COMPARATIVE STUDY OF EMERGENCY POWERS IN COMMONWEALTH AFRICA WITH SPECIAL REFERENCE TO ZAMBIA

by

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D E C L A R A T I O N

I..ALFRED..WINSTONE..CHANDA..... do solemnly declare that this dissertation represents my own work which has not previously been submitted for a degree at this or another University.

Signed.....AChanda.....

Date.....31st May..1984..

This dissertation of ALFRED WINSTONE CHANDA is approved as fulfilling part of the requirements for the award of the degree of Master of Laws by the University of Zambia.

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ABSTRACT

The dissertation focusses on a comparative study of emergency powers under some Commonwealth African Constitutions with specific reference to Zambia. The importance of this subject is underlined by the fact that all Commonwealth African Countries possess emergency legislation. Moreover, such legislation is very wide and has been extensively used, often improperly. Emergency powers, once invoked, seriously infringe fundamental individual rights and, therefore, undermine the Rule of Law.

The study examines the scope of these powers under the different constitutions in Commonwealth Africa, what safeguards have been provided for affected individuals and the role of the Judiciary in upholding the rights of the individual. Furthermore, the manner in which emergency powers have been used is considered.

The thesis is divided into two parts. The first part constitutes an account of the historical background to the theory of emergency powers, and has two chapters. Chapter one discusses the nature and scope of emergency powers found in other common law countries outside Africa. Chapter two examines the development of emergency powers during colonial rule in Zambia (then known as Northern Rhodesia).

Part II deals with emergency powers under the Independent Constitutions of Commonwealth Africa. It is composed of five chapters. Chapter three examines emergency powers under some Commonwealth African Constitutions.

Amongst issues considered are the nature of the power to declare an emergency, the role of the legislature and the judiciary to check this power and whether the declaration of an emergency is a justiciable issue. In chapter four the legal basis of emergency powers in Zambia is considered. In this regard the salient features of the Preservation of Public Security Act and the Emergency Powers Act are examined. The provisions relating to detentions and restrictions are dealt with in some detail. The last part of the chapter looks briefly at provisions of emergency statutes of other African Commonwealth Countries. Chapter five examines the safeguards available to detainees and how the judiciary has responded to alleged violations of these safeguards.

An appraisal of the use of emergency laws in Zambia is undertaken in chapter six. Reference is also made to the way emergency powers have been used in other countries in an attempt to see whether there are any parallels in the use of emergency powers in those countries.

Chapter seven is a conclusion.

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INTRODUCTION

It is an accepted fact that the state must of necessity arm itself with adequate power to preserve itself. The maxim: salus populi est suprema lex (i.e. the safety of the nation is the supreme law) is now an established principle in Constitutional Law. It has been argued that it is only when the safety of the state is assured that individual rights can be realised. The Attorney-General for Zambia in the case of Kachasu v Attorney-General[1] aptly expressed this point in the following manner:

> "The rights of the individual depend for their very existence and implementation upon the continuance of the organized political society - that is the ordered society established by the Constitution. The continuance of that society itself depends upon national security, for without security any society is in danger of collapse or overthrow. National security is thus paramount not only in the interests of the state but also in the interests of each individual member of the state; and measures designed to achieve and maintain that security must come first, and, subject to the provisions of the Constitution, must override, if need be, the interests of individuals and of minorities with which they conflict."

During normal times the government usually does possess sufficient power under various enactments to deal with problems of national security. However, there may arise situations where the normal powers vested in the government may prove inadequate to contain threats to national security. It is under such circumstances that it becomes imperative for the government to assume extra-ordinary or emergency powers.

Emergency powers in Africa have been extensively used

and have become the rule rather than the exception. It is, as Professor Nwabueze remarks, "the rather extensive and oppresive use made of them that has given them a fearful reality."[2] The record of independent governments in the use of emergency powers has been in many respects worse than that of their colonial predecessors.[3]

Emergency powers have had the greatest impact on personal liberty. Thus Amnesty International observed in 1970-71:

> "During the year 1970-71, continuing states of emergency in several African countries - Sierra Leone, Rhodesia, and Lesotho, for instance - entailed the detention without trial of large numbers of individuals, including many prisoners of conscience."[4]

The following year Amnesty International wrote:

> "Long-term detention without trial constitutes the more typical problem of violations of human rights on the continent."5

Again in 1974-75 Amnesty International had occasion to comment: "In Malawi, Tanzania, Zambia and Sudan detention without trial remains a serious problem."[6] As recently as 1980 it was reported that:

> "Detention without trial is widely used by governments to suppress real or suspected opposition and there are often inadequate safeguards for the treatment of detainees."7

Needless to say that emergency powers, once invoked, seriously infringe fundamental individual rights and, therefore, undermine the Rule of Law. The use of emergency powers, more especially detention without trial, has exercised the minds of lawyers in many parts of the world, including the present writer.

This study will endeavour to examine the full scope and implications of the emergency laws in Commonwealth Africa, which confer extra-ordinary powers on the government for the preservation of national security. In this regard three pertinent questions will be examined:

First, in what circumstances and subject to what safeguards should individual rights succumb to the claim of emergency powers by the government to preserve the nation?

Secondly, should every threat to the state, whether real or imaginary justify derogation from legal protection of individual rights?

Lastly, how can we ensure that emergency powers are not used, for example, to cover up police inefficiency or as a threat against rivals, or simply as a method of personal harassment?

The main focus of our inquiry will be on Zambia. Obviously references will be made to other African Commonwealth countries for purposes of comparison.

The thesis is divided into two parts. The first part constitutes an account of the historical background to the theory of emergency powers, and has two chapters. Chapter one discusses the nature and scope of emergency powers in other Common Law countries outside Africa. In what circumstances are emergency powers used and what safeguards are available to affected individuals in those countries? The chapter will also look at the role of the Judiciary in upholding individual liberty. The purpose

of the chapter is to ascertain to what extent the experiences of common law countries outside Africa have influenced the development of emergency powers in Africa.

Chapter two examines the development of emergency powers during colonial rule in Zambia (then known as Northern Rhodesia) in order to determine how much of the emergency powers of today is an inheritance from that past, and whether that inheritance has been added to or mitigated in stringency.

Part II deals with emergency powers under the independence and post-independence constitutions of Commonwealth Africa. It is composed of five chapters.

Chapter three examines emergency powers under some commonwealth African constitutions. It will consider such issues as who has power to declare an emergency, what limitations exist on that power and whether the declaration of an emergency can be questioned in courts of law.

In Chapter four the legal basis of emergency powers in Zambia is considered. In this respect the salient features of the Preservation of Public Security Act[8] and the Emergency Powers Act[9] are examined. The provisions relating to detentions and restrictions are dealt with in some detail. The chapter will examine the nature and scope of the power to detain or restrict and how the courts have interpreted this power. The last part of the chapter looks briefly at provisions of emergency statutes of other African Commonwealth countries.

Chapter five examines the safeguards available to detainees and how the Judiciary has responded to alleged violations of these safeguards in Zambia and other countries. Has the Judiciary played an active or passive role in the protection of individual liberty? An appraisal of the use of emergency laws in Zambia is undertaken in chapter six. In what circumstances have security/emergency powers been used? Have all situations justified the use of emergency powers? To what extent have emergency powers been used improperly? All these questions are dealt with in this chapter. Reference is also made to the way emergency powers have been used in other countries in an attempt to see whether there are any parallels in the use of emergency powers in those countries.

Chapter seven is a conclusion. It argues that the emergency powers in Africa are very wide and that they are susceptible to abuse by the executive. It proposes measures that can be taken to ensure that emergency powers are used for proper purposes.

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PART I

CHAPTER ONE

EMERGENCY POWERS IN THE COMMON LAW TRADITIONS

1. INTRODUCTION

It is evident that a sovereign government must have effective means to deal with emergency situations. Democratic countries, unlike dictatorships, must grapple with the intractable problem of reconciling the apparent necessities evoked by danger with the postulates of constitutional democracy especially with regard to individual rights.[1]

Although emergencies are of many types, three are predominant in contemporary times: (1) war; (2) internal subversion (including secession and insurrection); and (3) a breakdown, or potential breakdown in the economy. In addition to the foregoing, there are other emergencies caused by riots, great natural catastrophes such as fires and floods, earthquakes, strikes in strategic services and industries. However, the latter are often localised, temporary and are normally counteracted by the "normal" or customary powers of government.[2]

This chapter will briefly examine the emergency powers, especially those authorizing preventive detention, that are available to governments in various Common Law countries outside Africa. The circumstances under which the extra-ordinary powers are invoked and the limitations placed on their exercise will be considered. Finally,

the response of the judiciary to the infraction of individual rights during periods of emergency will be considered.

This chapter is relevant for two main reasons. First, all African Commonwealth countries were colonies of Britain and it is the colonial power which drafted the independence constitutions. It will be interesting to see whether the colonial power bequeathed to the newly independent states a replica of its own emergency laws. Secondly, it is important to ascertain to what extent emergency laws differ between common law countries outside Africa on the one hand, and those in Africa on the other. In this respect we may note at the outset that emergency powers in the older common law nations are less severe and are rarely used. This is because of their developed political culture and the long - traditions of democratic rule. The common law countries in Asia and Africa, however, still have to grapple with problems of underdevelopment and the need to forge national unity amongst people of different backgrounds. The democratic traditions are still undeveloped. Could this be the explanation for the differences in scope and application of emergency powers in the various countries?

2. EMERGENCY POWERS IN VARIOUS COUNTRIES

(A) CANADA

Section 91 of the British North America Act provides the basis for federal emergency power legislation. It stipulates:

> "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the peace, order and good government of Canada."

The War Measures Act[3] is the principal emergency legislation and when it is operative, the Bill of Rights is suspended.[4]

The issuance of a proclamation by Her Majesty or the Governor-General-in-Council under the Act is conclusive evidence that war, invasion or insurrection, real or apprehended exists, and has existed for the period specified in the proclamation - until revoked by another proclamation.[5]

The Governor-General is authorized to make such "orders and regulations, as he may deem necessary or advisable for the security, defence, peace, order and welfare of Canada." The said orders and regulations may provide for arrests, censorship, depotation, detention, and control over transportation, trading, production, and manufacture as well as the appropriation, control, forfeiture and disposition of property.[6]

He may prescribe penalties for violations of orders and regulations made under the Act.[7] An arrested alien can only be released with the consent of the Minister of Justice.[8]

Section 6 provides that Sections 3 to 6 come into force only when war, invasion or insurrection, real or apprehended, exist. It is, moreover, stipulated that once a proclamation is made, it must be laid before Parliament; but if Parliament is not sitting, then within 15 days after the next sitting. Ten members of Parliament can make a motion for the revocation of the proclamation, in which case it is to be debated. A proclamation ceases to have effect when both Houses resolve that it should be revoked. But any official who acted in good faith while the Act was in force is protected.

The Act also provides for the fixing of compensation for any property appropriated by the Government; the forfeiture of any ship or vessel used to transport goods contrary to regulations made under the Act, and, procedures to be employed in the courts in the said instances.[9]

Canada has, since the outbreak of World War I, been subject to emergency legislation for about 40 per cent of the time: that is, during both World Wars and for a period after, as well as during the Korean War.[10] A great number of regulations were made. One of these empowered the Minister of Justice to detain any person if he was "satisfied" that it was necessary to prevent that person "from acting in any manner prejudicial to the public safety or the safety of the state." It also provided that a detainee would "be deemed to be in legal custody."[11]

The response of the courts towards the infraction of individual rights during emergency times has been to uphold executive acts. For example in ex parte Sullivan[12] the court held that a detainee could not be released on the grounds that Regulation 21 (authorising detention) gave a detainee the status of a prisoner of war and that the Regulation permitted the Minister to detain persons without being hampered by judicial formalities.[13]

In another case, Nakashima v. The Queen[14], the court was invited to decide that the sale of property without or against the owner's consent was not for war objects, that it had nothing to do with the evacuation of Japanese Canadians from the West Coast, and that it was not a war measure and consequently beyond the competence of the Governor-in-Council.

The Court held that the Court could not assert a contrary opinion to what the Governor-in-Council thought advisable, Parliament having left the decision to the Governor-in-Council, the Court was powerless to intervene, and that corrective power lay with Parliament.

(B) BURMA

The Public Order (Preservation) Act[15] makes provision for preserving peace and order in certain areas. It was designed to cope with an abnormal situation arising out of the war and to take such measures as may be necessary for

preventing certain persons from engaging in acts prejudicial to public order and peace.[16] The declaration of a state of emergency is not a prerequisite for the operation of the Act.

Under the Act any police officer not below the rank of Sub-Inspector or somebody specifically authorized by the President may order the detention of any person suspected of disturbing or being about to disturb public peace, for 15 days without the President's order[17] and for two months with his order.[18] The President can order that any person be detained for an indefinite period if he is satisfied that it is necessary to prevent him from acting in any manner prejudicial to the public safety and the maintenance of public order.[19]

However, the President does not exercise this power personally; it is exercised by a delegate.[20] It is the Union governments that exercise executive powers in the name of the President. The officer ordering detention must do so according to his own discretion.

