave of democratisation swept around the globe in the 1990s ending authoritarian regimes in different parts of the world. The transition to democracy in South Africa took place against this background and following international and national pressure to end apartheid. The Constitution 5 embraced by the democratic South Africa introduced changes that altered the nature of government and governance in the country completely, embracing fundamental rights and judicial review and rejecting the arbitrary exercise of power. The last of the three constitutions chosen for comparison is that of Kenya, the youngest member of the democratic constitutional family on the continent. The new Constitution came into operation on 27 August 2010 after its approval in a referendum on 4 August 2010. 6 Kenya, like the majority of African countries, has a tumultuous constitutional history which include years under one-party rule. 7

The three chosen constitutions mark, against different historical backgrounds, national commitment to democracy, constitutionalism and the protection and advancement of human rights. This common pledge provides the necessary basis for the comparison of the emergency provisions of the three constitutions.

In this paper I provide, in the first instance, an exposition of the international law standards in respect of states of emergency. Then I outline the different states’ constitutional provisions in relation to states of emergency. The theoretical models that underpin international law are outlined briefly in explanation of the provisions adopted. In analysing whether the national provisions measure up to the international law standard, I consider de facto and/or de jure emergencies in the different jurisdictions as well as a general critique of models embraced internationally and nationally.

2 International law provisions in respect of states of emergency

5 Following the political negotiation between representatives of the apartheid system and the liberation movements, it was agreed that South Africa was to be governed immediately after the first democratic elections in terms of the negotiated interim Constitution Act 200 of 1993. This document contained 34 constitutional principles that guided the drafting of the Constitution of the Republic of South Africa, 1996 by the democratically elected Constitutional Assembly. The agreement further included certification of the constitution by the newly established Constitutional Court as compliant with the 34 principles.


A constitutional law framework enables the government of a country to govern. It also limits the power of government, particularly by providing for the protection of human rights against unjustifiable infringement. If a crisis disrupts the functioning of the constitutional order, the response thereto is often to grant the executive more power to enable it to quell the crisis. Additional power in the hands of the executive can take different forms, including the power to make new rules to be applied during the emergency which may result in the curtailment of human rights. This creates scope for potential human rights abuse.\(^8\) It is not difficult to imagine a response to a national crisis that leads to the severe restriction or complete denial of, for example, the right to freedom of movement or the right to a fair trial.\(^9\) In an attempt to minimise human rights abuse during times of crisis, while enabling the government to deal with the crisis effectively, international law outlines specific minimum requirements.

The standards set by article 4 of ICCPR bind Botswana, South Africa and Kenya by virtue of their signature and ratification of, or accedence to, the ICCPR.\(^10\) The standards set by article 4 are elaborated upon by the Paris Minimum Standards of Human Rights Norms in a State of Emergency,\(^11\) the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights\(^12\) and General Comment 29 on States of Emergency\(^13\) issued by the Human Rights Committee. These documents contain non-binding guidelines clarifying the scope and meaning of article 4.

The international law standards concern three closely related fundamental issues concerning substance and procedure in respect of states of emergency. These are

1. What constitutes an emergency that warrants a declaration of a state of emergency?
2. What procedural safeguards must be in place before and during the declared emergency?

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\(^11\) The standards were reproduced in (1985) *American Journal of International Law* 1072. The Paris Minimum Standards followed an intensive investigation by the International Law Association into the law applicable during states of emergency and were approved in 1984 at the 61\(^{st}\) Conference of the International Law Association. See SR Chowdhury *Rule of Law in a State of Emergency* (1989) 1-10.

\(^12\) The principles were reproduced in (1985) *Human Rights Quarterly* 3. The principles were drafted by a group of 31 international law experts who met in Siracusa, Sicily in 1984 with a view to consider the limitation and derogation provisions of the ICCPR more closely. See Chowdhury 8.

\(^13\) General Comment No 29 States of Emergency CCPR/C/21/Rev.1/Add.11 (31 August 2001). This comment replaced General Comment No 5: Derogation of rights (Art 4): 1981/07/31.
(3) Which rights may not be subjected to derogation during the state of emergency?

I consider each of these issues in turn.

2.1 What constitutes an emergency that warrants a declaration of a state of emergency?
Article 4 does not provide particular examples of emergencies or a list of crises that justify the declaration of a state of emergency. Instead it refers to ‘public emergency which threatens the life of the nation’ in justification of the declaration of an emergency. It is accepted that emergency situations may arise as a result of a serious political crisis, force majeure and economic circumstances connected to underdevelopment. Serious political crises that may justify the declaration of a state of emergency include war, both international or civil war, and internal unrest. Force majeure includes ‘public or natural disasters’ or ‘disasters of various kinds’. This will include natural disasters such as volcanoes, tsunamis and Chernobyl-like nuclear disasters. Economic crises are included in the list of potential disasters that may justify the declaration of a state of emergency despite criticism of potential abuse. International law leaves the origin and the nature of the crisis at the root of the emergency unspecified, but it requires that the crisis must be exceptional, actual or imminent and of a magnitude that ‘threatens the life of the nation’ as a whole. This means that a state of emergency may not be declared as a preventative measure and that it must, objectively speaking, warrant special measures to restore or maintain public order. An emergency that ‘threatens the life of the nation as a whole’

