



Law and Emergencies: A Comparative Overview

The Minerva Center for the Rule of Law under Extreme Conditions

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Emergency Laws and Regulations in South Africa: Executive Summary

Legislative Framework

The main legislation concerning emergencies is the South African Constitution and The Disaster Management Act of 2002 (DMA) which provides a generic framework for facing an emergency. Declaration is in accordance with the Constitution where DMA focuses on four elements – establishing an institutional framework for disaster management; policy development and strategic planning framework; classification of disasters; and funding of post disaster recovery and rehabilitation. There is additional legislation defining specific emergencies (e.g., War, Fire, Nuclear disaster, ect.)

Entrance into a State of Emergency

A generic emergency is defined by the DMA as a progressive or sudden, widespread or localized, natural or human-caused occurrence which causes or threatens to cause death, injury or disease; damage to property, infrastructure or the environment; or disruption of the life of the community. According to the Constitution, the power to declare a disaster is vests in the Parliament, as a state of emergency may be declared “only in terms of an Act of Parliament”. However, the constitution, the DMA and the State of emergency act 64 of 1997 authorize the declaration of a state of emergency by the President, the Minister of Co-operative Governance and Traditional Affairs, the Premier (at the provincial level) and the municipal council (at the municipal level) under certain conditions. A state of emergency that was declared through the constitution lapses no more than 21 days; if declared through DMA it lapses three months (and in both cases may be terminated before that or extended.)

Legal Powers

During a state of an emergency the president may make such regulations as are necessary or expedient to restore peace and order

and to make adequate provisions for terminating the state of emergency, or to deal with the circumstances which have arisen or are likely to arise as a result of the state of emergency. Additional authorities are granted to the National Disaster Management Center. Powers in specific type of emergencies are specified below.

Rights in a State of Emergency

According to South Africa Constitution, rights may be limited only “in terms of law general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” while taking into account relevant factors, such as the nature of the right and the purpose and period of limitation. Additionally, the Constitutions contain a specific reference to rights under a state of emergency, stating that any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required and that restricting legislation is consistent with the Republic’s obligations under international law; conforms to subsections of the constitution; and is published in the national Government Gazette.

Emergency Laws and Regulations in South Africa: Synopsis

Introduction

South Africa has a well-developed suite of disaster management policy and legislation. Almost all of its legislative instruments were developed since 1994, the year in which South Africa became a constitutional democracy (four years into the post-apartheid regime). The most important legal instrument is the 1996 constitution¹. It defines all organs of state, their relations, balance of power and a blueprint for the structure of governance.²

1. The Legislative Framework

The legislative structure, concerning disaster management, mainly comprises three tiers. First, there is a well-developed set of generic policies and laws dealing specifically with disaster management. Second, there are statutes concerning specific types of disasters. Finally, there are laws and policies regulating day to day issues (environmental issues, water resources, building and construction, etc.) that have specific provisions relating to disaster reduction, response and rehabilitation.³ The main legislative documents dealing with emergencies are the constitution⁴ and the Disaster Management Act of 2002 (DMA) which provides a generic framework for facing an emergency. The disaster management act focuses on four different elements: (1) it establishes an elaborate institutional framework for disaster management. (2) It entrenches a detailed policy development and strategic planning framework for disaster management. (3) It provides for the classification and declaration of disasters. (4) It addresses the funding of post disaster recovery and rehabilitation.⁵ Once an emergency has been declared according to the act, section 37 of the South African constitution comes to affect.

¹ The constitution of the republic of South Africa, 1996.

² Richard Wilson, *The Politics of Truth and Reconciliation*, in *South Africa: Legitimizing the post-Apartheid State* (Cambridge: Cambridge University Press 2001).

³ Tracy Humby, *Analysis of legislation related to disaster risk reduction in South Africa*, International Federation of Red Cross and Red Crescent Societies, Geneva, p.27 (2014).

⁴ FN 1, The constitution.

⁵ FN 3, Humby. 2-8.