The detainee's only remedy is to apply to the Supreme Court for a writ of habeas corpus for there are no constitutional safeguards. However, the courts have been zealous to ensure that the executive exercises the power of detention for proper purposes. The supreme court has, for instance, held that the Act was not intended to be used as a substitute for adequate available penal laws.[21] It has also invalidated a section of the Act

insofar as it purported to preclude judicial review of an order of detention not in a time of grave emergency.[22] Further,the executive has been held to strict compliance with the procedure for detention stipulated in the Act. Thus verbal orders of detention have been held void because the Act requires a written detention order. An order subsequently complying with the Act will not render legal an arrest which was illegal ab initio.[23]

Moreover, the Supreme Court has not allowed a previous decision upholding an order of detention to preclude an application for a writ of habeas corpus which alleged a change of circumstances subsequent to the original decision.[24]

Finally, unlike courts in other jurisdictions, the Supreme Court has rejected the subjective test of the executive's satisfaction as to the grounds justifying detention. On the contrary, the court itself will review the facts alleged to justify the order of detention. The Court, in holding the objective test applicable, has stated,

> ".. We must examine the materials to see if they are such as could have satisfied the Commissioner of Police. We fully realize that we are not sitting here in appeal from the Commissioner of Police and that we are not entitled to substitute our conclusions on facts for his. But a distinction must be drawn and must be kept ever present before our minds between reasonable satisfaction and apprehension born of vague anticipation. Reasonable satisfaction of the necessity to direct detention is the basis of the exercise of power under S.5A of the Public Order (Preservation) Act. It is an abuse of that power to exercise it on apprehension born of vague anticipation."[25]

Doubtlessly the Supreme Court's approach has much to commend it and has gone some way in mitigating the hardships of detention without trial.[26]

(C) INDIA

India's principal emergency statute is the Preventive Detention Act 1950.[27] This Act, which operates during peace times without the need for an emergency to be declared, was enacted as a temporary measure to cease "to have effect on 1st day of April, 1952", but through successive amendments of Section 1(1) of the parent Act it has uninterruptedly been kept on the statute books.[28]

Section 3 empowers the Central Government or the state government if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to -

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the state or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community....

it is necessary so to do, issue a detention order against such person. Where the order is made by one of the Officers named in Section 3(2)[29] such officer must report the fact of detention to his State Government and such order, if not approved by the State Government, expires after twelve days.[30] The state government concerned must, as soon as may be, report the fact of detention to the Central Government together with the grounds of detention.[31]

Preventive detention is sanctioned by Article 22(3) of the Constitution and therefore does not constitute an infringement of the fundamental rights of protection of life and personal liberty guaranteed under Article 21 and protection against arrest and detention under Article 22(1) of the Constitution.

However, both the Constitution and the Act prescribe safeguards for detainees. Article 22(4) of the Constitution provides that no person shall be detained for a longer period than three months unless an Advisory Board (whose members have qualifications of High Court Judges) has reported in the interregnum that there is sufficient cause for such detention. But even in such a case a person cannot be detained beyond the maximum period prescribed by Parliament. The Constitution permits Parliament to prescribe:

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board, and

(b) the maximum period for which any person may in any class or classes of cases, be detained.[32]

A detained person must, as soon as may be, be furnished the grounds of detention and must be afforded the earliest opportunity of making a representation against the order.[33]

However, the detaining authority is not required to disclose facts which such authority considers to be against the public interest to disclose.[34]

The Act incorporates the aforementioned safeguards. It provides that a detainee must, as soon as may be, but not later than five days from the date of detention, be furnished with grounds of detention and must also be afforded the earliest opportunity of making representation to the appropriate Government.[35] Whenever a detention order has been made, the appropriate government must, within 30 days, place before the Advisory Board the grounds on which the order has been made and the representation, if any, made by the detainee, and in case where the order has been made by an Officer, also the report by such officer under Section 3(3).[36] The Advisory Board must submit its report to the appropriate government within ten weeks from the date of detention.[37] However, the detainee cannot as of right appear in person before the Board, nor is he entitled to appear by any legal practitioner before the Board.[38] The report of the Board in favour of a detainee's release is binding on the detaining authority.[39] The maximum period for which any person may be detained is twelve months[40] but provision is made for re-detention in any case where fresh facts have arisen after the date of revocation or expiry of the detention.[41]

The Indian Supreme Court has dealt with numerous cases impugning the validity of detention orders.[42] The basic approach has been predicated on the following statement by the court:

> "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercises of the power must be jealously watched and enforced by the court."[43]

A detainee may be granted a writ of habeas corpus if the court finds in his favour any of the following points -

(1) If the grounds are so vague that he cannot make an effective representation to the detaining authority.[44]

(2) If the grounds are irrelevant to the circumstances under which preventive detention could be supported e.g. Security of India or of a State, maintenance of public order, etc.[45]

(3) If the grounds communicated to the detainee were not in existence at the time when the order was made;[46]

(4) If the grounds and such particulars as are necessary to make the representation were not furnished in time so as to afford to the detainee "the earliest opportunity of making a representation."[47]

(5) If the order of detention contravenes Article 21 of the Constitution by reason of not being in

conformity with the law authorising the detention, or if the procedural requirements of the law of preventive detention have been infringed - e.g.

(i) Where in a case coming Under Section 3(3) of the Act, the report to the State Government was not made "forthwith".[48]

(ii) Where there is failure to refer the detainee's case to the Board within the time fixed by Section 9(1), even though the detainee may have been temporarily released under Section 14(1).[49]

(iii) Where the Advisory Board did not submit its report within the time specified by Section 10(1).

However, the Supreme Court, unlike its Burmese counterpart, has held that a subjective test must be applied to the detaining authority's power to detain. Thus the subjective satisfaction of the detaining authority cannot be reviewed by the courts.[51] As was stated in one case:

> "It is the satisfaction of the detaining authority which is necessary for the order of detention, and if the grounds on which the appropriate authority has said it is so satisfied, have a rational connection with the objects which are to be prevented from being attained, the question of satisfaction cannot be challenged in a court of law except on the ground of mala fides."[52]

The court, therefore, cannot delve into the question whether on the merits the detaining authority was justified to make the order of detention or to continue it.[53] Neither

can it consider the propriety or reasonableness of the official satisfaction.[54]

It is quite clear that the Indian Supreme Court has done much to mitigate the rigours of detention law. It has been zealous in keeping a constant and vigilant watch over tendencies of the government to overstep the limits of their authority, and to by-pass procedural safeguards.[55]

(D) UNITED KINGDOM

Emergency legislation falls generally into two groups:

(a) Ad hoc legislation - which is passed to meet circumstances arising, or expected to arise, from a particular war or emergency and, prima facie at any rate, limited in duration to the continuance of that war or emergency. e.g. the Emergency Powers (Defence) Act, 1939 (repealed)

(b) Permanent legislation - i.e. that forming part of the permanent law, but the use of which is confined to circumstance of war or emergency.[56]
e.g. Emergency Powers Act, 1920.

The Emergency Powers Act, 1920[57] (as amended by the Emergency Powers Act, 1964[58]) confers powers exercisable on occasions of emergency arising from civil disobedience. Her Majesty is empowered to declare that a state of emergency exists where it appears that there have occured,

or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community of the essentials of life.[59] Parliament must be informed and, if separated, summoned within five days by proclamation.[60]

Once an emergency is proclaimed Her Majesty is empowered to make regulations by orders in Council for securing the essentials of life and for imposing penalties on persons contravening the regulations. Proclamations under the Act are limited in duration to one month, and regulations thereunder to seven days unless continued by resolution of both Houses of Parliament.[61] The regulations made should not provide for compulsory military service or industrial conscription. Nor should they make it an offence for any person to go on strike.[62]

This Act has only been used sparingly to limit the effect on the community of strikes.[63]

Emergency Legislation of the 1939-49 World War Period

In anticipation of the outbreak of war in 1939, and during the ensuing hostilities, it was found imperative to pass a large amount of legislation restricting the rights of individuals and empowering the Executive to do acts, otherwise possibly unlawful, interfering with those rights.

By far the most important legislation, which had the greatest impact on the freedom of the individual and over trade and industry, was the Emergency Powers (Defence) Act, 1939. It became operational on 24th August 1939 and expired on 24th February 1946.[64]

Section 1(1) empowered His Majesty by order-in-Council "to make such regulations as appear to him to be necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of any war in which his Majesty may engage, and for maintaining supplies and services essential to the life of the community."

The Defence (General) Regulations, 1939,[65] comprised the main group of regulations made under the Act and embraced provisions relating to security of the state, public safety and order, restrictions on the movement and activities of individuals, and control over ships, aircraft and railways, industry and commerce, and building and employment, and conferred power of requisitioning. One such regulation authorized detention without trial. Regulation 18B(1) provided:

> "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

Provision was made for the Constitution of an Advisory Committee[66] to which body the detainee could object. Further representations could be made by the detainee in writing to the Secretary of State himself.[67] The Secretary of State was bound to report to Parliament at least once a month as to the action taken under the Regulation and the number of cases, if any, in which he had declined to follow the advice of the Advisory Committee. However, none of the applications challenging the legality of detention ever succeeded before the courts because the courts construed the Regulation as giving an absolute discretion to the Home Secretary. In Liversidge v. Anderson[68] the House of Lords held (with Lord Atkin disserting), that where Regulations were made for the safety of the country and the "administrative plenary discretion" was vested in the Secretary of State it was for him alone to decide whether he had reasonable grounds and act accordingly. The court could not inquire into the actual grounds on which the Home Secretary had reasonable cause to believe, if only because in time of war the Security of the country might be endangered by revealing the grounds of the Home Secretary's belief. Since what was applied was a subjective test, the power to detain could not be controlled by courts, save to ensure that the Home Secretary had directed personal attention to the matter; and further that he was not acting in bad faith and was not mistaken as to the identity of the detainee.[69]

The decision in Liversidge v. Anderson has undoubtedly profoundly influenced many judges in common law countries.

(E) U. S. A.

The Constitution does not expressly provide for emergencies. However, by implication, martial law can be declared. Article 1(9) provides for the suspension of the writ of habeas corpus in certain cases of rebellion or invasion. Further, Congress has been granted the power to declare war and to raise and support the forces necessary for that purpose.[70] The Supreme Court in Luther v. Borden[71] held that the Judgement of the government of Rhode Island to use its military power to suppress an insurrection cannot be judically questioned. Martial law in that case was defined as the,

> "..exercise of the military power which resides in the Executive Branch of Government to preserve order, and ensure the public safety in domestic territory in time of emergency, when civil government agencies are unable to function or their function would itself threaten the public safety."[72]

Ex parte Milligan[73] contains the most important statement by the Supreme Court on martial law. During the Civil War, Milligan, a private citizen, was arrested in Indiana on the orders of the local military Commander.

A Military Commission found him guilty of treasonable

offences and of disloyalty and sentenced him to death. The Supreme Court had to decide whether a private citizen can be tried by a Military tribunal during a rebellion when he is not in an insurrectionary part of the country and the civil courts are open. The Court held that the trial, conviction and sentence were illegal as being unauthorized by the Constitution and the Laws. Trial of civilians by a military court cannot be authorised, whether by the President or Congress, except when, as a result of military operations, the ordinary courts have ceased to function or can no longer function. The independent and impartial administration of the law by the Courts, notwithstanding the existence of war, cannot be suspended or superceded, not even by the authority of an Act of Congress so long as the Courts are open. The Court stated:

> "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration... If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of actual military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by *martial rule until the laws can have their free course. As necessity creates the rule,* so it limits its duration; for if the government is continued after the courts are reinstated, it is a gross usurpation of power. Martial law

> can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."74

While the courts unquestionably interpret the grant of the war powers liberally in order not to frustrate victory, they have not relinquished their right to review actions taken by the executive. Justice Davies, speaking for the court in the Milligan case, in holding the petitioner entitled to release under a writ of habeas corpus stated:

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under any circumstances. No doctrine, involving more pernious consequences, was ever invented by the writ of man than that any of the its provisions can be suspended during any of the great exigencies of government. Such a doctribe leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence..."75

It must, however, be noted that in times of war the Supreme Court has been prepared to concede to the executive enormous powers. In Hirabayashi V. USA[76] it was said that the power to wage war is the "power to wage war successfully." In that case the Supreme Court permitted the imposition of a curfew on Japanese Americans on the West Coast at a time when the possibility of a hostile Japanese landing on the

American continent was imminent. It recognised that the Courts are scarcely equipped to make decisions which would override those of the Executive and of Congress during the actual time of hostilities. The Court found the classification, on the basis of race, which confined Japanese-Americans to their homes, to be reasonable owing to the high concentration of the Japanese-Americans on the West Coast.

A more extreme measure taken by the military authorities of ordering the removal of the Japanese-Americans from their West Coast homes and their internment in "Assembly Centres" was upheld by the Court in Korematsu v. U.S.A.[77] as resting within the war powers granted to the executive.[78]

3. SUMMARY

It is clear from the above resume of emergency powers in various countries that there is universal acceptance of the need for the existence of extra-ordinary powers to deal with abnormal situations.[79] It is incontrovertible that regardless of the method of dealing with emergency situations - be it state of siege, martial law or a delegation of legislative authority - the common denominator in all methods is that in times of emergency, power is abnormally concentrated in the

Executive Branch of government.

It is noteworthy, however, that the older common law countries such as the U.S.A., England, Ireland, Australia, New Zealand and Canada do not have provisions for preventive detention during peace time. In these countries preventive detention can only be effected during wartime. Even in those circumstances aggrieved individuals still have recourse to the courts.

It is significant that in India and Burma where preventive detention during peace time is permitted, certain safeguards have been provided for detainees. Despite the fact that the safeguards are meagre the courts have been vigilant to ensure that the executive complies with them, and also that the executive does not overstep the limits of its power.