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15 It is noteworthy that the text of art 4 is silent on war as justifying the declaration of a state of emergency, while both the American Convention on Human Rights (art 23) and the European Convention on Human Rights (art 15) mention was specifically. Chowdhury 22 notes that this omission in art 4 was deliberate because the United Nations was formed, amongst other things, to prevent war.
16 Chowdhury 15 and Oraá 31. Note principle 40 of the Siracusa Principles: ‘Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogation measures’.
17 Oraá 31.
18 Chowdhury 15.
19 Chowdhury 16.
20 Lillich ‘Foreword’ in Chowdhury x and see Chowdhury 17-22. See also Siracusa Principles 41.
21 See Paris Minimum Standards Section (A) 1; Siracusa Principles 39. See also Lawless v. Ireland (No 3) European Court of Human Rights (1 July 1961) para 28. See also the Greek Case Yearbook XII of the European Convention on Human Rights (1969) paras 152-165. See also GE Devenish ‘The demise of the salus republicae suprema lex in South Africa: emergency rule in terms of the 1996 constitution’ (1998) CILSA 142 at 145-150.
22 Ibid and see Oraá 27-33.
does not necessarily require the entire territory of the state to be affected by the emergency. What is required rather is a threat to the organised life of the community.\textsuperscript{23} The declaration of a state of emergency must furthermore be a last resort. It is only when the ordinary laws are inadequate in the face of the crisis that temporary emergency measures may be implemented to restore public order.\textsuperscript{24}

2.2 What procedural safeguards must be in place before and during the declared emergency?

International law stipulates that the rule of law prevails, specifically during a state of emergency.\textsuperscript{25} The pre-eminence of the rule of law requires prior formulation of the emergency measures that will apply during a state of emergency.\textsuperscript{26} It also requires an official declaration of the state of emergency\textsuperscript{27} and confirmation of the state of emergency by the legislature as soon as possible.\textsuperscript{28} Article 4 of the Covenant does not explicitly require the declaration to be made by a specific branch of government, but the practice is for the elected branches of government, the executive and the legislature, to be at the forefront.\textsuperscript{29} Typically, the decision to declare a state of emergency is taken by the executive, which then seeks approval of its decision from the legislature. International law requires the state party to notify the relevant treaty bodies of any derogation of rights during a state of emergency.\textsuperscript{30} In addition to this notification obligation, the Human Rights Committee has also indicated that a state party must provide a careful justification for the declaration of a state of emergency and derogation measures.\textsuperscript{31}

A requirement is that the state of emergency must be temporary and of the shortest duration possible.\textsuperscript{32} Once order is restored or when the predetermined time period of the state of emergency has lapsed, the state of emergency ends and emergency measures may no longer be applied.\textsuperscript{33} Extension of the state of emergency beyond the predetermined time period is only possible with the prior approval of the legislature.\textsuperscript{34}

\textsuperscript{23} Chowdhury 24-27 and Oraá 28-29.
\textsuperscript{24} Oraá 29-30.
\textsuperscript{25} Paris Minimum Standards Section (B) 4. See also General Comment No. 29 para 15.
\textsuperscript{26} Ibid and Siracusa Principle 43.
\textsuperscript{27} Paris Minimum Standards (A) 1 and Siracusa Principle 42. See also Oraá 34ff.
\textsuperscript{28} Paris Minimum Standards (A) 2.
\textsuperscript{29} Oraá 38-40.
\textsuperscript{30} Paris Minimum Standards (A) 2.
\textsuperscript{31} General Comment No 29 para 5. See also Oraá 72-76.
\textsuperscript{32} Paris Minimum Standards (A) 3 and Siracusa Principle 48.
\textsuperscript{33} Paris Minimum Standards (A) 6 and Siracusa Principle 50.
\textsuperscript{34} Paris Minimum Standards (A) 3.
During a state of emergency the legislature continues to represent the interests of the electorate and the ordinary rules relating to privileges and immunities of members of the legislature remain applicable. International law also stipulates that the legislature shall not be dissolved during a state of emergency.\textsuperscript{35} If, however, the dissolution of the legislature is necessary, it is to be replaced by a duly democratically elected legislature as soon as possible.\textsuperscript{36}

The oversight role of the legislature during a state of emergency is complemented by the oversight role of the judiciary.\textsuperscript{37} International law sets out extensive review powers of the judiciary in respect of states of emergency. This includes the authority to determine whether emergency legislation is in accordance with the country's constitution, whether the exercise of emergency powers is in accordance with emergency legislation and whether the derogation of rights under the emergency is allowed and in proportion to the emergency.\textsuperscript{38} The judiciary remains independent during the state of emergency, and removal of judges or restructuring of the judiciary to undermine the independence of the judiciary is prohibited.\textsuperscript{39}

2.3 Non-derogable rights
The last issue, and arguably the most important issue addressed by international law in respect of states of emergency, concerns the non-derogability of certain human rights. It is understood that an emergency may justify the severe curtailment or even suspension of constitutionally guaranteed human rights beyond the limitation of rights which is normally constitutionally justifiable. However, international law proclaims certain rights as non-derogable. This means that those rights may not be limited beyond that which is normally constitutionally justifiable and that suspension of these rights during a state of emergency is not allowed. The list of non-derogable rights in article 4 of the ICCPR include the right to life, the right not to be subjected to cruel, inhuman and degrading treatment, the right not to be subjected to slavery, slave trade and servitude, the right not to be imprisoned for failing to fulfil contractual obligations, the right not to be convicted of offences created retrospectively, the right to be recognised as a person before the law and the right to

\textsuperscript{35} Paris Minimum Standards (A) 5.
\textsuperscript{36} Ibid. See also Chowdhury 55-57.
\textsuperscript{37} Chowdhury 57-66.
\textsuperscript{38} Paris Minimum Standards (B) 5.
\textsuperscript{39} Paris Minimum Standards (B) 3.
freedom of thought, conscience and religion.\textsuperscript{40} Measures taken to deal with the emergency may not discriminate on the basis of race, colour, sex, language, religion and social origin.\textsuperscript{41} The Human Rights Committee has made it clear that the omission of a right from the list of non-derogable rights does not mean that the right may be derogated at will during a state of emergency.\textsuperscript{42} The derogation of any right must objectively be required by the exigencies of the situation.\textsuperscript{43} Proportionality is a fundamental principle that applies during a state of emergency.\textsuperscript{44} This principle requires the derogation of rights to be proportional to the exigencies of the situation. A curtailment of a right beyond that would not be defensible in terms of international law.