Below is a non-comprehensive list of laws dealing with emergencies and extreme conditions in South Africa:

Law	Dealing with
The constitution of the republic of South Africa, 1996, section 37	All emergencies
Disaster Management Act of 2002	All emergencies
State of emergency act 64 of 1997	All emergencies
National Veld and Forest Fire Act, 1998	Fire
Fire Brigade Services Act of 1987	Fire
Defense Act 42 of 2002	War
Nuclear regulation act of 1999	Nuclear disaster
Safety at Sports and Recreational Events Act of 2010	Safety at Public gathering
National Environmental Management Act 107 of 1998	Environmental emergencies
National Water Act 36 of 1998	Pollution of water resources following an emergency incident
Local government: municipal finance management act 56 of 2003.	Management of the financial affairs of municipalities and other local institutions

2. Declaration of a State of Emergency: A Table of Analysis⁶

According to the constitution of South Africa, “A state of emergency may be declared only in terms of an Act of Parliament”.⁷ However, the constitution, the Disaster management Act 57 of 2002 and the State of emergency act 64 of 1997 authorize the declaration of a state of emergency by the president, the Minister of Co-operative Governance and Traditional Affairs, the Premier or a Municipal council as follows:

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
Generic emergency	<p>According to the disaster management act an emergency is: a progressive or sudden, widespread or localized, natural or human-caused occurrence which (a) causes or threatens to cause: (i) death, injury or disease;</p> <p>(ii) damage to property, infrastructure or the environment; or</p>	<p>The power to declare a disaster vests in the relevant political head of each sphere:</p> <p>(1) National level:</p> <p>When the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order⁹,</p> <p>(i) The president may by proclamation in the gazette declare a state of emergency in the republic or any area within the republic. The reasons for the declaration of the state of</p>	<p>A state of emergency lapses three months after it has been declared.</p> <p>However, it may also be terminated by the Minister by notice in the gazette before laps three months.</p> <p>In addition, it may be extended by the Minister by notice in the gazette for one month at a time.¹⁷</p> <p>The President may at any time withdraw the proclamation by like proclamation in the Gazette.¹⁸</p> <p>Note¹⁹: if an emergency has been</p>

⁶ Note: since 1990, the beginning of the post-apartheid regime, the ministry of justice in South Africa has not administrated any laws or acts concerning terrorism events.

⁷ FN 1, The Constitution, §37(1).

⁹ Id. The Constitution §37(1)(2).

	<p>(iii) Disruption of the life of the community; and (b) is of a magnitude that exceeds the ability of the affected by the disaster to cope with its effect using only their own resources.⁸</p>	<p>emergency shall be stated briefly in the proclamation.¹⁰</p> <p>(ii) The parliament can declare an emergency through section 37 of the constitution</p> <p>(iii) In an event of national disaster, the Minister of Co-operative Governance and Traditional Affairs can declare an emergency¹¹.</p> <p>(2) Provincial level: the Premier can declare an emergency in an event of a provincial disaster.¹²</p> <p>(3) Municipal level: the municipal council can declare an emergency in an event of a local disaster.¹³</p> <p>Note: The classification of a disaster as national, provincial or local is determined by the National Disaster Management Center.¹⁴</p> <p>The main criterion for classification is the spatial</p>	<p>declared through the constitution (not through the disaster management act), it lapses no more than 21 days unless the National Assembly resolves to extend the declaration.</p> <p>The Assembly may extend a declaration of a state of emergency for no more than three months at a time.</p> <p>The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be, by a resolution, adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution may be</p>
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¹⁷ Disaster Management Act 57 of 2002, §27(5). No limit on number of extensions was found.

¹⁸ State of emergency act 64 of 1997, § 1.

¹⁹ FN 1, The Constitution, §37(2).

⁸ Disaster Management Act 57 of 2002, §1.

¹⁰ State of emergency act, § 1.

¹¹ FN **Error! Bookmark not defined.**, Disaster Management Act, § 27

¹² Id. § 41.

¹³ Id. § 55.

¹⁴ Id. § 23, 35, 49.