The rest of this work will consider how the theory of emergency powers has been adapted to Commonwealth African Countries in general, and to Zambia in particular. Are there any parallels between the emergency powers in the common law countries outside Africa and those in Africa? In what way, if any, have African countries been influenced by the practice of the former (i.e. countries outside Africa) - and in what significant ways have the new states of Arrica deviated from the pattern of the application of emergency powers by the older democracies?

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10. Marx, supra, p.40.

11. Reg. 21.

12. 78 Can. Crim. Cas. Ann. 400 (C.A. Ont. 1941).

13. See also Re Guralrick, 78 Can. Crim. Cases Ann. 152 (K.B. Man. 1942) where the petitioner was convicted of being a member of an illegal organization - the Communist Party - and given a 12 month sentence. On appeal he was given a suspended sentence. He was then detained by Order of the Minister.

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15. Act XVI of 1947.

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26. For an enlightening discussion of emergency powers in Burma see:

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51. Gopalan case, supra.

52. Puranlal v Union of India, A. (1958) S.C.R 163 at 171.

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56. Halsbury's Statutes of England, 3rd ed. Vol. 38 (London: Butterworths, 1972), p.274.

57. 10 & 11 Geo.5. C. 55.

58. C. 38

59. Emergency Powers Act, 1920, S.1(1) (as amended).

60. Ibid, S.1(2).

61. Ibid, S.2 (1), (2).

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63. Halsbury's statutes of England, supra.

64. 2 & 3 Geo. 6, C. 62. This Act was originally expressed to operate for one year and then expire, but provision for extention for a further period of one year(S11(1) was made. Before the first year had passed this provision was amended and a period of 2 years substituted for the initial period of one year by the Emergency Powers (Defence) Act 1940 (repealed) but the provision for continuance from year to year remained. The Act was extended by a series of Orders-in-Council until 24th August, 1945; S.11(1) was again amended by the Emergency Powers (Defence) Act 1945 and the Act expressed to continue until the expiration of six months beginning with 24th August 1945 with a provision for continuance as before. No further continuance orders were made and the Act accordingly expired on 24th February, 1946.

65. S.R & O. 1939 No. 927 (as amended by numerous subsequent Orders).

66. Ibid, Reg. 188(3).

67. Ibid, Reg. 188(4).

68. (1942) A.C. 206.

69. See also: R v Halliday, Ex parte Zadig (1917) A.C 260;

Green v Home Secretary (1942) A.C 284.

70. Article 1.

71. 48 US (7 How) 1, (1849).

72. Ibid, at p.45.

73. 71 U.S. 4 Wall.2.

74. Ibid, at p.127. See also Duncan v Kahanamoku 327 US.304.

75. Milligan case, supra, at pp.120-1. See also: Youngstown Sheet & Tube Co. v Sawyer 343 US. 579, 96 L. Ed. 1153 (1953).

76. 320 US 81, 87 L.ed. 1774, 63 S. Ct. 1375.

77. 323 US 214, 89 L.Ed. 194 (1944).

78. For a discussion of emergency powers in the U.S.A. see:

1. Harry Groves, "Emergency Powers", supra, pp. 3-4.

2. Nwabueze, Presidentialism in Commonwealth Africa (1974), supra, pp. 304-310.

3. Eugene A. Gilmore, "War Power - Executive Power and the Constitution", 29 Ia. L. Rev. 463 (1943-44).

79. It is not possible for reasons of space to include all common law countries in this chapter. But the countries discussed fairly represent the position obtaining in the other states as well.
e.g. Sri Lanka has the Public Security Ordinance 1947; Malaysia - The Internal Security Act, 1960; Australia - The National Security Act, 1939-40, etc.

CHAPTER TWO

EMERGENCY POWERS DURING COLONIAL RULE: WITH REFERENCE TO ZAMBIA

1. INTRODUCTION

The emergency powers that are found under the laws of Zambia and indeed under the laws of other African countries can be traced back to the immediate colonial past. Most African countries at the advent of independence inherited substantial parts of the colonial emergency legislation, with only slight modifications in some instances.

It is therefore important to consider the extent to which the colonial experience influenced the retention and manner of use of the extensive security powers now currently in existence under the many independent African Constitutions.

This chapter will examine the development of emergency legislation and the way it was used during the colonial period in Zambia (then known as Northern Rhodesia).

2. SOURCE OF, AND DEVELOPMENT OF, EMERGENCY POWERS UP TO 1964

Northern Rhodesia up to 1924 was administered by the British South Africa Company under Royal Charter. However, in 1924 company rule ceased and the British government took over direct administration of the protectorate through the colonial office.[1]

The first piece of emergency legislation enacted by the Legislative Council was the Emergency Powers Ordinance 1927.[2]

The object of the Ordinance was to provide measures for the better administration of the territory in cases of emergency. It empowered the Governor to declare a state of emergency by proclamation published in the gazette whenever it appeared to him that any action had been taken or was immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of any of the essentials of life.[3]

Once a state of emergency was declared the Governor or his authorised agent was granted extensive powers to deal with the situation. He could assume control and regulate all means of communication and transport, all fuel, buildings, plant and materials; all food and liquor supplies and all necessaries; all electric, water and other power stations; and all arms, ammunition and explosives.[4] He could further regulate and control prices of necessaries,[5] and also take any other measures which he deemed essential to the public safety and the life of the community.[6]

The Governor was empowered to make and publish regulations and to issue orders and instructions for the purpose of exercising the powers conferred on him by the Ordinance.[7] Penalties were prescribed for persons who contravened any regulation, order or instruction issued under the Ordinance.[8]

The next piece of emergency legislation was the

Emergency Powers Orders-in-Council 1939 and 1956[9] enacted by the British government and extended to all the colonies and dependences.

Section 3(1) empowered the governor, if satisfied that a public emergency existed, to declare, by proclamation, that the provisions of Part II of the Orders-in-Council shall come into operation in the territory. He could revoke the declaration in a similar manner. The Queen retained the residual power to revoke, add to, amend or otherwise vary the Order-in-Council from time to time.[10]

Part II contained provisions empowering the governor to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the defence of the territory, 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.[11] The regulations made could, inter alia, provide for the detention, deportation and exclusion of persons from the territory; authorise the taking of possession or control of any property or undertaking and also the acquisition of any property other than land; authorise the entering and search of premises; provide for amending any law, for suspending the operation of any law and for applying any law with or without modification; provide for payment of compensation and remuneration to persons affected by the regulations; and provide for the apprehension, trial and punishment of persons contravening the regulations. But no

regulation could make provision for the trial of persons by Military Courts.[12]

The regulations made could override any conflicting provisions in any law and such conflicting provisions if not amended, modified or suspended would be ineffective to the extent of such inconsistency.[13]

Subsequently, the governor made the Emergency Powers Regulations 1956[14], which provided for the control of publications, public meetings and processions, acts likely to cause sedition and mutiny, of arms and ammunition and many other activities.

Regulation 16(1) provided that whenever the governor was satisfied that for the purpose of maintaining public order it was necessary to exercise control over any person, he could order the detention of such person. Regulation 16(6) on the other hand, empowered any police officer of or above the rank of Assistant Inspector to arrest without warrant any person in respect of whom he had reason to believe that there were grounds which would justify his detention under the regulation and any such person could be detained up to twenty-eight days pending a decision whether a detention order should be made against him.[15]

The Governor was also empowered to make restriction orders.[16] Regulation 16(7) provides for the establishment of one or more Advisory Committees comprizing persons appointed by the governor and chaired by a judicial officer. The function of an Advisory Committee was to consider and

make recommendations to the Governor in respect of any objections which were duly made to the Committee by any person detained under the Regulation.[17] The governor was empowered to make rules as to the manner in which such objections could be made to such an Advisory Committee.[18]

The governor made the Emergency Powers (Detained Persons) Regulations in 1956.[19] These regulations enumerated the various rights that detainees were granted such as being permitted to smoke and receive newspapers, to be given employment, to wear their own clothes, to have exercises, to have visitors, and to have a full diet, etc.[20] Furthermore, the governor could appoint two or more persons to constitute a Committee of Inspection, which could at any time visit any place or places of detention to inspect the conditions under which detainees were living. The Committee could also hear complaints of maltreatment or other hardships from detainees. It could also make recommendations in a minute book, which had to be sent by the Officer-in-charge without delay to the Provincial Commissioner of the Province concerned.[21]

In the same year the Governor made the Detention Orders (objections) Rules 1956. Every person detained had to be served with a general statement of the grounds upon which the detention order had been made against him together with the relevant notice and form of objection.[22] Every objector had to be given not less than seven days notice in writing of the time and place fixed for the hearing of his objection[23] and was entitled to appear

before and be heard by the Commissioner or by the Committee on the consideration of his objection personally or by his legal representative or agent.[24]

Owing to frequent sabotage of railways by militant Africans at the height of the struggle for independence the Governor made the Emergency Powers Regulations 1958.[25] These regulations were aimed at protecting the railways by empowering various authorities to arrest suspected saboteurs. Restriction Orders could be made by the Governor in respect of such persons.[26]

The Emergency Powers Ordinance 1927 was am ended in 1957.[27] The am ended Ordinance empowered the Governor, if at any time he was satisfied that any action had been taken or was immediately threatened by any person or body of persons that such action, though not of itself of such a nature and of such an extensive a scale as to warrant the declaration of a state of emergency, but nevertheless calculated to create or lead to a situation in which the Governor would be empowered to declare a state of emergency to make regulations prohibiting, restricting or otherwise regulating any such action.[28] Such regulations, which could apply to the whole or part of the Territory, and to any person or class of persons or to the public generally, would come into force upon the date of publication in the gazette and would remain in force for thirty days. But the life of such regulations could be extended by the Legislative Council by resolution for up to three months.[29]

The Governor was obliged, as soon as practicable after the publication of the regulations, to appoint a person, vested with all the powers of a Commissioner,[30] to inquire into all the circumstances which gave rise to the making of such regulations and to report and make recommendations.[31] A new section provided that the expiry of any regulation made under the provisions of the Ordinance would not affect the operation of such regulation vis-a-vis things previously done or omitted to be done.[32]

In December 1956 the Emergency (Transitional Provisions) Ordinance[33] was enacted. It provided for the restriction of movement of certain persons and also the holding of a Judicial inquiry into the cases of such persons. The object of the Ordinance was neatly stated by Mr McCall, a nominated official, in the following words:

> "It is that when the time comes the ordinary normal state of affairs should be restored, except those who are likely to reproduce a situation where the normal state of affairs would have to be suspended again. If such persons are likely to jeopardise good order or good government in the Territory then in the interests of the overwhelmingly large majority of the public they must be subject to some restraint. The Bill provides for restraint in the form of restriction orders. They are prophylactic orders; they are made for the purpose of preventing a relapse into the serious infection which required the drastic operation of a proclamation of emergency last September."[3

Thus, the Ordinance was mean t to provide a mechanism for the continued control of detained persons after the expiry of a declaration of a state of emergency. Where, upon the specified date, any emergency order or restriction order was in force against any person, such order would, notwithstanding the lapse of the Emergency Regulations,

continue to have force and effect for a period of one month after such date.[35] During the said period the restrictee would be notified, with sufficient particulars to give him reasonable information, of the nature of the facts alleged against him, the grounds of his restriction.[36] This was to enable him to exculpate himself before the Commissioner, who, after considering the evidence adduced before him and making any further investigations which he considered desirable, was required to make a report to the Governor setting out his findings of fact and his conclusions on any question of law involved.[37] The Governor, after considering such report, and if he was satisfied that, having regard to the findings of fact and any conclusions of law as stated therein, it was necessary in order to safeguard public order and good government in the Territory so to do, to make a restriction order against the person concerned within thirty days of receipt of the report.[38]

However, the Commissioner was required, as soon as practicable after the expiration of each period of six months after the date upon which a restriction order was made, to review all the circumstances relating to such order, and to submit a report thereon to the Governor.[39]

The Ordinance was to expire, if not previously re-enacted, on 31st December, 1957[40] but its life was extended to 31st December 1959.[41]

A subsequent Ordinance empowered the Governor at any time to vary or revoke any restriction order, or to direct

that the operation of such order should be suspended subject to such conditions as he saw fit.[42]

An Amendment Ordinance enacted in 1959 empowered the Legislative Council to extend, by resolution, the life of regulations made for up to six months instead of only three months[43] as provided in the Principal Ordinance (i.e. The Emergency Powers Ordinance 1927 (as amended)).