Against this background of the international law requirements I now provide outlines of the emergency provisions of the three countries.

\textbf{3 Provision for states of emergency in the Botswana Constitution}

Section 17(1) of the Constitution of Botswana provides that the president may, at any time, declare a state of emergency by proclamation published in the government gazette. This provision does not require the existence of a \textit{de facto} emergency in justification of the declaration. When this provision is read with the Emergency Powers Act,\textsuperscript{45} which empowers the president to make regulations to deal an emergency, the impression is created that the declaration of a state of emergency presupposes the existence of a \textit{de facto} emergency.\textsuperscript{46} There is, however, no constitutional directive to read section 17 with any legislation. Ntanda Nsereko’s conclusion that an emergency exists in Botswana when the president says that one does, is thus correct.\textsuperscript{47}

Section 17(2) of the Botswana Constitution requires the declaration of a state of emergency to be confirmed by Parliament\textsuperscript{48} within seven days of its declaration. The

\textsuperscript{40} Art 4(2). See Oraá chapter 4 for a discussion of the non-derogability principle. It is interesting to note that different treaties and documents set different rights as non-derogable, indicating a lack of consensus in this regard. I focus my discussion of non-derogable rights to those set out in the ICCPR, given its binding effect on all three countries under discussion.
\textsuperscript{41} Art 4(1). See also Paris Minimum Standards B (2).
\textsuperscript{42} General Comment No 29 para 6.
\textsuperscript{43} Ibid. See also Hatchard, Ndulo and Slinn 282-283.
\textsuperscript{44} Ibid. See also General Comment 29 para 4 and
\textsuperscript{45} Emergency Powers Act Chapter 22.04
\textsuperscript{46} Section 3(1). The Act specifically mentions ‘the maintenance of public order’ and the need to ensure ‘supplies and services essential for the life of the community’.
\textsuperscript{47} DD Ntanda Nsereko \textit{Constitutional Law in Botswana} (2002) para 651. See also the discussion below.
\textsuperscript{48} Parliament consists of the National Assembly and the president (s 57).
declaration ceases to have effect unless confirmed by a majority of the voting members of Parliament within seven days of the declaration if Parliament is sitting, or has been summoned to meet within seven days. If Parliament is not sitting and has not been summoned, approval from Parliament must be obtained within 21 days of the declaration of the state of emergency. Once Parliament has approved the declaration of the state of emergency, it continues to be in force for a period of six months from the date of approval and it may be extended for six months at a time by a resolution supported by the majority of voting members of the Parliament. Parliament may also resolve to revoke an earlier approval of a declaration of a state of emergency.

The Constitution does not elaborate on the measures that may be taken to deal with the emergency. The Emergency Powers Act however empowers the president to ‘make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community’.\(^49\) Emergency regulations may be made applicable only in respect of a particular area of Botswana.\(^50\) The Emergency Powers Act details, but does not limit, some of the purposes that may be served by emergency regulations.\(^51\) Emergency regulations may provide for the detention of persons, restrict the movement of persons, provide for the deportation and exclusion of non-citizens from the territory of Botswana; appropriation of any property; authorisation to enter and search premises; amendment or suspension of any law; provision for charging for licensing or permit fees; provision for payment of compensation to persons affected by the emergency measures and to provide for offences and punishment in respect of violations of the emergency measures. Emergency regulations have no force unless approved by the National Assembly.\(^52\) These regulations only remain in place during the state of emergency and automatically fall away once normalcy is restored.\(^53\) During the state of emergency, however, the emergency regulations enjoy primacy above other legal provisions\(^54\).

\(^49\) Section 3(1).  
\(^50\) Section 3(3).  
\(^51\) Section 3(2).  
\(^52\) Section 5(2).  
\(^53\) Section 5(1).  
\(^54\) Section 4.
In Botswana’s initial state party report to the Human Rights Committee in respect of the ICCPR (dated November 2006)\(^\text{55}\) it was maintained that ‘the laws of Botswana do not provide for derogation from the rights under article 4, paragraph 2, of the Covenant’.\(^\text{56}\)

Under the heading ‘Derogation from fundamental rights and freedoms’, section 16 of the Constitution suspends the application of section 5 (providing for personal liberty) and section 15 (prohibiting discrimination) in instances of a declared emergency or when Botswana is at war. This section further incorporates the principle of proportionality in relation the derogation of these rights by requiring that the ‘measures … [must be] reasonably justifiable for the purpose of dealing with the situation’. Contrary to the view of the authors of the report, section 16 clearly provides for derogation of rights as foreseen in article 4(2) of the ICCPR. Section 16(2) is specific in providing for the derogation of the right to personal liberty. It details the rights of detainees during a state of emergency and ensures that information regarding the detention is provided to the detainee, that the detention is made known through publication in the government gazette, and that it is reviewed independently. In addition to these specific derogations, several sections of the Botswana Constitution outlining fundamental rights contain internal limitations allowing justifiable restriction of rights in the interests of public safety and public order.\(^\text{57}\) These internal limitations apply in times of emergency and in times of normalcy and the repeated references to public order indicate the high premium placed thereon.