		<p>scope of the disaster and the capacity of the relevant sphere of government to deal with the disaster effectively.¹⁵</p> <p>Until a disaster is classified it is regarded as a local disaster.¹⁶</p>	<p>adopted only following a public debate in the Assembly.²⁰</p>
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¹⁵ Id. §23 (4)-(6).

¹⁶ Id. § 23(7).

²⁰ FN 1, The Constitution §37(2)(b)

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
War	According to the defense act ²¹ a state of emergency is as contemplated in section 37 of the South African constitution.	A national state of emergency is declared according to section 37 of the South African constitution and the emergency management act.	
Nuclear disaster	According the nuclear act ²³ an emergency is defined as "nuclear accident". Thus, any occurrence or succession of occurrence having the same origin which: (1) Results in the release of radioactive material, or a radiation dose, which exceeds the safety standards. (2)Is capable of causing nuclear damage.	The law does not require a formal declaration of a state of emergency. However, it mentions that If a nuclear accident occurs in connection with a nuclear installation, nuclear vessel or action, the holder of the nuclear authorization in question must Immediately report it to the regulator and to any other person described in that nuclear authorization. ²²	

²¹ Defence Act 42 of 2002.

²² §37 Nuclear regulation act of 1999.

²³ Nuclear regulation act of 1999.

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
Public gathering	<p>The Safety at Sports and Recreational Events Act of 2010 ²⁴ deals primarily with measures to ensure the safety and security of people attending large-scale sporting or recreational events.²⁵</p> <p>There is no plain definition of an emergency, but one can have some idea of it by understanding the main purpose of the act.</p> <p>The main purpose focuses on protecting from any harm the physical well-being, safety and rights of all persons attending public recreational gathering.</p>	The law does not require a formal declaration of a state of emergency.	

²⁴ Safety at Sports and Recreational Events Act of 2010.

²⁵ Note: the act was initiated after a disaster called: "the Ellis Park tragedy" in which 43 people lost their lives as a result of overcrowded sporting event. For a case study of this incident see Douglas M. Bowley, Paddy Rein, Hendrik J. Scholtz & Kenneth D. Boffard (2004) 'The Ellis Park Stadium tragedy' 1 European Journal of Trauma 51-5.

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
Environmental emergency	An environmental emergency incident is defined as: an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potential serious pollution of or detrimental to the environment, whether immediate or delayed. ²⁸	The law does not require a formal declaration of a state of emergency but refers to an obligation (of the man responsible) ²⁶ to report to a number of state agencies about the emergency incident. ²⁷	
Pollution of water resources following an emergency incident	An emergency incident refers to a simple incident or an accident, in which a substance pollutes or has the potential to pollute a water resource, or has, or is likely to have a detrimental effect on a water resource. ³⁰	The law does not require a formal declaration of a state of emergency but refers to an obligation (of the man responsible) to report to a number of state agencies about the emergency incident which caused/ may cause the pollution ²⁹	

²⁶ § 30(1)(b) National Environmental Management Act 107 of 1998.

²⁷ Id. § 30(3).

²⁸ Id. §30

²⁹ §20 (3) , National Water Act 36 of 1998.

³⁰ Id. §20

Note: since 1990, the beginning of the post-apartheid regime, the ministry of justice in South Africa has not administrated any laws or acts concerning terrorism events.

Judicial review

In addition to the varied laws concerning the declaration of an emergency, it is important to mention the constitution defines a Judicial review clause that states that any competent court may decide on the validity of a declaration of a state of emergency, extension of a declaration or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.³¹

3. Legal Powers

Emergency regulations

The President may declare a state of emergency in the Republic or in any area within the Republic.³² In a state of an emergency the president may, in respect of the republic or of any area in which the state of emergency has been declared and for as long as the proclamation declaring the state of emergency remains of force, by proclamation in the gazette make such regulations as are necessary or expedient to restore peace and order and to make adequate provisions for terminating the state of emergency, or to deal with the circumstances which have arisen or are likely to arise as a result of the state of emergency.³³

These regulations may provide for³⁴:

³¹ FN 1, The Constitution, §37(3).

³² FN 10, State of emergency act, § 1 .

³³ Id. § 2.

³⁴ Id. §2(2).