In order to safeguard elections under the Benson Constitution scheduled for the 20th of March, 1959[44] the Governor made the safeguard of Elections and Public Safety Regulations 1959.[45] The regulations provided that whenever the Governor or any Provincial Commissioner was satisfied that any person either alone or as a member of and in combination with a body of persons was participating or immediately intending or preparing to participate in certain named activities in circumstances in which such action was calculated to or would probably create or lead to a situation endangering the public safety and that his restriction was necessary in order to restrict such person from creating or leading to such situations, he could make a restriction order against such a person. Some of the named activities were, inter alia: the use or threat to make use of any force, violence or restraint upon or against any person in order to induce or compel that person to refrain from voting at the election, or in order to induce or compel that person to refrain from standing as a candidate for the election; the wilful obstruction at the election of a voter either at

the polling station or on his way thereto; the use or threat to make use of any force or violence against any person having stood as a candidate for the election; the publishing, uttering or reproducing of any statement with intent to promote feelings of ill-will or hostility between different classes of the population; and the organisation, holding, or participation in unlawful meetings or assemblies.[46]

Competent authorities including District Commissioners and police officers not below the rank of Assistant Superitendant were empowered to prohibit meetings or processions if, in their view, such a meeting or procession would culminate in the occurrence of any of the actions aforementioned.[47]

Many other sweeping powers of arrest, search and so on were granted to the authorities under the regulations. These regulations were extended for a further period of three months by the Legislative Council on 8th April 1959. Again in June 1959 an Ordinance was enacted, whose purpose was to extend the regulations by a subsequent resolution of the Legislative Council for a period of six months after 8th July 1959.[48]

In 1960 the Preservation of Public Security Ordinance,[49] which has been renamed the Preservation of Public Security Act after Independence, was enacted. This Ordinance repealed the Emergency Powers Ordinance 1927 and replaced it with provisions that were considered more useful and efficacious in dealing with serious breaches of public security, order,

peace and good government. Explaining the imperative necessity for this type of legislation the Acting Chief Secretary to the Government, Mr Nicholson stated in the Legislative Council:

> "We are not the first country to need a legislative safeguard of this kind and here I would explain that the first need for this legislation was to deal with the circumstances arising at the termination of the Mau Mau Emergency in Kenya. The model legislation which we are following has been designed in its final form for a wider purpose, namely to provide a general answer to the problem of equipping governments in the uneasy security situation which many countries face today, equipping them with powers to enable them to forestall serious emergencies or, if serious trouble arises, to prevent a recurrence of that trouble.... There is in most cases initially the stage of gradual development of conditions of unrest, of the intimidation, lawlessness and erosion of authority which, if it not checked leads to actual physical disorder and violence. Thereafter, if the situation has been obtained, there is often a third phase in which, until there is a return to peaceful conditions, the aftermath of trouble has to be dealt with and measures have to be maintained to guard against a recurrence."50

The Ordinance had eight sections and embodied nearly all the substantive provisions of the Emergency Powers Ordinance 1927 (as amended). As a matter of fact it represented a codification of the Emergency Powers as substantially amended to suit the circumstances of the early sixties. The regulations which were made on 12th May, 1960 were merely a reproduction of the 1956 regulations.[51]

At independence on 24th October, 1964 the Emergency Powers Orders-in-Council 1939 and 1956 ceased to have effect as part of the Law of Zambia.[52] A new Emergency Powers Act[53] was enacted on the eve of Independence to cater for full emergencies.

3. USE OF EMERGENCY POWERS BY THE COLONIAL AUTHORITES

It is trite that the main preoccupation of the colonial authorities was the maintenance of law and order. Any threat to law and order was dealt with ruthlessly.[54]

The period following the end of the 2nd World War marked the beginning of African national consciousness in Northern Rhodesia. It was a reaction to the settler's drive for political power. African discontent, which had been muted hitherto, began to appear more openly, especially on the Copperbelt and in the towns along the line of rail. The African mineworkers were in the fore-front of the struggle for economic and political rights. A number of strikes were organized in 1935 and 1956, the latter being the more serious.[55] The 1956 strike compelled the Acting Governor of Northern Rhodesia, A. Williams to declare a state of emergency on the Copperbelt (i.e. then known as the Western Province) on 11th September, 1956 pursuant to the powers vested in him by the Emergency Powers Orders in Council 1939 and 1956. The Provincial Commissioner, to whom some of the Governor's powers were delegated under regulation 47,[56] made detention orders against 54 leaders of the African Mine Workers Union. These detention orders were later declared invalid by the High Court in Stewart v The Chief Secretary of Northern Rhodesia[57] in habeas corpus proceedings on the ground that before the Governor could make a detention order under the regulations, it was requisite, in terms of the regulations, that he should be satisfied that it was necessary

to exercise control over the person to be detained, and that this was a duty or obligation resting on the Governor which had not in fact been delegated to the Provincial Commissioner in terms of the delegation of powers to him, and that, therefore, in the absence of proof that the Acting Governor had been so satisfied, an essential pre-requisite for the making of the detention orders was lacking.

However, the Federal Supreme Court overruled the Stewart case in The Attorney-General for Northern Rhodesia v Mungoni[58] and held that if it was intended (as was to be assumed) that the delegation should confer on the Provincial Commissioner effective powers, it was clearly necessary for the Provincial Commissioner to decide when, and in respect of what persons he would exercise the powers thus conferred upon him; and the necessity so to decide imported by implication the power or jurisdiction to make the decision.

In justifying the declaration of a state of emergency and the detention of the 54 persons the then Minister of Labour and Mines, Mr Roberts stated in the Legislative Council:

> "The fact is that during the 1956 African strike, towards its closing phases, there was a very distinct possibility of an explosive situation arising. Thousands of Africans were gathering daily at the Shaft heads to go underground and their leaders at that time were exhorting them not to do so. There were European miners in the same vicinity milling around trying to get underground on shift, and it would have only needed one small spark to set off a situation which could easily have led to bloodshed and so forth. It was for that reason that the 1956 Emergency Regulations were declared and certain of the Union's leaders were restricted."59

In December 1956 shortly before the detained mine union leaders were about to be released from detention at the expiry of the state of emergency, the Emergency (Transitional Provisions) Ordinance was passed. When the state of emergency was lifted after four months restriction orders were issued against the detained labour leaders under the provisions of the said Ordinance.

The amendment of the Emergency Powers Ordinance 1927 in 1957[60] was precipitated by the increased militancy of Africans in Nkumbula's African National Congress (ANC). ANC was resolutely opposed to the establishment of the Federation of Rhodesia and Nyasaland in 1953. After the Federation had got off the ground the ANC organised mass disobedience campaigns, boycotts and strikes in a futile endeavour to destroy it. As a result the government considered it imperative to arm itself with more powers. The object of the amendment was:

> "to provide a means of dealing with situations that might lead to action being necessary under the Emergency Powers Ordinance before such situations have reached such a degree of gravity as to necessitate the declaration of a full state of emergency... When the last state of emergency was declared in 1956 it lasted four months. During that period individuals were arrested and detained without trial, and many of them are still restricted in their movements. Had we in 1956 an Ordinance on the lines of the present Bill it is possible that the state of emergency might have been avoided by the earlier action which it would have been possible for the officer administering the government to take."61

It is submitted that the main purpose of the amendment was to perpetuate the restriction of the leaders of the Mine Workers Union for another two years.[62]

In expressing the colonial regime's position vis-à-vis the restrictees the Attorney-General, Mr Doyle stated:

> "It would be a political mistake to allow these persons unrestricted access to the Copperbelt.. In certain cases the governor has reduced the area in which these persons are allowed to move about.."63

As the struggle for independence gathered momentum the Africans began sabotaging various economic installations, particularly railways. In a bid to counteract this activity the Governor, Arthur Benson on 30th September 1958 declared a state of emergency in the railway reserve of Northern Rhodesia.[64] Part II of the Emergency Powers Orders in Council 1939 and 1956 came into operation. Regulations were made which made it an offence for any person to be within the railway reserve without authorisation, and made it a serious offence for any person to be found within the reserve with any article or implement capable of being used to destroy or damage the railway line, or any railway engine or rolling stock, and also made it an offence for any person to aid and abet such action.[65] The Governor assumed power to detain such persons up to twenty eight days and to restrict them afterwards. These powers were used extensively.

Despite the fact that the colonial regime was constantly arming itself with wide and all embracing powers, the African struggle for independence did not abate. On the contrary, the Africans became even more militant. The British Government then introduced the Benson Constitution

which was the first of British multi-racial constitutions to be introduced in Central Africa. It reflected the ideas on racial partnership, 'fancy franchises' and controlled political change. The main objective was to devise a constitution which could govern the Territory's advance for the next decade in such a way as to encourage politics to develop on party rather than racial lines.[66]

As the African struggle intensified the main nationalist party, ANC split up on 24th October, 1958. This was precipitated by Nkumbula's lack of quality leadership as well as his moderate policies. The more militant leaders led by K. Kaunda, S. Kapwepwe, M. Sipalo and others formed a splinter Party named the Zambia African National Congress (Z.A.N.C.). While the ANC decided to accept the Benson Constitution and to participate in the forthcoming elections, ZANC's immediate objectives were to boycott the election and to supplant the ANC as the territory's major nationalist Party. Consequently, many eligible Africans declined to register as voters at the instigation of Z.A.N.C. despite a vigorous campaign by the government. Z.A.N.C. was rapidly gaining influence among the Africans. As the election was set for 20th March 1959 and Z.A.N.C. was threatening to continue its boycott at the polls, the government considered it imperative to get to grips with the problem posed by the party for a low poll among Africans on election day would accentuate the deficiency caused by the low registration, with disastrous consequences.[67]

The Governor issued the Safeguard of Elections and Public Safety Regulations 1959 on 11th March, nine days before polling. Z.A.N.C.'s sixty-four principal leaders were arrested on 12th March and immediately restricted to various remote areas. Z.A.N.C. and all its registered branches in the Territory were proscribed under Section 21(2) of the Societies Ordinance by the Governor. The government hoped that Z.A.N.C.'s boycott threat would die with the party and that African voters would flock to the polls.

In a radio broadcast justifying his action, Governor Arthur Benson accused Z.A.N.C. leaders of conspiring with nationalists from Southern Rhodesia and Nyasaland to launch a violent revolution in Central Africa. He claimed the plan had been prepared by the Federation's nationalist leaders at the Accra Pan-African Congress of 1958 and consisted of three stages:

(a) to be widespread civil disobedience;

(b) the provocation and 'stretching' of the forces of law and order; and

(c) outright revolution, which aimed at violent attacks on persons in authority, as well as the killing of Africans, Asians, and Europeans who resisted the imposed order.

According to him the first stage had been reached in Northern Rhodesia.[68] He continued:

> "It is the Zambia leaders who have, since the turn of the year, been threatening violence to other Africans, been declaring that Africa is for Africans alone, been organizing disobedience to just laws and have in particular been making preparations to prevent by violence and intimidation any African voter from casting his vote at the elections on 20th March. This they have done openly in public. But worse, far worse, is what they have done privately in the villages and in the towns at night. There they have instituted a reign of terror. They have placed men in fear of their lives. They have threatened death and mutilation to their wives and children. They have invoked witchcraft and unmentionable cursings in order to deter Africans from voting. And because all these things take place in private and at night with no witnesses, they are desperately difficulty to deal with in law."[69]

The immediate effect of the proscription of Z.A.N.C. was to decapitate it in one swift blow, and so the election was held without serious incident.[70] However, in the long-term, the ban served to enhance the hand of the militant leaders for Z.A.N.C. had,

> "been bestowed suddenly with an element of martrydom, which set its leaders distinctly apart from and well above all other Northern Rhodesia nationalists."[71]

Moreover, the restriction of Z.A.N.C.'s leaders to remote areas provided new opportunities for agitation, often in areas which had previously been noted for their political quiescence. The mood of the Africans at the height of the struggle was aptly captured by Sikota Wina in a letter to Arthur Wina, from restriction:

> "..If the objects of the emergencies were to terrorise Africans sentiment into submission and break the hold the Congresses have upon African allegiance it has failed ludicrously in both. Far from stilling African allegiance it has inflamed it; while by arresting moderate and radicals alike, it has offered its opponents the obduracy of extremes and linked them on the rack of Congress

> martyrdom. Above all, it has left the avenue of civil disobedience open to opposition, and stimulated the very violence against which it now pretends that it was obliged to protect itself."[72]

In the course of time Z.A.N.C. was replaced by U.N.I.P. (formed on 1st August 1959), which was headed initially by Mainza Chona and then by Kaunda upon his release from restriction on 31st January 1960. U.N.I.P.'s immediate objective was to organize the boycott of the Monckton Commission which was appointed to review the Federation.

This boycott was successful as few Africans made any submissions to the Monckton Commission.[73]

As political tension continued rising serious incidents of violence broke out in various parts of the country, particularly on the Copperbelt. On 8th May at Ndola, a group of Africans, returning home after the police had dispersed an unauthorized UNIP meeting, attacked a white housewife, Mrs Lillian Burton, and her two children, who were in a car. The car was set ablaze after having been stopped. The children survived but Mrs Burton died subsequently. Copperbelt Europeans, led by the UFP and the Mineworkers Union, pressurised the government to ban UNIP throughout the Territory.[74] As rioting and other disturbances persisted, European pressure on the government increased, and on 11th May 1960 the Governor, acting pursuant to the Preservation of Public Security Ordinance, banned UNIP on the Copperbelt and declared the Party's branches unlawful.[75] On 12th May restriction orders were issued

against five UNIP leaders including Kaunda (who was in London at the time) forbidding them to enter the Copperbelt area.[76]

It is evident that the government saw the disturbances as offering an opportunity for weakening UNIP's position in the crucial Copperbelt Province. However, the ban on UNIP and the restriction orders against its leaders, were revoked on 14th November, 1960 less than three weeks before the opening of the Federal Review.[77]

In July 1961 UNIP held a General Conference at Mulungushi, where Kaunda was empowered to effect UNIP's "master-plan" (popularly known as Cha Cha Cha) which was a combination of positive action, sabotage, violent actions and disturbances in all areas.[78]

Shortly after the conference incidents began to happen. UNIP initiated a 'keep sober' campaign and attempted to launch a mass boycott of local beerhalls in Lusaka. Sporadic cases of arson occurred and minor disorders broke out on the Copperbelt.

August, 1961 became the worst month of violence. Early in the month serious disturbances erupted in Northern Province and on the Copperbelt and spread to Luapula Province. By the third week (precisely the 19th of August) the Governor, Sir E. Hone declared a state of emergency in the Northern and Luapula Provinces. The first two parts of the Preservation of Public Security Regulations were

applied to the two Provinces. The Governor invoked Sections 3, 4 and 6 of the Ordinance and made regulations to preserve peace, order and security. The Governor banned all of UNIP's branches in the two areas under the Societies Ordinance, banned meetings, and declared ten camps as places of detention.