Section 18 of the Constitution affirms the supremacy of the Constitution by asserting the justiciability of the fundamental rights contained in the Constitution. This extends to section 16 which allows for the derogation of the right to personal liberty and the right not to be discriminated against during a state of emergency. This means that a court will have the authority to review emergency regulations, at least insofar as the derogation is regulated by section 16. It is however not clear whether the declaration of a state of emergency itself (in terms of section 17 of the Constitution) is subject to judicial review.

In Botswana, as elsewhere, numerous ordinary legislative provisions deal with urgent situations, public order, safety or the interests of peace. The operation of these legislative provisions does not depend on the declaration of a state of emergency in terms of the Constitution, but depends on what is perceived, usually by the executive, to be in the

\(^{55}\) Consideration of reports submitted by state parties under article 40: Botswana (23 November 2006) CCPR/C/BWA/1 (2 May 2007).

\(^{56}\) Para 135.

\(^{57}\) See for example s 8(1)(a), s 9(2)(a), s 11(5)(a), s 12(2)(a), s 13(2)(a) and s 14(2)(a).
interests of public order, safety or peace. Such enactments increase the powers of the executive and allow it to limit the rights of individuals. The Constitution provides the benchmark for the limitation of rights by such legislative provisions.

In addition to these legislative provisions, several policies have been put in place to deal with urgent situations. One such policy is the National Policy on Disaster Management of 1996, which recognises the need for the development of a coordinated and comprehensive programme to deal with all disasters. A National Disaster Management Office was established within the office of the president in 1998. An emergency that attracted sufficient attention to warrant the formulation of a comprehensive policy is the high prevalence and rapid spread of HIV/AIDS in Botswana. In 2000, then president of Botswana Festus Mogae declared HIV/AIDS ‘a national emergency’. This ‘state of emergency’ was seemingly not declared in accordance with the provisions of the Constitution and it is regarded to be ongoing. The declaration has however formed the basis of a forceful response to the pandemic, including the roll out of anti-retroviral medicines on a large scale. The measures taken to deal with the scourge of HIV/AIDS may well have implications for the protection of rights under the Constitution.

The Botswana Constitution complies with the international standards by requiring an official declaration of a state of emergency, legislative approval of the declaration and extension of the emergency and judicial oversight of the emergency measures. But the provisions fall short of the standard by not explicitly requiring a de facto emergency in justification of the declaration, by not providing for the non-derogation of all the rights set out in article 4(2) of the ICCPR and insofar as it gives too much discretion to the president.

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4 Provision for states of emergency in the South African Constitution

Section 37 of the Constitution provides that a state of emergency may only be declared in terms of an Act of Parliament when ‘the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency’ and where the declaration is necessary to restore peace and order.\(^63\) The Act of Parliament which provides for the declaration of a state of emergency in terms of section 37 is the State of Emergency Act 64 of 1997. Section 1 of the Act designates the president as the functionary who may declare a state of emergency by proclamation in the government gazette. The section further stipulates that reasons for the declaration of the emergency must be stated briefly in the proclamation. The constitutional requirement is that ‘the life of the nation’ must be at stake to justify the declaration of a state of emergency. The threat posed to the organised life of the community by the emergency must be manifest and exceptional and the ordinary legal measures must be inadequate to deal with the threat.\(^64\)

A state of emergency may be declared for the entire country or the part thereof affected by the emergency.\(^65\)

The declaration may be effective only prospectively and the state of emergency lapses after 21 days if not approved by a majority of the members of the National Assembly.\(^66\)

The National Assembly’s resolution to extend the declaration may only follow after a public debate in the Assembly, as is also required in respect of further extensions of the state of emergency. Extensions beyond the initial approval of the state of emergency require the support of at least 60% of the members of the Assembly. An extension may be for no

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\(^{63}\) The political agreement to include section 34 which provided for the declaration of a state of emergency and regulation thereof in the negotiated interim Constitution of 1993 was controversial (G Erasmus ‘Limitation and Suspension’ in D van Wyk, J Dugard, B de Villiers and D Davis Rights and Constitutionalism: the New South African Legal Order (1994) 629 at 650). Given the traumatic South African experience involving states of emergencies and the abuse of human rights during these times under apartheid, suspicion in relation to states of emergency was to be expected (Haysom (1989) Columbia Human Rights LR 139). Those opposed to its inclusion argued that the Bill of Rights was not to allow the suspension of rights under any circumstances. The view that prevailed, maintained that the rule of law could only triumph if the Constitution itself regulated the declaration of the state of emergency and the suspension of rights there under (Erasmus 651). The constitutional principles that guided the drafting of the 1996 Constitution did not specifically require the Constitution to make provision for the declaration and regulation of a state of emergency, but the Constitutional Assembly took its cue from the interim Constitution and opted for the inclusion of section 37 regulating the declaration of a state of emergency and in the Bill of Rights. Section 37 was certified as compliant with the constitutional principles in the second Certification judgment (Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) paras 28-40) after reservations as to the constitutionality of the original text were expressed in the first Certification judgment (Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) paras 91-95).

\(^{64}\) See 2 above.

\(^{65}\) Section 1(1) of the State of Emergency Act.