- The empowering of persons or bodies to make orders, rules and bylaws for any of the purpose for which the president is authorized to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or bylaws.
- The imposition of penalties for any contravention or failure to comply with the provisions of the regulations or any directions issued or conditions prescribed by or under the regulations. These 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.

However, these regulations are limited and could not³⁵:

- Be inconsistent with section 37 of the constitution.³⁶
- Authorize an imprisonment for a period exceeding three years.
- Authorize to render military service other than provided for in the defense act, 1957.³⁷
- Change elements and personnel in the South African parliament.

Parliamentary supervision

A copy of any proclamation declaring a state of emergency and of any regulation, order, rule or bylaw made in pursuance of any such declaration shall be laid upon the Table in Parliament by the President as soon as possible after the publication thereof.

In addition, the National Assembly may disapprove of any such regulation, order, rule or bylaw or of any provision thereof; or make any recommendation to the President in connection with any such proclamation, regulation, order, rule, bylaw or provision.³⁸

³⁵ Id. §2(3).

³⁶ The section concerns a state of emergency.

³⁷ Defense Act 44 of 1957.

³⁸ FN 9, state of emergency act, §3.

(General emergency powers)

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power	Statue and Article
Fire	<p>Chapter 5 places a duty on all owners to acquire equipment and have available personnel to fight fires. Certain persons and officials are given the power to enter land and fight fires in an emergency. It provides for agreements to be entered into between the Minister and fire protection associations, or between such associations, to assist each other in the case of a fire.</p> <p>(1) The power to enter land and fight fires in an emergency.</p> <p>(2) In taking control over the fighting of a fire a fire officer is allowed to:</p> <p>(a) Take control from any person who has, until his or her arrival, controlled the fighting of the fire;</p> <p>(b) Order any person who is apparently not younger than 16 years and not older than 60 years to assist him or her.</p> <p>(3) Any person, in case of a fire emergency, may, if he or she considers it necessary for the protection of life, property or the environment or for preventing a fire from spreading or for</p>	<p>Powers 1,2 - fire protection officers, police officer, and an officer appointed in terms of section 5 or 6 of the Fire Brigade Services Act, 1987 (Act No. 99 of 1987).</p> <p>Power 3- any person.</p>	<p>Fire emergency according to its definition in the National Veld and Forest Fire Act, 1998.</p>	<p>National Veld and Forest Fire Act, 1998, Chapter 5 (articles 17-19).</p>

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power	Statue and Article
	extinguishing it— (a) Enter any land; (b) Destroy trees, grass, crops or other vegetation; (c) Enter or break and enter any premises; (d) Prevent any person from entering any premises; (e) Forcibly remove from the scene any person who is in danger or who obstructs him or her in the performance of his or her duties; and (f) Remove or order to be removed any vehicle or other thing.			
War	The power to authorize the employment of the Defense Force for service inside the Republic.	The President or the Minister of Defense.	The employment can be authorize only in order to: <ul style="list-style-type: none"> • Preserve life, health or property in emergency or humanitarian relief. • Ensure the provision of essential service. • Support any department of state, including support for purposes of socio-economic upliftment. 	Defence Act 42 of 2002, articles 18-20, 59.

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power	Statue and Article
			<ul style="list-style-type: none"> Effect national border control. <p>In addition, according to the defense act, once a state of emergency has been declared every person who is contracted to serve in the Defense Force is obliged to serve and remain in service.</p>	

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power	Statue and Article
Nuclear disaster	<p>Performing emergency precaution acts like stating that no unauthorized person may enter any premises which:</p> <p>(1) Are under the control of the Regulator</p> <p>(2) The Regulator has identified as premises where information relating to the Safety and security of or on a nuclear installation is kept.</p>	The regulator.	If a nuclear accident occurs in connection with a nuclear installation, nuclear vessel or action.	Nuclear regulation act of 1999, articles 37, 42.