And on the Copperbelt, where a state of emergency had been declared in May 1960, all UNIP Youth Brigade branches were proscribed.[79]

Government reports on 1st September put the number of incidents since July 24 at 901, resulting in 1,400 arrests; 38 schools had been burned down, 34 in Northern Province alone; more than sixty roads had been blocked; 24 bridges destroyed or seriously damaged; and twenty-seven people had died. Among the more than 3,000 people arrested before the disturbances ceased in October, the government reported a grand total of 2,691 convictions, 2,158 of which involved known supporters of UNIP.[80]

The state of emergency in Luapula, Northern and Copperbelt Provinces was extended by the Governor on 26th September, 1961 and continued in force till the ANC-UNIP black coalition government took office in January 1963.

4. CONCLUSION

It is apparent that the Governor, during the colonial period, was armed with an overwhelming battery of emergency powers to deal with any disturbances which tended to disrupt law and order. These powers were almost unfettered as they were not subject to any effective restrictions. On the other hand, the safeguards afforded to the individual were very meagre indeed.

Emergency legislation was amended from time to time to meet the exigencies of the situation. As a matter of fact every new piece of legislation passed merely served to accentuate rather than to diminish the Governor's enormous powers.

It is clear from the foregoing discussion that the emergency powers were used extensively during the period immediately preceding independence as the African struggle for independence intensified. The emergency powers, needless to point out, were used essentially for political purposes, to still the struggle of the African people against the Federation initially, and later for political independence.

The range of emergency powers conferred on colonial authorities in other parts of Commonwealth Africa, and the use to which they were put followed the Northern Rhodesia pattern.[81]

Thus, in Kenya emergency powers were used to destroy the Mau Mau rebellion, and in Malawi they were used against the Malawi Congress Party and its leaders.[82] It is these enormous powers which were inherited by the independent African countries with little or no modification.

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8. Ibid, S.6.

9. S.I. 1956, No. 731; GN No.56 of 1939.

10. Emergency Powers Orders in Council 1939 and 1956, S.5.

11. Ibid, S.6(1).

12. Ibid, S.6(2).

13. Ibid, S.7.

14. G.N. No. 220 of 1956.

15. It is interesting to note that reg.16(1) and 16(6) are similar to reg.33(1) and 33(6) respectively of the Preservation of Public Security Regulations, 1964. See infra.

16. Emergency Powers Regulations 1956, reg.18.

17. Ibid, reg.16(8).

18. Ibid, reg.16(9).

19. G.N. No.277 of 1956.

20. See Ibid, regulations 6, 7, 8, 9, 11 and 5 respectively.

21. Ibid, reg.13.

22 Rule 3, The Detention Orders (objections) Rules 1956. See also rule 5 of the 1959 Rules, GN No. 249 of 1959.

23. Ibid, rule 5; Also rule 5 of 1959, Ibid.

24. Ibid, rule 6; See also rule 6 of 1959, Ibid.

25. GN No. 303 of 1958.

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27. The Emergency Powers (Amendment) Ordinance, No.48 of 1957.

28. Ibid, S. 4A(1).

29. Ibid, S. 4A(2), (3).

30. Commissions of Inquiry Ordinance, CAP. 34.

31. S. 48(1), The Emergency Powers (Amendment Ordinance), supra.

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36. Ibid, S. 5.

37. Ibid, S. 7(3).

38. Ibid, S. 8.

39. Ibid, S. 10(1).

40. Ibid, S. 15.

41. The Emergency (Transitional Provisions) (Amendment) (No. 2) Ordinance 1957, No. 46 of 1957, S.2.

42. The Emergency (Transitional Provisions) (Amendment) Ordinance 1957, No.7 of 1957, S.2(1).

43. The Emergency Powers (Amendment) Ordinance 1959, No.9 of 1959, S.2.

44. Proclamation No. 4 of 1959, GN No. 187 of 1959.

45. GN. No. 81 of 1959.

46. Ibid, Reg. 3(9).

47. Ibid, reg. 4(1).

48. The Emergency Powers (Amendment) Ordinance 1959.

49. No.5 of 1960.

50. Northern Rhodesia, Legislative Council, Hansard 99 (24th November-3rd February 1960), Col. 723.

51. The salient provisions of the Preservation of Public Security Act and Regulations made thereunder will be considered in Chapter 4.

52. Zambia Independence Order, S.13.

53. CAP.108. This, too, will be examined in Chapter 4.

54. See: Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya (Nairobi, 1970), pp.125 et. seq.
Also J.B. O Jwang and K.G. Kuria, "The Rule of Law in General and Kenyan Perspectives," (1975-77) 7-9 Zambia Law Journal, p.116.

55. D.C. Mulford, Zambia: The Politics of Independence: 1957-1964 (London: Oxford University Press, 1967) chp.1, pp.13-46.

56. Regulation 47 of the Emergency Powers Regulations 1956 provided:
"47: The Governor, may, by writing under his hand, and either generally or specially, depute any person or persons, either by name or by office, to exercise all or any of the powers conferred upon the Governor by these regulations, subject to such conditions, if any, as he may specify, and thereupon any person so deputed shall have and exercise such powers accordingly, but no such delegation shall affect or impair the power of the Governor to act himself under these regulations."

57. (1956) R & N 617.

58. (1958) R & N 710.

59. Northern Rhodesia, Legislative Council, Hansard 98 (27th November-14th December 1959), Col. 106.

60. See The Emergency Powers (Amendment) Ordinance 1957.

61. The Chief Secretary (Mr Evelyn Hone) addressing the Legislative Council. Hansard 93 (5th November-28th November, 1957), Cols.593-95.

62. That was the maximum period of restriction prescribed by the Emergency (Transitional Provisions) (Amendment) (No.2) Ordinance 1957.

63. Northern Rhodesia, Legislative Council, Hansard 93, Supra., Cols.140-150.

64. This constituted a strip of land owned by the then Rhodesia Railways extending 100ft from the outer rail on either side of such land and including the area between rails. See Hansard 95 (1st July - 3rd October, 1958), Col.2560.

65. See reg.3, The Emergency Powers Regulations 1958, GN. No. 303 of 1958.

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PART II

CHAPTER THREE

EMERGENCY POWERS UNDER SOME COMMONWEALTH AFRICAN CONSTITUTIONS (INDEPENDENCE AND POST-INDEPENDENCE PERIOD)

I. INTRODUCTION

This Chapter will examine emergency powers under Constitutions of some Commonwealth African Countries at and after Independence. In this connection it is intended to examine three issues, viz-

(i) The authority in whom power to decide whether or not a state of public emergency exists is vested;

(ii) The availability of Judicial investigation and determination, in any ordinary or special court, whether a state of emergency exists; and

(iii) The power of the legislature to control the exercise of the power to declare an emergency.

As much as possible it is intended to trace the various changes which have been introduced in post-independence Constitutions regarding the subjects stated above. However, emergency powers under military regimes will not be considered as military rule is outside the scope of this enquiry which is solely concerned with constitutions under civilian rule.

2. SURVEY OF CONSTITUTIONAL BASIS OF EMERGENCY POWERS

(A). ZAMBIA

In Zambia, like in many other countries, the sine qua non for the operation of the emergency laws is the existence of a state of emergency. The proclamation of a state of emergency is provided for by the Constitution. The provisions relating to the proclamation of a state of emergency have not remained the same since Independence. They were radically altered by a constitutional amendment of 1969.[1] It would, therefore, be useful to look at the position that obtained at independence and contrast it with the position after 1969.

(i) The Position Under the Independence Constitution

Section 29 of the Independence Constitution empowered the President to declare, by proclamation published in the gazette, either that a full state of public emergency was in existence or that a threatened state of public emergency was imminent (i.e. a semi-emergency). Such a declaration, if not sooner revoked, would cease to have effect -

(a) in the case of a declaration made when Parliament was sitting or had been summoned to meet within five days at the expiration of a period of five days beginning with the date of publication of the declaration;

(b) in any other case, at the expiration of a period of 21 days beginning with the date of publication of the declaration; unless before the expiration of that period, it was approved by a resolution passed by the National Assembly.[3]

Furthermore, a declaration approved by resolution of the National Assembly would continue in force until the expiration of a period of six months.[4] But the National Assembly could by resolution at any time revoke a declaration approved by the Assembly under the section.[5]

The foregoing was the procedure which was followed in declaring an emergency till 1969 when this section was repealed.[6]

(ii) <u>The Position after 1969</u>

A new section was substituted therefor and is now article 30 of the One Party State Constitution 1973.[7]

Article 30 empowers the President at any time, by proclamation published in the gazette, to declare either a full or semi-state of emergency. Such a declaration shall cease to have effect within 28 days of its commencement unless before the expiration of such period it has been approved by a resolution of the National Assembly.[8] The Assembly may at any time, by a resolution supported by a majority of all its members, revoke a declaration of emergency.[9] A declaration may also be revoked at any time

before it has been approved by a resolution of the Assembly, by the President by a proclamation published in the gazette.[10] The validity of anything previously done under the declaration of emergency is not affected by the expiry or revocation of the declaration.[11]

It may be observed that the provisions relating to the declaration of an emergency before and after 1969 differ in three respects. First, whereas under the Independence Constitution a declaration, if not sooner revoked, ceased to have effect within five days if Parliament was s itting and within 21 days in any other case if it was not approved by the National Assembly,[12] the position under the present Constitution is that such a declaration only ceases to have effect on the expiration of 28 days unless it has been approved by the National Assembly in the interregnum.[13]

Secondly, unlike the pre-1969 position when the National Assembly was required to renew a declaration at intervals of six months[14] the position now is that once a declaration has been approved by a resolution of the Assembly it continues in force until it is revoked by a resolution of such Assembly.[15]

Lastly, before 1969 the National Assembly could, by resolution at any time revoke an emergency declaration[16] but under the present constitution there is a specific requirement that such a resolution must be supported by a majority of all the members of the Assembly.[17]

The overall result of the changes recounted above is that the restraints on the power to declare an emergency that existed under the previous constitution have been whittled down. The only restraint now appears to be the requirement that the declaration must be approved by a resolution of the National Assembly within 28 days.

(8) KENYA

Kenya attained its independence on December 12, 1963. Its Independence constitution provided for the proclamation of a state of emergency by the President.[18] No declaration of emergency could be made except with the prior authority of a resolution of either House of the National Assembly supported by the votes of 65 percent of all the members of that House, and every declaration expired after seven days unless it had in the meantime been approved by a resolution of the other House supported by the votes of 65 percent of all the House members.[19]

However, a declaration of emergency could be made without the prior authority of a resolution of a House of the National Assembly at a time when Parliament stood prorogued or when both Houses of the National Assembly stood adjourned, but every such declaration lapsed after seven days unless it had in the meantime been approved by a resolution of each House supported by the votes of 65 percent of all the members of that House.[20] Furthermore,

a declaration could be made without the prior authority of a resolution of a House of the National Assembly at any time when Parliament stood dissolved but any such declaration lapsed after seven days, unless it had in the meantime been approved by a resolution of the Senate supported by the votes of 65 percent of all the Senators.[21]

A declaration complying with the aforementioned requirements could at any time be revoked by the President by notice published in the gazette but could otherwise remain in force so long as those resolutions remained in force and no longer.[22]

A resolution passed by a House of the National Assembly could remain in force for two months or such shorter period as may be specified therein. Such resolution could be extended from time to time for a further period by a resolution supported by the votes of all the members of the House concerned, each extension not exceeding two months from the date of the resolution effecting the extension. Any such resolution could be revoked at anytime by a resolution supported by the votes of a majority of all members of the House.[23]

However, amendments were effected to the Constitution subsequently.[24] The position now is that the President may at any time, by order published in the gazette, bring into operation, generally or in any part of Kenya Part III of the Preservation of Public Security Act[25] or any of the provisions of that Act.[26] Such an order would expire

after 28 days unless at Sometime before the expiration of that period it has been approved by a resolution of the National Assembly.[27] No special majority is specified for the approval. Unless the President revokes the order earlier, it remains in force indefinitely[28] albeit the National Assembly may revoke it at any time by resolution supported by the votes of the majority of all the members of the Assembly.[29]

It may be seen that the elimination of the requirement for a declaration of a state of emergency had the effect of accentuating the danger of abuse of emergency powers by the executive. One important change in the Constitution concerns the accountability of the executive to the legislature. Whereas before the change the President had to seek parliamentary approval of a declaration of a state of emergency after five days, the position now is that a declaration by him bringing into operation Part III of the Preservation of Public Security Act may subsist without parliamentary approval for 28 days. Furthermore, whereas under the previous Constitution a declaration was subject to renewal after every two months, the position now is that it continues in force indefinitely once it has been approved by Parliament.

The overall effect of these changes has been the reduction of the effectiveness of parliamentary control over the President's exercise of emergency powers. This constitutes a serious threat to individual liberties and freedoms as the individual is now virtually at the mercy

of the executive. The situation is further exacerbated by the fact that there need not be in existence a state of emergency before emergency powers can be invoked. The President has absolute discretion to determine when and where to bring into force the provisions of the emergency statute (i.e. The Preservation of Public Security Act, CAP.57).