\(^{66}\) Section 37(2).
longer than three months at a time.\textsuperscript{67} A state of emergency terminates when the president withdraws the declaration of the state of emergency by proclamation in the government gazette\textsuperscript{68} or when the time period for which the state of emergency was stipulated lapses. When the state of emergency terminates, all regulations, orders or rules made pursuant to the declaration cease to be of force and effect.\textsuperscript{69}

The power to make regulations to deal with the emergency vests in the president.\textsuperscript{70} The president may make regulations by proclamation in the government gazette, the content of which must further be disseminated to the public by appropriate means.\textsuperscript{71} Regulations made pursuant to the emergency must comply with the provisions of section 37 of the Constitution and the State of Emergency Act and may not allow for imprisonment of longer than 3 years, military conscription or amendment of the qualifications, election, powers, privileges or immunities of members of the national or provincial legislature.\textsuperscript{72}

Specific provision for legislative oversight of the emergency regulations and the exercise of emergency powers is made by section 3 of the State of Emergency Act. The president must table any regulation, order, rule or bylaw as soon as is possible after the publication thereof in Parliament. The National Assembly may disapprove of the exercise of the emergency power or make recommendations to the president in relation such exercise of power.\textsuperscript{73} The exercise of power (whether a regulation, rule, order or bylaw) ceases to have effect from the date on which the National Assembly disapproved of such exercise of power.\textsuperscript{74} The role of the National Assembly as an oversight body thus extends to both the declaration of the state of emergency and the exercise of powers thereunder. A further check on the exercise of emergency power is that of judicial review. Section 37 of the Constitution confirms the supremacy of the Constitution and foundational commitment to the rule of law by explicitly providing for judicial review in respect of the declaration of a state of emergency, any extension thereof and in respect of the constitutionality of any legislation enacted or action taken as a result of the declaration.\textsuperscript{75}

\begin{footnotesize}
\textsuperscript{67} Ibid.
\textsuperscript{68} Section 1(3) of the State of Emergency Act.
\textsuperscript{69} Section 2 of the State of Emergency Act.
\textsuperscript{70} Section 2(1)(b).
\textsuperscript{71} Section 3 of the State of Emergency Act.
\textsuperscript{72} Section 3(2).
\textsuperscript{73} Section 3(2).
\textsuperscript{74} Section 4(2)(b)(ii).
\textsuperscript{75} Section 37(3).
\end{footnotesize}
The principle of proportionality is incorporated into section 37. Derogation of rights during an emergency is only permitted where it is strictly required by the emergency.\(^76\) Derogations are further only permissible insofar as they comply with the international law obligations of South Africa;\(^77\) there has been publication thereof in the government gazette as soon as reasonably possible\(^78\) and they comply with the constitutionally determined benchmarks set for derogation of rights.\(^79\) The benchmarks are set out in relative detail in s 37(5) and largely coincide with the international standards. So, for example, the rights to life and human dignity are non-derogable, torture is absolutely prohibited and unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language is not permitted during a state of emergency.\(^80\) One particular aspect concerning the derogation of rights during a state of emergency is addressed in some detail in the Constitution. Not surprisingly, given South Africa’s history, section 37(6) sets out the rights of those who are detained without trial as a result of the emergency.\(^81\) The Constitution

\(^{\text{76}}\) Section 37(4).

\(^{\text{77}}\) Section 37(4)(b)(i).

\(^{\text{78}}\) Section 37(4)(b)(iii). The publication requirement is amplified by s 2(1)(b) of the State of Emergency Act which requires

\(^{\text{79}}\) Section 37(4)(ii) read with s 37(5).

\(^{\text{80}}\) Section 37(5) contains a table setting out the extent to which rights may be derogated under a state of emergency:

<table>
<thead>
<tr>
<th>Section number</th>
<th>Section title</th>
<th>Extent to which the right is protected</th>
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<tbody>
<tr>
<td>9</td>
<td>Equality</td>
<td>With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language</td>
</tr>
<tr>
<td>10</td>
<td>Human dignity</td>
<td>Entirely</td>
</tr>
<tr>
<td>11</td>
<td>Life</td>
<td>Entirely</td>
</tr>
<tr>
<td>12</td>
<td>Freedom and Security of the person</td>
<td>With respect to subsections (1)(d) and (e) and 2(c)</td>
</tr>
<tr>
<td>13</td>
<td>Slavery, Servitude and forced labour</td>
<td>With respect to slavery and servitude</td>
</tr>
</tbody>
</table>
| 28             | Children                                          | With respect to:
|                |                                                   | -subsection (1) (d) and (e); |
|                |                                                   | -the rights in subparagraphs (i) and (ii) of subsection (1) (g); and |
|                |                                                   | -subsection (1) (i) in respect of children of 15 years and younger. |
| 35             | Arrested, detained and accused persons            | With respect to:
|                |                                                   | -subsections (1) (a), (b) and (c) and (2) (d); |
|                |                                                   | -the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d); |
|                |                                                   | -subsection (4); and |
|                |                                                   | -subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.' |

\(^{\text{81}}\) During states of emergency in the apartheid era, detention without trial was not adequately regulated and few, if any, safeguards for the rights and dignity of those detained, were in place. The result was that detainees ‘disappeared’ and/or suffered abuse at the hands of security officers. See I Currie and J de Waal The Bill of Rights Handbook 5th ed (2005) 805 and Haysom (1989) Columbia Human Rights LR 139.
now provides, among other things, that information about the detention be published and made available to family members of detainees, that a detainee may consult legal and medical professionals and that a court may review the detention no later than 10 days after the commencement thereof. These specific safeguards seem to indicate that the experiences of the past have been taken to heart.

The detailed constitutional provisions setting out the framework for the declaration and regulation of states of emergency in South Africa also stipulate that no indemnity for any unlawful act committed pursuant to the emergency may be granted.\textsuperscript{82} Section 37(5) further prohibits any derogation of section 37 itself and derogations permitted thereby during a state of emergency. The provision is thus constitutionally secure and not under threat of amendment while a state of emergency is in place.