Public gathering	(1) Entering a public gathering place to conduct an inspection and make such inquiries as may be necessary to ensure compliance with this act.	A person appointed in writing as an inspector by a local authority.	The inspector appointed can exercise its powers anytime.	Safety at Sports and Recreational Events Act of 2010, article 14.
Environmental emergency	(1) Question a person about any act or omission in respect of which there is a reasonable suspicion that it might constitute an offense in terms of the National Environmental Management Act 107 of 1998. (2) Seizing anything contained in or on any vehicle, vessel, aircraft or pack-animal that may be used as evidence in the prosecution of any person for an offence in terms of this Act or a specific environmental management Act.	An environmental management inspector.	The inspector appointed can exercise its powers anytime.	National Environmental Management Act 107 of 1998, articles 30-31.
Pollution of water resources following an emergency incident	Recover all reasonable costs incurred by it from every responsible person jointly and severally.	The catchment management agency.	Pollution of water resources following an emergency incident, such as an accident involving spilling of a harmful substance that finds or may find its way into a water resource.	National Water Act 36 of 1998, article 20(7).

National Disaster Management Center

The Disaster Management Act establishes the "National Disaster Management Center" which assumes a key role facing national emergencies³⁹. Its objective is to promote an integrated and coordinated system of disaster management, which specializes in

³⁹ FN 3, Humby, p. 6.

prevention and mitigation, by national, provincial and municipal organs of state.⁴⁰

General Powers of the "National Disaster Management Center":⁴¹

- Monitor whether organs of the state and statutory functionaries comply with this Act and the national disaster management framework and must monitor progress with post-disaster recovery and rehabilitation.
- Act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management.
- Act as an advisory and consultative body on issues concerning disasters and disaster management to:
 - Organs of state and statutory functionaries.
 - The private sector and non-governmental organizations.
 - communities and individuals; and other governments and institutions in southern Africa
- Make recommendations regarding the funding of disaster management and initiate and facilitate efforts to make such funding available.
- Make recommendations to any relevant organ of state or statutory functionary.
- Promote the recruitment, training and participation of volunteers in disaster management.
- Promote disaster management capacity building, training and education throughout the Republic, including in schools, and, to the extent that it may be appropriate, in other southern African states.
- Promote research into all aspects of disaster management.
- Exercise any other powers conferred on it, and must perform any other duties assigned to it in terms of this Act.
- Engage in any lawful activity, whether alone or together with any other organization in the Republic or elsewhere, aimed at promoting the effective exercise of its powers or the effective performance of its duties.

The powers of the "National Disaster Management Center concerning the classification and recording of disasters⁴²

⁴⁰ FN8, Disaster Management Act.

⁴¹ Id. §15.

⁴² FN 8, Disaster Management Act, §23.

- When a disastrous event occurs or threatens to occur, the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so. The National Centre must immediately —
 - Assess the magnitude and severity or potential magnitude and severity of the disaster;
 - Classify the disaster as a local, provincial or national disaster.
 - Record the prescribed particulars concerning the disaster in the prescribed register.
- May reclassify a disaster classified in terms of subsection (1)(b) as a local, provincial or national disaster at any time after consultation with the relevant provincial or municipal disaster management centers.

Provincial level

The Disaster Management Act provides that provincial and municipal disaster management frameworks/plans may identify incentives that will promote disaster risk reduction amongst communities. Thus, it establishes the "provincial disaster centers".⁴³

General Powers of the "Provincial Disaster Management Center"⁴⁴

- Promote an integrated and coordinated approach to disaster management in the province, with special emphasis on prevention and mitigation.
- Act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management in the province.
- Act as an advisory and consultative body on issues concerning disasters and disaster management in the province.

⁴³ FN 3, Humby, p. 8.

⁴⁴ FN 8, Disaster Management Act, §30.

- Make recommendations to any relevant organ of state or statutory functionary.
- Promote the recruitment, training and participation of volunteers in disaster management in the province.
- Promote disaster management capacity building, training and education, including in schools, in the province.
- May exercise any powers and must perform any duties delegated and assigned to it.
- A provincial disaster management center may engage in any lawful activity in the province, whether alone or together with any other organization, aimed at promoting the proper exercise of its powers or performance of its duties.
- A provincial disaster management center must liaise and co-ordinate its activities with the National Centre and the municipal disaster management centers in the province.