(C) MALAWI

Malawi became independent on July 6, 1964 and attained Republican status within the Commonwealth on July 6, 1966. The Independence Constitution embodied a justiciable Bill of Rights[30] and provided for a declaration of a state of emergency. The Governor-General was empowered to declare at any time, by proclamation published in the gazette, that a state of public emergency existed.[31] The other provisions such as Parliament's approval of such a declaration, the period of subsistence of a declaration, revocation, etc. were exactly similar to the provisions contained in the Zambia Independence Constitution 1964.[32]

But in the 1966 Republican Constitution, the Bill of Rights was removed. Moreover, the requirement for a declaration of emergency to be in existence as a prerequisite for the invocation of emergency powers was abandoned. This was in spite of the fact that the Constitutional Review Committee which made proposals for the Republican Constitution of Malawi had recommended that the new Constitution should stipulate that the President,

whenever he was satisfied that a state of public emergency or semi-emergency existed, could issue a proclamation enabling him to take emergency measures to deal with the situation in both the legislative and executive fields. However, ultimate parliamentary control would be maintained by providing that a Presidential proclamation would cease to be valid unless it was approved by a majority of parliament within seven days if parliament was actually sitting or within thirty days if it was not.[33]

Thus, like in Kenya, in order for the government to invoke emergency powers there need not be in existence a state of public emergency.

The Preservation of Public Security Act[34] provides that if at any time the Minister (responsible for interior affairs) is satisfied that it is necessary for the preservation of public security to do so, he may, by gazette notice, declare that the provisions of subsection (2)[35] shall come into operation.[36] He can revoke the declaration at any time in the same way. The power is exercisable solely in his discretion and he is not subject to the control of parliament or any other authority. When one considers that the constitution does not have a Bill of Rights,[37] which would at least to some extent, limit executive power then the situation becomes pretty dangerous for the way is now open for dictatorial rule.

(D) GHANA

Ghana attained its independence on March 6, 1957 and became a republic on July 1, 1960.

The constitution of July 1, 1960, as amended on January 1, 1964 did not have a Bill of Rights. Like the Malawi Constitution, the Ghana Constitution did not make provision for the declaration of a state of emergency. This was despite the existence on the statute books of the Preventive Detention Act 1958, which conferred extra-ordinary powers on the executive. That Act could be used at any time. The National Assembly had no role to play in the matter. As we shall see in Chapter six the Act was indiscriminately used and during the rule of President Nkrumah there was a contumelious disregard for individual liberty. This was accounted for by the absence of effective constitutional or other controls on executive power.

The Constitution of Ghana 1979 (suspended since the military coup of 31 December, 1982), marks a drastic departure from the earlier constitutions. It embodies a Bill of Rights and also provides for the declaration of an emergency. The President may, acting in accordance with the advice of the Council of State,[38] declare that a state of public emergency exists in Ghana or in any part of Ghana.[39] Once he makes the declaration he is required to immediately place before Parliament the facts and circumstances leading to the declaration of the state of public emergency.[40] Parliament

must, within 72 hours thereof, decide whether the proclamation shall remain in force or shall be revoked.[41] A declaration, if not sooner revoked, shall cease to have effect at the expiration of a period of seven days beginning with the date of publication unless it has earlier been approved by a resolution passed by a majority of all members of Parliament.[42] If the declaration is not revoked by Parliament it subsists for three months[43] and may thereafter be extended by Parliament for periods of not more than one month at a time.[44] A state of public emergency is defined as including any action that has been taken or is immediately threatened by any person or body of persons -

(a) which is calculated to deprive the community of the essentials of life; or

(b) which renders necessary the taking of measures which are requisite for securing the public safety, the defence of Ghana and the maintenance of public order and supplies and services essential to the life of the community.[45]

The aforementioned provisions are most commendable for they ensure that the executive is strictly accountable to Parliament for the exercise of emergency powers. They contrast sharply with the provisions of other constitutions which we have examined in this chapter.

(E) BOTSWANA

Botswana, which attained its independence on 30 September, 1966, has a Bill of Rights in its constitution. The President is empowered at any time, by proclamation published in the gazette, to declare that a state of emergency exists.[46] Such a declaration, if not sooner revoked, shall cease to have effect -

(a) in the case of a declaration made when Parliament is sitting or has been summoned to meet within seven days, at the expiration of a period of seven days;

(b) in any other case, at the expiration of a period of 21 days unless before the expiration of that period, it is approved by a resolution passed by the National Assembly, supported by the votes of a majority of all the voting members of the Assembly.[47]

The other provisions regarding renewal of an emergency declaration after every six months[48] and revocation[49] are similar to the provisions contained in the Zambia Independence Constitution before 1969.[50]

(F) NIGERIA

Nigeria became independent on October 1, 1960 and a republic on October 1, 1963. The Republican Constitution 1963 embodied a Bill of Rights. It was upon the Nigerian

model that Bills of Rights in other African countries were patterned. Unlike in the other countries we have seen, hitherto, the power to declare a state of public emergency in Nigeria resided in Parliament. Parliament could at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to it to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.[51]

A period of emergency was defined as any period during which

> "(a) the Federation is at war;
>
> (b) there is in force a resolution of each House of Parliament declaring that a state of public emergency exists; or
>
> (c) there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion."[52]

Such a resolution would remain in force for twelve months or such shorter period as may be specified therein. It could, however, be revoked at any time or be extended for a further period not exceeding 12 months by resolution passed in like manner.[53]

The Federal Parliament was empowered to make laws for regions during emergencies.[54]

The Consitution of 1979 (suspended since the military coup of 31st December 1983) also provides a

Justiciable Bill of Rights, closely modelled on the parallel sections of the earlier constitutions of 1960 and 1963. Under the 1979 Constitution the authority to proclaim a state of emergency resides in the President.[55]

A state of emergency (whether in the Federation as a whole or in part of it) may be proclaimed in the following circumstances: war; the imminent danger of invasion; actual breakdown of public order and safety such as to require extra-ordinary measures (or clear and present danger thereof); an occurrence of imminent danger or any disaster or natural calamity or any other public danger clearly threatening the existence of the Federation; when a state Governor, supported by a two-thirds majority of all members of the House of Assembly, asks the President to proclaim an emergency in the state because of a breakdown in public order and safety (or the danger thereof) or an imminent danger of disaster confined to the state. If the Governor fails within reasonable time to make such a request the President may act on his own initiative. The declaration of an emergency must be approved by resolution of each Federal House, passed by two-thirds of all members, within two days (or ten days if the National Assembly is not sitting). The proclamation expires after six months unless extended for a further period of six months by similar resolution. The National Assembly may at any time revoke an emergency declaration by resolution passed by simple majorities in each House.

Retrospective penal legislation, notwithstanding the existence of an emergency, is not permitted and death caused by acts of war is the only derogation permitted from the right to life.[56]

These provisions, like the Ghana provisions, are quite commendable for they circumscribe the President's discretion to declare an emergency. Furthermore, they prescribe the only circumstances under which an emergency can be declared. Other constitutions (apart from the Ghana constitution) do not define an emergency thus leaving it solely to the President to decide what constitutes an emergency.

(G) UGANDA

Uganda became independent on 9 October, 1962. Its Independence Constitution[57] embodied a Bill of Rights. The President was empowered at any time, by proclamation published in the gazette, to declare a state of public emergency.[58] Such a declaration, if not sooner revoked, would cease to have effect -

(a) in the case of a declaration made when Parliament was sitting or had been summoned to meet within five days, at the expiration of five days;

(b) in any other case, at the expiration of 15 days unless it had earlier been approved by a resolution passed by not less than one half of all the members of the National Assembly.[59]

A declaration of a state of public emergency would, if not revoked by resolution of the National Assembly,[60] continue in force until the expiration of a period of six months. The National Assembly could extend its approval of the declaration for periods of not more than six months at a time.[61]

The 1966 revolutionary Constitution of Uganda contained substantially similar provisions vis-ā-vis the declaration of an emergency.

3. SCOPE OF EMERGENCY POWERS

It is evident from the survey of the constitutional provisions concerning emergencies that they exhibit many similarities. It is significant that in all Constitutions, with the exception of the Nigeria Independence constitution, authority to declare an emergency resides in the President. The variations in the various constitutions are minor involving mainly periods for the subsistence of emergency declarations and resolutions of Parliament. However, it is significant that Zambia's is the only Constitution which provides for the declaration of a semi-emergency.

One question that arises is whether the declaration of an emergency is a justiciable issue. The power to declare a state of emergency is, as is stated elsewhere in this chapter, a Presidential prerogative. It is,

therefore, discretionary. The President is the sole judge of the existence of the conditions which justify the exercise of the power. The question of justiciability of the power to declare an emergency has arisen in a number of cases.

In Kapwepwe and Kaenga v Attorney-General[60] Baron, J.P. commented:

> "It is not open to the courts to debate whether it is reasonable for there to be in existence a declaration under Section 29 (which I will call for convenience a state of emergency)."

Under the Nigerian Constitution of 1963, as we have noted, the power to declare an emergency was vested in the Federal Parliament. In Williams v Majekodumni,[61] Ademola, C.J. ruled that:

> "That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this court to decide. Once that state of emergency is declared, it would seem that according to the Constitution, it is the duty of the government to look after the peace and security of the state, and it will require a very strong case against it for the court to act."[62]

In another case, Adegbenro v Attorney-General[63] the then Premier of the Western Region was dismissed by the Governor on the strength of a letter signed by 66 out of the 124 members of the Assembly, and the Supreme Court decided that the purported dismissal was invalid on the ground that the Premier could only be validly removed under Section 33(10) of the Regional Consitution of 1960 if a motion to that effect had been passed by a majority of its members. The Privy Council reversed the Supreme Court decision by holding that, on the strict interpretation of the section concerned, the dismissal of the Premier by the Governor was lawful since the

latter was entitled to inform himself otherwise than by a formal vote of no-confidence carried against the Premier on the floor of the House of Assembly. Not long afterwards the Western Region Legislature nullified the Privy Council ruling by the Constitution of Western Nigeria (Amendment) Law 1963 which provided that a Premier could be removed from office only as a result of an adverse vote passed against him by a majority on the floor of the House. In this action the applicant, inter alia, impugned the declaration of a state of public emergency in Western Nigeria. He argued that the declaration of public emergency was not a proper or valid exercise of a discretion vested in Parliament since there were no grounds for Parliament to declare a state of emergency; that the incident which occurred in the Western House of Assembly when supporters of the ex-Premier and the opposition members clashed on 29th May, 1962, was not enough to warrant a declaration of a state of emergency. Replying to this argument Ademola, C.J. at p.546 stated:

> "We, however, feel that on the question whether or not there were sufficient grounds for parliament to declare a state of emergency, it is unnecessary for us to rule on the submission that if parliament acted mala fide in making a declaration of a state of public emergency the court could hold invalid, since it is impossible to say in the present case that there was no ground to justify a declaration, it is not for this court to go outside the provisions of Section 65(3) of the Consitution of the Federation defining emergency..."

The facts in the above case are almost identical to those of the case of Ningkan v Government of Malaysia.[64] The appellant, in this case, who was the Chief Minister of the state of Sarawak in Malaysia, was asked to resign by the

Governor of the state on the ground that the members of the Council of Negri (i.e. Parliament) had passed a vote of no confidence in him. Upon his refusal to resign he was dismissed by the Governor. In a court action impugning his dismissal it was held that the Governor had no power to dismiss him and therefore he was still the Chief Minister of Sarawak. Subsequently, the Federal Government proclamed a state of emergency in Sarawak. The government then enacted the Emergency (Federal Constitution and the Constitution of Sarawak) Act 1966, which, inter alia, empowered the governor to dismiss the Chief Minister should he refuse to resign upon a vote of no confidence passed against his government. The appellant was removed as Chief Minister by virtue of this new law. Thereupon, he brought an action in the Federal court arguing, inter alia, that the proclamation of emergency was invalid, and therefore, the Emergency (Federal Constitution and Constitution of Sarawak) Act, under which the government acted in removing him was invalid. He further argued that the express object of the proclamation was to dismiss him from his office, and, therefore, this constituted an improper exercise of the power to declare an emergency. The government argued that the validity of the proclamation is not justiciable; that the power to make the proclamation is satisfied if the authority in which the power is vested is satisfied that there is an emergency or a threat to the security of the state, and that there is no limit to the grounds on which it may act. The question is not whether an emergency exists, and that the bona fides of the proclamation cannot be attacked. The

government further contended that if the court was allowed to investigate the bona fides of the proclamation, then the question as to whether an emergency existed would be determined by the judgement of the court and not the Head of State. The Federal Court upheld the government's arguments and held that the validity of the proclamation was not justiciable. On appeal to the Privy Council the decision of the Federal court was upheld. Lord MacDermott, who delivered the judgement of the Board, observed at p. 391:

> "It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to inquire whether that situation could itself have been avoided by a different approach. But, taking the position as it was after Hailey, J. had delivered judgement in September, 1966, they can find, in the material presented, no ground for holding that the respondent government was acting erroneously or in any way mala fide in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of stable government, and amounted to an emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essentially matters to be determined according to the judgement of the responsible Ministers in the light of their knowledge and experience."

An obvious drawback in most constitutional provisions (with the exception of the Nigerian Constitutions 1963 and 1979, and Ghana 1979) is that what constitutes an 'emergency', war apart, is not defined. The natural meaning of the word 'emergency' is capable of covering a very wide range of situations and occurrences. As Lord Dunedin observed when delivering the judgement of the Board in Bhagat Sing v King Emperor[65]:

> "A state of emergency is something that does not permit any exact definition: it cannotes a state of matters calling for drastic action...."