Outside the constitutionally envisioned emergency regulation, several Acts of Parliament and policy documents provide for disaster management\textsuperscript{83} and combating terrorism.\textsuperscript{84} The operation of these statutes does not depend on the declaration of a state of emergency, yet they invoke a sense of urgency that is usually associated with an emergency that requires extraordinary measures and, perhaps more than usual, limitations of fundamental rights. The standard for constitutionality of such legislative enactments is set by the Constitution and the limitations they impose should not exceed that which is constitutionally defensible in terms of section 36 which sets the threshold for limitation of rights.

The constitutional framework providing for the declaration and regulation of states of emergency in South Africa is comprehensive. The detail it contains can for the greater part be seen as a reaction to the experiences under apartheid. The provisions are concerned with the maintenance of public order, democracy and the rule of law and are as such in accordance with the international standards.

\section*{5 Provision for states of emergency in the Kenyan Constitution}

\textsuperscript{82} Section 37(5)(a)

\textsuperscript{83} Disaster Management Act 57 of 2002.

\textsuperscript{84} Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.
The Constitution of the Republic of Kenya that was operation until 26 August 2010, provided that the president could bring the Preservation of Public Security Act or any part thereof into operation at any time by order published in the government gazette. Insofar as the constitutional framework did not require the existence of a de facto emergency, it was similar to the Botswana Constitution. The current discussion does not require a detailed exposition of the provisions of that Constitution, but it is noteworthy that the Constitution and the Act, while providing for legislative oversight of the order, granted the president extensive powers to deal with what he perceived to be an emergency.

In more than one way, the new Kenyan Constitution marks a clear break from the past. The contrast between the previous regime and the new dispensation is stark insofar as the emergency provisions are concerned. Article 58 of the Kenyan Constitution is to a large extent modelled on section 37 of the South African Constitution. It provides that the president may declare a state of emergency only when the state is threatened by war, invasion, general insurrection, natural disaster or other public emergency and when the declaration of a state of emergency is necessary to deal with the crisis. Article 58(2) further provides that the state of emergency and any legislation enacted or action taken there under only apply prospectively for a maximum period of 14 days unless the declaration is extended by the National Assembly. The National Assembly may extend the

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85 The Preservation of Public Security Act Cap 57.
87 Section 85 also provided for revocation of the declaration by the president of the National Assembly. Subsection 5 stipulated that an order to bring the Preservation of Public Security Act in operation ceased to have effect in the event of a change of the holder of the office of the president following an election. It thus seems as if the central concern of the Constitution in relation to emergencies was with the president and his subjective views as to the existence of an emergency rather than whether an emergency existed or not. This Preservation of Public Security Act could be brought into operation for a variety of reasons, including the defence of the people or territory of Kenya, the prevention or suppression of mutiny, violence, disorder and crime and the preservation of the administration of justice (s2). Such an order expired after 28 days unless it was approved by the National Assembly. The Act, which was first enacted in 1960, contains detailed provisions outlining the power of the president to make regulations to preserve the public order. The regulations may provide for detention of persons, restriction of movement, deportation of foreigners, censorship and control of information, acquisition and requisition of property and require the provision of work or services (s 7 and see also Consideration of reports submitted by state parties under article 40: Kenya (27 September 2004) CCPR/C/KEN/2 (27 September 2004) para 40). Section 83 of the Constitution outlined the rights of persons detained during the operation of a public security order. The detainee had the right to be informed of the reason for the detention within 5 days. details of the detention had to be published in the government gazette within 14 days and the detention was to be reviewed by an independent tribunal within one month of its commencement at intervals of 6 months. Detailed provisions regarding detention under the Act are contained in subsidiary legislation to the Act. No specific provision for confirmation or approval of the regulations by the legislature is made by the Act or was contained in the Constitution. It is noteworthy that the wording employed by this constitutional emergency framework is very similar that of the Botswana Constitution. The similarity can perhaps be attributed to the colonial roots of these constitutions.

declaration by resolution following a public debate. The initial approval must be by two-thirds of the members of the Assembly and subsequent extensions must be supported by three quarters of the members of the Assembly. An approval by the National Assembly may be for no longer than two months at a time.

The measures and legislative enactments in response to the emergency may include the limitation of rights. Fundamental rights may only be limited in response to an emergency if the limitation is required by the emergency and consistent with the international obligations undertaken by Kenya in respect of emergencies. The limitation of rights does not take effect until publication in the government gazette. Article 25 of the Kenyan Constitution lists freedom from torture and cruel, inhuman or degrading treatment and punishment, freedom from slavery and servitude, the right to a fair trial and the right to an order of habeas corpus as non-derogable. Specific constitutional provision is made for the detention without a trial during an emergency by way of an internal limitation of the right to freedom and security of the person. Such detention will only be constitutionally defensible if objectively required by the emergency which itself is constitutionally unassailable.

Article 58(5) details the aspects of judicial review in respect of states of emergency. The Supreme Court has the authority to decide on the validity of the declaration, the extension of a state emergency and any legislative or other measures taken in response to the emergency. The Constitution also determines that no indemnity may be granted to the state or any person for unlawful actions or omissions in the declaration of a state of emergency or legislation passed or action taken under the state of emergency.

It is evident that the drafters of the Kenyan Constitution took heed of the international framework relevant to states of emergencies and the provision for emergencies in other constitutional democracies. The new constitution provides for legislative and judicial oversight of the declaration of a state of emergency which may only be temporary and may only limit rights if objectively necessary. The relative novelty of this constitutional framework for emergencies means that the requisite supportive legislative provisions are not yet in place. Instead old order legislation remains on the statute book. The Preservation of Public Security Act Cap. 57 and the Public Order Act Cap. 56 place

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89 Article 58(6).
90 Article 29(b).
significant constraints on fundamental rights and place extensive powers in the hands of the executive when confronted with an emergency and both are arguably unconstitutional. Attention from the legislature is required.