Municipal disaster management centers⁴⁵

Municipal-level involvement in decision-making takes place through the representation of municipalities on provincial co-ordination structures as the provincial and municipal advisory forums. While the Disaster Management Act⁴⁶ includes references to the use of indigenous knowledge in processes of disaster risk assessment and disaster management planning, in terms of the provincial disaster management frameworks, indigenous knowledge appears to be used in a very limited sense to determine the frequency and intensity of hazardous events.⁴⁷

The responsibilities of the Municipal disaster management centers in an event of local disaster⁴⁸:

- Irrespective of whether a local state of disaster has been declared:
 - The council of a metropolitan municipality is primarily responsible for coordination and management of local disasters that occur in its area.
 - The council of a district municipality, acting after consultation with the relevant local municipality, is primarily responsible for the coordination and management of a local disaster that occur in its area.

⁴⁵ Id. §54.

⁴⁶ Id. §43-55.

⁴⁷ FN 3, Humby, 8 [The international federation of the red cross and red crescent states that it could play a greater role in better understanding communities' perceptions, responses and actions to emergency events.]

⁴⁸ FN 9, Disaster Management Act, §54.

- The municipality having primary responsibility for the coordination and management of a local disaster must deal with a local disaster:
 - In terms of existing legislation and contingency arrangements, if a local state of emergency has not been declared.
 - In terms of existing legislation and contingency arrangements as augmented bylaws or directions made or issued, if a local state of disaster has been declared.

4. Rights in a State of Emergency

South Africa is known for its well-developed "bill of rights", described in chapter 2 of the South African constitutions.⁴⁹ In general, the rights in the bill may be limited only "in terms of law general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the relevant factors:

- The nature of the right.
- The importance of the purpose of the limitation.
- The nature and extent of the limitation.
- The relation between the limitation and its purpose.
- Less restrictive means to achieve the purpose."⁵⁰

In addition, there is a specific reference to the status of the different rights in a state of emergency.⁵¹ According to the constitution, any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that:

- The derogation is strictly required by the emergency
- The legislation:
 - Is consistent with the Republic's obligations under international law applicable to state of emergency.
 - Conforms to subsections of the constitution.
 - Is published in the national Government Gazette as soon as reasonably possible after being enacted.

Any act or emergency legislation must not, however, permit any derogation from non-derogable rights listed, to this extent⁵²:

- The "equality" section of the bill of rights⁵³ - with respect to unfair discrimination solely on the grounds of race, colour,

⁴⁹ FN 3, Humby, 28; RICHARD J. GOLDSTONE, *The South African Bill of Rights*, 32 *Tex. Int'l L. J.* 451 (1997).

⁵⁰ FN 1, *The Constitution*, §36.

⁵¹ *Id.* §37.

⁵² *Id.*

⁵³ *Id.* §9.

ethnic or social origin, sex, religion or language.

- The "human dignity" section of the bill⁵⁴- entirely.
- The "life" section of the bill⁵⁵ - entirely.
- The "freedom and security" section of the bill⁵⁶ - with respect to: the right not to be tortured, the right not to be treated or punished in a cruel, inhuman or degrading way and the right not to be subjected to medical or scientific experiments without their informed consent.
- The "slavery, servitude and forced labor" section of the bill⁵⁷ - with respect to slavery and servitude.
- The children's section of the bill⁵⁸ - with respect to: (1) the right to be protected from maltreatment, neglect, abuse or degradation and exploitative labor practices. (2) The right to be required or permitted to perform work or provide services that is inappropriate for a person of that child's age; or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development. (3) The right not to be used directly in armed conflict, and to be protected in times of armed conflict.
- The "Arrested, detained and accused persons" section of the bill⁵⁹ - with respect to: (1) the right to remain silent (to be informed promptly of the right and its consequences). (2) The right not to be compelled to make any confession or admission that could be used in evidence against that person. (3) The right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. (4) The right to a fair trial. (5) The right to receive information a language that the person understands. (5) The right to exclude evidence if the admission of that evidence would render an unfair trial.

⁵⁴ Id. The Constitution, §10.