It is certainly clear, therefore, that the power to declare an emergency may be abused. It is not inconceivable that an emergency could be declared even when, prima facie, conditions for an emergency did not exist. It will be noted that under the various constitutions considered the courts have inadequate power to check the power to declare an emergency. The role of the court, once the President has declared a state of emergency, is confined to determining whether the declaration has been approved by a resolution of the National Assembly.[66]

The absence of judicial review constitutes a grave threat to the guaranteed rights as certain rights (e.g. freedom of movement, assembly, expression, liberty) are severely curtailed during emergency. The position is worse in those countries like Malawi, Tanzania and Kenya where emergency powers can be invoked at any time without a state of emergency being formally declared.

The existence of an emergency brings into operation emergency laws. These laws will be the subject of the next chapter.

REFERENCES

1. Constitution (Amendment) Act No.5 of 1969.
2. Zambia Independence Order, Schedule II.
3. Ibid, s.29(1).
4. Ibid, s.29(3).
5. Ibid, s.29(4).
6. Constitution (Amendment) (No.5) Act 1969, s.6.
7. CAP.I, Laws of Zambia.
8. Ibid, s.30(2)(a).
9. Ibid, s.30(4).
10. Ibid, s.30(3).
11. Ibid, s.30(6).
12. Independence Constitution 1964, s.29(2).
13. One Party State Constitution 1973, art. 30(2).
14. Independence Constitution 1964, s.29(3).
15. CAP.1, art. 30(4).
16. Independence Constitution 1964, s.29(3).
17. CAP. 1, art. 30(4).
18. Independence Constitution 1963 (KENYA), S.29(1).
19. Ibid, s.29(2).
20. Ibid, s.29(3).
21. Ibid, s.29(4).
22. Ibid, s.29(5).
23. Ibid, s.29(6), s.29(8).
24. Constitution (Amendment) (No.3) Act, No. 18 of 1966 (KENYA).
25. CAP. 57 (KENYA).
26. Constitution of Kenya (as amended), s.85.

27. Ibid.

28. Act No. 45 of 1968 deleted the provisions whereby the maximum duration of an order without further parliamentary approval was eight months.

29. Constitution of Kenya (as amended), s.85.

30. Chapter II, Constitution of Malawi 1964.

31. Ibid, s.26.

32. Ibid, s.26(2), (3) and (4).

33. Proposals for the Republican Constitution of Malawi presented to Parliament by the Prime Minister, November, 1965, para.23.

34. CAP.14: 02 (MALAWI).

35. Subsection (2) of section 3 empowers the Minister to make regulations for the preservation of public security .

36. Ibid, s.3(1).

37. The Malawi constitution merely has in section 2 what are called "Fundamental Principles of Government." These are, however, not justiciable.

38. The Council of state is established under Chapter 10 of the constitution. Its functions are to aid and counsel the President and Parliament in the performance of their respective functions. It consists of prominent personalities like former heads of state, former Chief Justices, etc..

39. Constitution of Ghana 1979, s.33(1).

40. Ibid, s.33(2).

41. Ibid, s.33(3).

42. Ibid, s.33(4).

43. Ibid, s.33(5).

44. Ibid, s.33(6).

45. Ibid, s.33(9).

46. Independence Constitution 1966, s.17(1) (BOTSWANA).

47. Ibid, s.17(2). These sections are similar to the provisions of the Kenya Independence Constitution, particularly s.29(2) (3).

48. Ibid, s.17(3).

49. Ibid, s.17(4).

50. Constitution of Zambia 1964, s.29(3) and s.29(4).

51. Republican Constitution 1963, s.70(1) (NIGERIA).

52. Ibid, s.70(3).

53. Ibid, s.70(4).

54. Ibid, s.71.

55. Constitution of Nigeria 1979, s.41(2).

56. Ibid, s.265.

57. Of October 2, 1962, as amended on September 30, 1963.

58. Ibid, s.30(1).

59. Ibid, s.30(2).

60. (1972) ZR 248 at p.263.

61. (1962) 1 A11 NLR 328.

62. Ibid, at p.336.

63. (1962) 1 A11 N.L.R. 338.

64. (1969) 2 W.L.R. 365. For an interesting comparison of the two cases see:

    T.O. Elias, "Emergency in Malaysia and Nigeria" 4 NLJ 149.

65. L.R. 58 I.A 169.

66. Eg. Article 30(2) of the Zambia Constitution 1973.

CHAPTER FOUR

LEGAL BASIS OF EMERGENCY POWERS IN ZAMBIA

1. INTRODUCTION

In this Chapter the salient features of emergency statutes in Zambia will be specifically examined. The extent to which the executive or any other governmental functionary has autonomous power to make emergency or security regulations during the subsistence of a declared public emergency will be considered. The full range of emergency powers conferred on the executive by the emergency statutes, particularly the powers of detention and restriction will also be analysed in some detail.

In the last part of the chapter reference will be made to emergency statutes of other countries for comparative purposes.

2. ZAMBIA'S EMERGENCY POWERS ACT AND THE PRESERVATION OF PUBLIC SECURITY AND REGULATIONS THEREUNDER

There are two statutes which come into operation whenever there is an emergency declaration in existence: the Emergency Powers Act[1], and the Preservation of Public Security Act.[2]

Both statutes empower the President to make regulations for the preservation of public security and for any other matters incidental thereto.

Some of the regulations that the President may make may, *inter alia*, provide for:

(1) the prohibition, restriction and control of assemblies;[3]

(2) the regulation, control and maintenance of supplies and services;[4]

(3) the taking of possession or control of any property or undertaking and the acquisition of any property other than land;[5]

(4) the control of publications;[6]

(5) authorise the entering and search of any premises;[7] and

(6) the detention and restriction of persons,[8] etc..

Although both statutes provide for the making of regulations to cover more or less similar activities, they are really mean t to govern two different situations. They, therefore, differ in some respects.

First, the Emergency Powers Act comes into force only when a full state of emergency is declared;[9] the Preservation of Public Security Act is invoked when a semi-emergency is declared.[10]

Secondly, the powers granted to the President under the Emergency Powers Act are wider. For instance, under that Act, not only can the President make regulations for the detention or the restriction of persons, but also for the deportation and exclusion from Zambia of aliens.[11]

Thirdly, the scope of the property which the President may acquire on behalf of the Republic under the Emergency Powers Act is wider. He can acquire "any property or undertaking"

other than land under the Emergency Powers Act but under the Preservation of Public Security Act he can only acquire "movable property".[12]

Fourthly, under the Emergency Powers Act the President may make regulations to provide for the amendment of any enactment with or without modification.[13] But under the Preservation of Public Security Act the President may only make regulations to provide for the suspension of the operation of any written law other than the Constitution.[14]

Finally, as regards the duration of regulations the Emergency Powers Act stipulates that only emergency regulations that have been affirmed by resolution of the National Assembly shall take effect during an emergency.[15] However, regulations made under the Preservation of Public Security Act are valid even if they have not been tabled before the National Assembly until the expiration of three months.[16]

Both statutes clearly forbid the making of regulations to provide for the trial of persons by military courts.[17] It is to be noted that the regulations made under the two statutes override any conflicting provisions in any other law with the exception of the constitution.[18]

(i) <u>The Meaning of 'Public Security'</u>

It is now appropriate to consider what is meant by "public security." Close examination of the two pieces of legislation reveals the fact that the term "public security" is not defined. What is given is a mere description of

activities which are embraced by the term "public security."

The meaning of the term is construed widely in the Preservation of Public Security Act, section 2 as including:

> ".. the security or safety of persons, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance of administration of justice."

Similarly, Section 3(1) of the Emergency Powers Act talks of the President making regulations for:

> "securing the public security, 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."

A number of cases have discussed the meaning of the expression "public security." In Mudenda v The Attorney-General,[19] Silungwe, C.J. asserted that the definition in section 2 of the Preservation of Public Security Act is not "exhaustive" but merely "illustrative." In Chibwe v Attorney-General,[20] where the applicant had been detained on the grounds that he had conspired with two others to externalise unlawfully three million Kwacha, Sakala, J. agreed with Silungwe, C.J.'s observation that the expression "public security" is inclusive not exclusive. He went on to say:

> "In my view, to conspire to unlawfully externalise three million Kwacha from a country whose economy is experiencing great difficulties in foreign exchange is certainly prejudicial to public security which activity if left uncontrolled would lead to certain economic consequences and hardships on the people of this country."

According to this definition "public security" can cover

anything including the suppression of economic crimes like illegal trafficking in emeralds as was the case in Mudenda v Attorney-General, and illegal externalisation of foreign currency, whose connection with public security is remote.

A more useful definition of "public security" was given by Cullinan, J. in Kaira v Attorney-General.[21] In this case Cullinan, J. broke up the definition of "public security" as set out in section 2 as follows:

(1) the securing of the safety of persons and property;

(2) the maintenance of supplies and services essential to the life of the community;

(3) the maintenance of public order;

(4) the maintenance of the administration of lawful authority; and

(5) the maintenance of the administration of justice.

He accepted that all the five groupings involved the prevention and suppression of particular acts which could well amount to crimes but he was of the view that the only reasonable construction he could place on the definition is that "crime" relates to all crimes involved in the above groupings, that is, with public security as otherwise defined. To quote him:

> "I do not wish to be taken as suggesting that the regulations or indeed the other regulations made under the Act, contain a full code of the crimes indirectly referred to in the definition of "public security" in the Act. It is my view simply that the regulations necessarily contain samples of the type of crimes which the parliamentary draughtsman had in the said definition. In my judgement it is only that type of crime which has a connection with the objects contained in the definition and which may, in certain

circumstances, result in detention. I say 'in certain circumstances' because the Commission of a Crime having a connection with public security cannot in itself give rise to the necessity for detention."

After referring to Baron, D.C.J.'s oft-quoted passage on the machinery of detention in his judgement in Re Kapwepwe and Kaenga,[22] Cullinan J., continued:

"Although the above passage stresses that a person may be detained where he is not even thought to have committed a criminal offence, nonetheless it also demonstrates that he cannot be detained simply because he has committed a criminal offence. It is only where the detaining authority regards, and I would add, reasonably regards the law as inadequate for example, for reasons stated in the above passage, to deal with the situation, that the commission of a particular crime in itself may otherwise constitute a threat to public security. For example, the offence of armed robbery is a crime which could be said to have a connection with public security. Nonetheless an armed robber may only be detained where the ordinary law is inadequate to deal with the situation and where the commission of the crime actually results in a threat to public security. If it were otherwise then the ordinary law would be otiose; and so indeed would be the criminal sanctions to be found in the regulations themselves..."

Cullinan then observed that the Preservation of Public Security Act was a product of pre-Independence legislation and was enacted primarily to prevent civil unrest. He went on to say:

"The words "public security" in their ordinary sense surely mean the securing of the safety of all persons and property and the preservation of law and order. It can be said that the last four objects stated in the definition supplement the first object. Thus, in order to protect the safety of persons and property it is necessary to maintain supplies and services essential to the life of the community, to prevent public disorder, or subversive activities, or indeed a breakdown of law and order. The emphasis,

> in my view, is on the preservation of the safety of the community, rather than on its economic prosperity or otherwise. There may well be a nation whose economy is little short of chaotic but the peace and safety of whose citizens is never in doubt."[23]

Cullinan's judgement was cited with approval by Moodley, J. in Chiluba v Attorney-General,[24] It is submitted that Cullinan's judgement represents the better view and that Sakala, J's judgement should not be followed because it gives the executive power to use the Act for purposes which cannot reasonably be said to fall under public security.

It is precisely the absence of a clear definition of "public security" which has inevitably culminated in the gross abuse of security powers. In Zambia, as in many other countries, national security has been construed very widely. Indeed, this is not surprising, being an inherent characteristic of presidential regimes in underdeveloped countries. It is evident that such countries are invariably confronted with stupendous constraints in their efforts to overcome poverty, hunger, disease and ignorance, and to unite their people, which constraints are exacerbated by the various machinations of imperialism. National instability, is, therefore, a regular feature in these countries as is manifested in the military coups in many countries. It is no wonder, then, that there is a pronounced concern for national security. Of presidential regimes Professor Nwabueze has aptly written:

> "It can hardly be disputed that the presidential regimes are more sensitive about national security than prime-ministerial ones. Concentrated power is very sensitive to criticism and very jealous and suspicious of rivals or competition. Hence the increasing predominance of the one-party system in presidential regimes. The President is a personal ruler, and is indeed the government, and as such he is identified with the state. National security is thus given a personal dimension, too. It involves not only the security of the state and its institutions, but also the security of the President's tenure of office. Anything that threatens the security of his continuance in office is also a threat to the security of the nation. He is the symbol of the nation, and the instrument through which this personal identification is achieved is the single or dominant party. A threat to the security of the Party is therefore viewed as a threat to the security of the nation. Herein, therefore, lies the underlying reasons for the sensitive concern for national security in presidential regimes."25

(ii) EMERGENCY POWERS AND PERSONAL LIBERTY

The use of security powers entails the abridgement of individual rights. But the infringement of these rights is sanctioned by article 26 of the constitution, which provides that some rights guaranteed such as liberty,[26] property,[27] privacy,[28] conscience,[29] freedom of expression,[30] freedom of assembly and association,[31] movement,[32] and protection from discrimination,[33] can be derogated from during any period of war or any period when a state of emergency declared under article 30 of the constitution is in force. However, notwithstanding the existence of a state of emergency, the right to life, protection of the law and freedom from forced labour cannot be derogated from.

Personal liberty has suffered the most on the invocation

of security powers. In this section we shall deal at length with the power of detention and restriction under the Preservation of Public Security Act because of its wide and frequent use since 1964.

Section 3(2)(c) and Section 3(3)(a) empower the President to make regulations to provide for the restriction and detention of persons respectively.