6 Constitutional provision for states of emergency considered
The three constitutional frameworks described above share the international standards’ underlying approach and they comply to lesser or greater extent with the standards as indicated above. The international standard, and the different reflections thereof in the three constitutions, aim to accommodate emergency rule within the constitutional framework. Gross and Aoláin⁹¹ in their comprehensive analytical treatise on emergency rule, identify this approach within the fold of models of accommodation.⁹² The understanding is that provision for the declaration and management of emergencies as a temporary measure within the existing legal order best serve the rule of law and democratic principles.⁹³ Different models of accommodation exist. Provision for emergency rule can be made in the constitution itself, in special legislative enactments⁹⁴ or through interpretation of the existing rules.⁹⁵ In various forms, accommodation models attempt to strike a balance between granting extensive powers to the executive to deal with the emergency and minimising the risk for abuse of powers and infringement of human rights.⁹⁶ Typically the determination of whether an emergency exists is left to the executive. The power to make regulations to deal with the emergency is similarly vested in the executive. But these powers are subject to constitutional checks that usually take the form of legislative oversight and/or judicial review.⁹⁷

⁹¹ Gross and Aoláin Law in Times of Crisis (2006) chapter 1. Various other models exist, see for example J Ferejohn and P Pasquino ‘The law of the exception: a typology of emergency powers’ (2004) International Journal of Constitutional Law 210; T Poole ‘Constitutional exceptionalism and the common law’ (2009) International Journal of Constitutional Law 247 and S Levinson and J Balkin ‘Constitutional dictatorship: its dangers and designs’ (2010) Minnesota LR 1790. The models put forth by Gross and Aoláin are wide enough to include the various other propositions. In addition to the accommodation models, the authors identify the ‘business as usual model’ (chapter 2) which is based on the premise that the law as it is, is sufficient to deal with the emergency. (See also Scheppele 126.) This model is not discussed in detail here since the constitutions under consideration all aim to accommodate states of emergency within the legal framework.
⁹² Gross and Aoláin 35-66.
⁹³ Gross and Aoláin 17.
⁹⁴ Gross and Aoláin 66-72.
⁹⁵ Gross and Aoláin 72-79.
⁹⁶ Gross and Aoláin 62-63.
⁹⁷ Gross and Aoláin 63.
The constitutional frameworks for the accommodation of emergencies in Botswana, South Africa and Kenya reflect flexibility that allows the executive to respond to emergencies quickly and in appropriate ways.\textsuperscript{98} The flexibility however creates scope for abuse of emergency powers.\textsuperscript{99} The generously worded emergency provision in the Constitution of Botswana and the curious declaration of a state of emergency in that country in 1999 provide a crude illustration of the potential for abuse of extensive and flexible emergency powers. It will be recalled that the wording of the Constitution of Botswana does not stipulate that an emergency may only be declared when one exists; the determination is left entirely up to the president. Shortly before the general elections in 1999 and after Parliament had already been dissolved in anticipation of the elections, it was discovered that more than 60 000 voters were to be disenfranchised because the electoral roles have not been certified timeously in terms of the Electoral Act. Only Parliament could rectify the situation through amendment of the Electoral Act. Pursuant to the provision in the Constitution that allows the president to recall Parliament after its dissolution during a state of emergency,\textsuperscript{100} the president declared a state of emergency for the sole purpose of recalling Parliament. No real emergency existed and the state of emergency lasted only one day.\textsuperscript{101} The declaration of a state of emergency under these circumstances was ill-advised and serves to illustrate how the flexibility of the constitutional accommodation of emergency powers renders such powers susceptible to abuse.

Theoretically, the legislative and judicial oversight of the exercise of emergency powers that is provided for in the constitution should prevent the abuse of these powers. In reality, however, legislatures and courts in different jurisdictions have deferred to the executive when it comes to the exercise of emergency powers.\textsuperscript{102} In the face of an emergency that threatens the life of the nation, neither of these institutions has proven to be willing to take a firm stance in opposition to the executive’s appraisal that an emergency exists which

\textsuperscript{98} Gross and Aloáin 81.
\textsuperscript{99} Scheppele 125-126 and Gross and Aloáin 80.
\textsuperscript{100} Section 91(5) of the Botswana Constitution.
\textsuperscript{101} See Ntanda Ntsereko para 651; P Cailleba and RA Kumar ‘Democratic statecraft versus political legitimacy: the case of Botswana’ (22-24 May 2008) paper delivered at the 11th Conference of Africanists, Moscow, Russia 35 at 37.
\textsuperscript{102} Gross and Aloáin 64-66 and 81. See also Scheppele 137-138. Scheppele provides numerous examples of legislatures deferring to the executive by granting extraordinary powers to the executive in ordinary legislation which the latter may invoke when it deems this necessary (Canada 1914, India 1962 and 1975); by delegating legislative authority to the executive (Colombia 1958-1974, Ghana 1960s, Germany 1933, India 1975) or by granting the executive the power to act outside the normal legal constraints (Ghana 1964; India 1962 and 1975). Courts are often sidelined (by the appointment of special tribunals during emergencies such as that in Hungary 1962); their decisions ignored (Ghana 1964, 1975 and 1977) or they undermine their own authority during emergencies by refusing to rule on the existence of an emergency (Columbia 1955-1974).
calls for extreme measures limiting fundamental rights. This deference to the executive stems from the wide discretion of the executive branch in matters concerning national security. The provision for emergency rule in the Botswana, South African and Kenyan constitutions have not been tested through application during a de facto emergency and whether the legislature and the judiciary of these jurisdictions will take a deferential stance when considering the constitutionality of the declaration of a state of emergency or emergency measures is unclear. Experience in other jurisdictions seems to indicate that they will defer to the executive and ‘rally around the flag’ in the face of an emergency.