⁵⁵ Id. §11.

⁵⁶ Id. §12.

⁵⁷ Id. §13.

⁵⁸ Id. §28.

⁵⁹ FN 1, The Constitution, §35.

Emergency funding, financing and rehabilitation

Facing an emergency requires, beside well organized emergency management structure, a great amount of funding. In The South African legislative system there are specific provisions on emergency funding which are set out in three different laws.

The Disaster Management Act

Chapter 6 of the Disaster Management Act provides the basic principles for the funding of disasters by the national, provincial and local spheres of government.⁶⁰ When a disaster occurs the following principles apply⁶¹:

- National, provincial and local organs of state may financially contribute to response efforts and post-disaster recovery and rehabilitation.
- The cost of repairing or replacing public sector infrastructure should be borne by the organ of state responsible for the maintenance of such infrastructure.

In addition, the Disaster Management Act states that the national government may aid with financial assistance to the provincial and municipal organs to face their state of emergency. It should take into account the following elements:⁶²

- Whether any prevention and mitigation measures were taken, and if not, the reasons for the absence of such measures.
- Whether the disaster could have been avoided or minimized had prevention and mitigation measures been taken.
- Whether it is reasonable to expect that prevention and mitigation measures should have been taken in the circumstances.
- Whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence of inadequacy of insurance cover.
- The extent of financial assistance available from community, public or other non-governmental support programs; and the magnitude and severity of the disaster, the financial capacity of the victims of the disaster and their accessibility to commercial insurance.

⁶⁰ FN 3, Humby, 32.

⁶¹ FN 9, Disaster Management Act, §56.

⁶² Id.

Furthermore, when a municipality or a province, in the event of a local or provincial disaster, requests the national government to financially contribute to post-disaster recovery and rehabilitation, the following factors may be taken into account:⁶³

- Whether any prevention and mitigation measures were taken or initiated by the municipality or province, and if not, the reasons for the absence of such measures.
- Whether the disaster could have been avoided or minimized had prevention and mitigation measures been taken.
- Whether it is reasonable to expect that prevention and mitigation measures should have been taken or initiated in the circumstances by the municipality or province.
- Whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence of inadequacy of insurance cover.
- The magnitude and severity of the disaster and whether or not available financial resources at local level, or if it is a provincial disaster, at provincial level, are exhausted.

The Public Finance Management act⁶⁴

The Public Finance Management act's main purpose is to regulate the financial management in the national and provincial governments. Thus, it provides specific guidelines for the national and provincial governments of how to use their funds in emergency situations:⁶⁵

- The Minister of finance may authorize the use of funds from the national/ provincial revenue fund to defray expenditure of an exceptional nature which is currently not provided for, and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds.
- The combined amount of any authorizations may not exceed two per cent of the total amount appropriated in the annual national budget for the current financial year.
- An amount authorized is in a direct charge against the national/ provincial revenue fund.

⁶³ Id. §57.

⁶⁴ Public Finance Management act 29 of 1999.

⁶⁵ Id. Public Finance Management, § 16,25..

- An amount authorized must be reported to parliament within 14 days and be attributed to a vote.
- Expenditure must be included in a proper legislation within 120 days of the Minister authorizing the expenditure, or be included in the next adjustment budget, whichever sooner.

The local government: Municipal Finance Management act⁶⁶

The local Government: Municipal Finance Management Act's main purpose is to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. It states⁶⁷ that the mayor of a municipality may in emergency or other exceptional circumstances authorize unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure must:

- Be in accordance with any framework that may be prescribed.
- Not exceed a prescribed percentage of the approved annual budget.
- Be reported by the mayor to the municipal council at its next meeting.
- Be appropriated in an adjustments budget.

If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorized.

Note: Section 10A of the Local Government: Municipal Systems Act⁶⁸ is also essential for purposes of addressing the issue of the disaster management "unfunded mandate" at the level of municipalities.

⁶⁶ Local Government: Municipal Finance Management act 56 of 2003.

⁶⁷ Id. § 29.

⁶⁸ Local Government: Municipal Systems Act 2000.