At the root of the international law and national law attempts to accommodate emergency rule is the premise of a dichotomy between emergency and normalcy. The understanding is that an emergency is a temporary exception requiring exceptional short-term measures which may include suspension or severe curtailment of human rights. Once normalcy is restored, the emergency measures are to fall away and the ordinary law is applied once again. The emergency frameworks within the constitutions of Botswana, South Africa and Kenya reflect this dichotomy explicitly by providing for the invocation of emergency powers following an official declaration of an emergency which will be of limited duration. Experience worldwide has shown that the black-and-white distinction between normalcy and emergency overlooks the many shades of grey in between. Emergency and normalcy do not necessarily occupy clearly distinguishable and exclusive time-frames. Examples from the recent past in Kenya and South Africa illustrate this point.

Shortly after the 2007 general elections in Kenya, violence erupted in different parts of the country. In the period between 27 December 2007 and 29 February 2008, 1133 people were killed and 3561 injured in post-election violence. The violence was, at least in

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103 Gross and Aoláin 64 referring to the work of Bruce Russett.
106 Gross and Aoláin 174.
some instances, the result of organised political groups thus indicative of insurrection. The new Constitution of Kenya with its detailed emergency provisions was not in place at time. Its predecessor, however, also provided for the accommodation of emergency rule by allowing the president to bring the Preservation of Public Security Act into operation. Rightly or wrongly, no reliance was placed on the emergency provisions and the various government agencies had to deal with the crisis without the additional powers that the Preservation of Public Security Act would have granted them. Previously, the provisions of this Act were put in place in times of political violence.\textsuperscript{108} The failure to invoke emergency rule during this time when large scale grave human rights violations took place illustrates the fallacy of the emergency/normalcy dichotomy, especially given the finding that the government agencies were not able to deal with violence effectively.\textsuperscript{109} The example from South Africa is fairly similar.

In May 2008, widespread violence against foreign nationals broke out in townships all around South Africa.\textsuperscript{110} More than 60 people were killed as a result of the violence. No state of emergency was declared in any part of the country and government agencies had to deal with the outbreak of violence in accordance with its ordinary powers. Did the xenophobic violence of May 2008 represent normalcy or emergency in South Africa? It is possible to argue that the violence justified the implementation, for example, of a curfew and that it, as such warranted the invocation of emergency rule. But it is also possible to argue that the ordinary law provided an adequate framework for dealing with public violence and that May 2008 was a month as normal as any other. Whatever one’s view on this particular point may be, it is evident that the violence of May 2008 caught several governmental agencies unaware and under-prepared.\textsuperscript{111}

\subsection*{7 Conclusion and the way forward}

The constitutions of Botswana, South Africa and Kenya are for the most part compliant with international law standards insofar as emergency rule is concerned. There is provision for the formal declaration of a temporary state of emergency, the proclamation of emergency measures and legislative and judicial oversight.

\textsuperscript{108} Waki Report 80.
\textsuperscript{109} Waki Report chapter 11.
\textsuperscript{111} SAHRC Report chapter 3.
But international law standards, and thus, the constitutions of the three countries are premised on a dichotomy that eschews reality. This affects the ability of a government to respond to an emergency effectively as is evident from the discussions of the post-election violence in Kenya and the xenophobic violence in South Africa above. Is there an alternative? Or how can the existing system be tailored to more attuned with reality?

Schepele suggests that an alternative to accommodation of emergency rule would be to ‘normalize emergency government within the constitutional order rather than constitutionalize emergency exceptions to normal government’.

Gross and Aloáin provide a different alternative. They propose an ‘extra-legal measures model’ which allows public officials to respond to an emergency through extra-legal means (i.e. beyond that which is allowed by the law) but which also requires public officials to disclose the nature of their actions fully to the people. The people are then called upon to respond to these actions, either by approval or rejection thereof. They can approve and ratify the actions of the public officials or they can hold the officials responsible for their wrongful actions, either through criminal prosecution or through the political process. They authors argue that this approach is more realistic than the accommodation model and that it respects the sovereignty of the people who ultimately decide whether the actions of the public officials should be condoned.

Both proposals are quite radical and they require a change in the constitutional design of countries without providing any guarantee that either model would enable government to deal with crises effectively while minimising the adverse impact of emergency rule on human rights. Instead of throwing the baby out with the bathwater, I would suggest a more modest adjustment of the constitutional accommodation model in order to address some of its shortcomings.

112 Schepele 127. See the rest of the chapter for details regarding this proposal.
113 Gross and Aloáin 111-112. See chapter 3 for details regarding this model.
The adjustments I would like to suggest relate mostly to oversight powers. In addition to the legislative and judicial oversight of the declaration of a state of emergency and the measures taken thereunder, a third tier of review is to be introduced to ensure that the declaration of the state of emergency and its measures are constitutionally defensible. The body that performs this oversight task has to be independent and capable of objective assessment. In order to come to its decisions, the body must have access to information from various sources. Representatives of the three branches of government and civil society (e.g. organised business, organised labour etc) are to make up this review body which has to be empowered to terminate the state of emergency and veto proposed emergency measures. In order to address the failure of states to invoke emergency powers where emergencies seemingly exists, the proposed body should also be empowered to convene on own accord and recommend the declaration of a state of emergency and measures to be taken thereunder to the president. This additional safeguard to address the shortcomings of the accommodation model does not address the normalcy/emergency dichotomy that underpins the model. But it proposes a means to manage this flawed premise within the framework of the rule of law.

115 Hatchard, Ndulo and Slinn 281.