Regulation 16 of the said Act empowers the President in his discretion to make a restriction order against anyone whom he considers to be a threat to public security. Regulation 33(1) provides:

> "Whenever the President is satisfied that for the purposes of preserving public security it is necessary to exercise control over any person, the President may make an order against such person, directing that such person be detained and thereupon such person shall be arrested, whether in or outside the prescribed area, and detained."

Regulation 33(6) authorises any police officer of or above the rank of Assistant Inspector to arrest, without warrant, any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation and may order that such person be detained for a period not exceeding twenty-eight days pending a decision whether a Presidential detention order should be made against him. The proviso stipulates that such a person shall be released where, before a decision is reached as to whether or not a detention order should be made against him, the

police officer who arrested him finds on further inquiry, that there are no grounds which would justify his detention under the regulation.

The detentions under regulation 33(1) and regulation 33(6) are separate and quite distinct. In Sharma v Attorney-General,[34] where the appellant was first detained under regulation 33(6) and later under regulation 33(1) it was argued by the appellant that the detentions under the two orders were in fact and must be treated in law as one continuous detention, and that since the first detention (under regulation 33(6)) was unlawful it followed that the second detention was unlawful as well. The supreme court held that albeit they relate broadly to the same subject-matter, grounds for detention under regulation 33(6) are not the same as grounds for detention under regulation 33(1); regulation 33(6) and 33(1) and the resulting detentions thereunder are quite distinct: the detaining authorities, the purposes of the detention, and the periods of permissible detention are all different. The detention under regulation 33(1) cannot be assailed on the basis of any unlawfulness in the detention under regulation 33(6).

It is apparent that the power of detention embodied in regulation 33 allows little scope for challenge in the courts. The authority to issue a detention order, where the words "satisfied" and "has reason to believe" appear in the enabling legislation, is an absolutely discretionary one requiring only that the President or police officer should be satisfied in a subjective sense about the necessity

for the order. Since, as we have noted elsewhere in this chapter, the statute does not give any guidelines as to what acts might be deemed prejudicial to the security of the state, as the Ghanaian[35] and Indian[36] statutes do, it is virtually left to the discretion of the detaining authorities to decide what acts are prejudicial to the security of the state and therefore must be prevented in order to preserve the security of the state. The Indian writer Jain has accurately described the nature of detention power:

> "... by its very nature the subject of preventive detention implies detention on the judgement of an executive authority. It would be very difficult to lay down objective rules of conduct, failure to conform to which should lead to detention. As the very term implies, detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. Nor would it be practicable to indicate or enumerate in advance what acts or classes of acts would be regarded as prejudicial. The responsibility for the security of the state and the maintenance of public order is on the the executive and it must therefore be left free to exercise the power of preventive detention whenever it thinks the occasion demands it."[37]

However, it is a requirement of the law that the detaining authority must have acted <u>bona fide</u> by fulfilling two conditions. First, he must apply his mind to the necessity alleged for the detention. Secondly, there must be some grounds or basis of fact precipitating the necessity. These grounds must, however, relate to public security. Baron, D.C.J. (as he then was) emphasized this point in <u>Joyce Banda v Attorney-General</u> when he stated:

"The defendant relied for his justification of the deprivation of the plaintiff's liberty on the fact that she was detained under regulation 33(6). That is not sufficient in itself; .. for a detention to be lawful ab initio grounds must exist at the time. But it is not any ground which justifies the deprivation of liberty, even if the detaining authority genuinely believes that it falls within the regulations.. the grounds must as a matter of law be intra vires the regulations. The police officer must have reason to believe that the person concerned, if left at liberty is likely to engage in activities prejudicial to public security.. If what the police officer had reason to be believe was not as a matter of law good ground for detention under regulation 33(1) then the arrest and detention under regulation 33(6) were unlawful ab initio. Suppose, for instance, the police officer believed that it was a valid ground of detention under regulation 33(1) that the person concerned had committed a series of petty thefts... or to use an example which is unfortunately not hypothetical, suppose the police officer detains a person, invoking regulation 33(6), in order to put pressure on him to disclose information concerning commission of an offence by someone else... It is... clear that the regulation does not give power to detain for reasons such as those."[38]

Recent decisions have gone further and subjected the detaining authority's satisfaction to the test of reasonableness. In Lombe & Chisata v The Attorney-General[39] the applicants were alleged to have been involved in unlawful meetings and in particular they were held responsible for arson and the death of 12 people at Chililabombwe. They pleaded alibis. Cullinan, J.S. delivering the judgement of the Supreme Court stated:

"I agree that there is no onus upon the detaining authority to prove the grounds for detention, nor are we necessarily concerned with the truth or falsity as such of the grounds. ...I accept that the detaining authority is not prima facie obliged as such to'support any suspicion,' his order is valid on the face of it. To that extent I agree that the detaining authority's satisfaction is not

> subject to review. I hesitate to think however that the learned Judge President (in Re Kapwepwe & Kaenga) by the use of the term 'subjective satisfaction' meant to convey that the detaining authority's satisfaction was absolute and was not subject to the test of reasonableness where challenged on prima facie grounds."[40]

The Court then referred to Doyle, C.J.'s dicta in Eleftheriads v Attorney-General[41] where he said the court could not question the discretion of the detaining authority if it is exercised within the power conferred and that the question here is one of vires. The Supreme Court held that that dicta was authority for the widely accepted proposition that provided a detaining authority's discretion is not shown to be unreasonable, the court cannot then replace the detaining authority's discretion with its own discretion in the matter.

After referring to Baron, J.P's dicta in Kapwepwe and Kaenga to the effect that the court was precluded from enquiring into the reasonableness of the declaration of emergency[42] Cullinan, J.S. continued:

> "Whereas Baron, J.P. there said that it is not open to the courts to consider whether or not a declaration under section 29 (now article 30) of the Constitution is reasonable, it is of note that he did not say that the courts could not consider whether or not there was reasonable suspicion of the allegations against a detainee: he merely said that, in any particular case, 'assuming the truth of the allegations against a detainee' a court could enquire as to whether it was reasonable to resort to detention. That observation does not, in my view, preclude an enquiry as to whether or not it was reasonable to suspect the detainee of such allegations."[43]

The High Court (Moodley, J.) in Chiluba v Attorney-General[44] followed the decision in Chisata. In Chiluba the applicant alleged that the grounds for his detention were fabrications

and that they created doubts in his mind as to the fides of the decision to detain him. He contended that his detention was a systematic attempt by the President to weaken and demoralise the labour leadership of the country. The court held that the grounds for detention were not based on reasonable suspicion. A study of the grounds for detention showed that they were impossible in relation to times, locality and persons dealt with by the applicant. Further, the court stated that where the applicant had adduced prima facie evidence to challenge the grounds for his detention, the detaining authority was obliged to answer that challenge. In fact the Court in Chiluba went further than Chisata to examine the merits of the affidavit filed in response. To quote Moodley, J.:

> "There is authority for the proposition that the applicant is required not merely to deny the allegations in the grounds for detention or argue that they were non-existent, but is required to adduce prima facie evidence to support this contention. I would hold that the same principle should apply with equal force to the respondent's affidavits in opposition. I do not think that the respondent can seek refugee in merely confirming the allegations set out in the grounds of detention or merely denying the contentions advanced by the applicant. The respondent in my view is required to adduce evidence to contradict the applicant's evidence."[45]

These recent trends in the thinking of the courts must be commended for it is important that the executive's discretion to detain must be subject to close scrutiny lest it be abused.

The courts have also ruled that detention is not a punitive but a precautionary measure. In Gopalan v State of Madras,[46] Mukerjee, J. said:

> "preventive detention is not punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence."

In Elefheriads v Attorney-General,[47] the Supreme Court held that regulation 33 is directed to the preservation of public security and that it cannot be used solely as a punitive measure. Past activities can furnish good grounds for detention under the regulation provided that those activities have induced an apprehension in the mind of the detaining authority of future activities prejudicial to the public security.

The question arises as to whether the executive has power to detain where the offence falls under criminal law or where the accused has been acquitted on criminal charges. In Re Kapwepwe and Kaenga,[48] it was submitted, inter alia, that the discretion to detain was exercised in bad faith because the grounds for detention constituted criminal offences for which a criminal prosecution could have been instituted. Dismissing this submission, Baron, J.P. (as he then was) stated, inter alia:

> "The machinery of detention or restriction without trial is, by definition, intended for circumstances where the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy, there may be insufficient evidence to secure a conviction, or it may not be possible to secure a conviction, or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose;

> or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore; or the activity in which the person concerned is believed to have engaged may not be a criminal offence, or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspiscion. The question is purely one for his subjective satisfaction."[49]

The decision above was followed in the case of Re Buitendag,[50] where the applicant was tried before the High Court on four counts under section 3(c) of the State Security Act[51] and was acquitted at the trial. The applicant submitted that his detention was unlawful as the detaining authority had exercised his discretion to detain in bad faith. In dismissing the application for a writ of habeas corpus, Cullinan, J. stated:

> "It seems to me that where a detaining authority decides to lay a criminal charge rather than detain he is not then precluded by an acquittal per se from doing that which he always had power to do, that is, to detain. I do not see therefore that there can be any general rule that where a detaining authority decides first to lay a criminal charge that he cannot then detain when the allegations are not proved to the court's satisfaction beyond reasonable doubt."[52]

It goes without saying that the decisions above have helped to further accentuate the harshness of detention. What is implied is that a person who is found innocent by the courts can still face imprisonment on the same set of facts. This is indeed most unfortunate as the detaining authority is given unfettered power to detain without trial. The courts seem impotent to protect individual liberty in such circumstances

and the individual is left helpless and at the complete mercy of the executive.

3. A BRIEF SURVEY OF PROVISIONS OF EMERGENCY STATUTES OF A FEW OTHER COUNTRIES

(A) MALAWI

The basic statute conferring extra-ordinary powers on the executive is the Preservation of Public Security Act.[53] Like the Zambian statute, it does not define what constitutes 'public security'. The wording of section 2, which gives a broad description of activities embraced by the term 'public security', is identical to section 2 of the Zambian statute (i.e. the Preservation of Public Security Act).

Section 3(1) provides that if at any time the Minister is satisfied that it is necessary for the preservation of public security so to do, he may by notice published in the gazette, declare that the provisions of sub-regulation (2) shall come in operation.

Section 3(2) empowers the Minister to make regulations to cover a wide range of activities including the detention of persons. Again section 3(2) is identical to section 3(2) of the Zambian statute. The regulations may be made to apply to Malawi or to any part thereof, and to any person or class of persons or to the public generally.[54] Like in Zambia, there is an express bar against the making of regulations providing for the trial of persons by military courts.[55]

Regulation 3(1) provides that the Minister may, if he considers it to be necessary for the preservation of public security so to do, order that any person be detained. Regulation 3(7), like the Zambian regulation 33(6) permits an authorised officer[56] to arrest without warrant any person of whom he has reason to believe that there are grounds which would justify his detention under the regulation, and to detain such person for not more than twenty-eight days pending a decision whether a detention order should be made against him.

Malawi has also got the Restriction and Security Order Act[57] to cater for restrictions. This Act provides for the regulation of the making of Restriction and Security Orders in respect of undesirable and convicted persons. An "undesirable person" is "a person who is or has been conducting himself so as to be dangerous to peace, good order, good government or public morals, or who is or has been attempting, or conducting himself in a manner calculated, to raise discontent or disaffection among the citizens or the inhabitants of Malawi, or to promote feelings of ill-will and hostility between different races or classes of the population of Malawi."

Section 3 empowers the Minister, if he sees fit, to make a restriction order in respect of an 'undesirable' person or a convicted person.

These two statutes can be invoked at any time, even in the absence of an emergency. They vest enormous powers

in the executive. The powers can be used to deal effectively with opponents of the regime. This is the more so since the constitution does not embody a bill of rights.

(8) SWAZILAND

The Emergency Powers Act[58] authorizes the taking of measures necessary to deal with a state of emergency declared by His Majesty the King in terms of the constitution. Under this Act the Prime Minister is empowered, when an emergency declaration is in force, to make such regulations as are reasonably justifiable for securing the public safety, the defence of Swaziland, 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 and for making adequate provision for terminating the emergency or for dealing with any circumstances, which in his opinion, have arisen or are likely to arise as a result of the emergency.[59] Such regulations may, inter alia, provide for: the detention of persons; deportation and exclusion from Swaziland of non-citizens; restriction of persons; imposition of curfews; amending of any law, the suspending of the operation of any law and for applying a law with or without modification; taking possession or control of any property or undertaking; acquisition of property other than land; entering and search of any premises, etc.[60]

Parliamentary control over the executive's power to make regulations is effected by the requirement that all

regulations made shall be laid before both Houses of Parliament within seven days of their having[61] been made if a House is sitting,[62] or if a House is not sitting, on the day of the commencement of its next sitting.[63] Both Houses may, at a joint sitting pass a resolution declaring a regulation invalid.[64]

The Swaziland statute, unlike the Malawi and Zambian statutes, does not have a provision prohibiting the setting up of military tribunals.

(C) UGANDA

Uganda has two public security statutes: the Emergency Powers Act 1968[65] and the Public Order and Security Act 1967.[66] The former statute amended and consolidated the law relating to emergency. Section 4 of the Emergency Powers Act provides that whenever a proclamation of emergency is in force, the Minister may by statutory Instrument, make such regulations as appear to him to be necessary or expedient for securing the defence of Uganda, the public safety, the effective government of Uganda or any part thereof, the maintenance of public order and the enforcement of the law, and for maintaining supplies and services necessary to the life of the community. Such regulations may inter alia provide for: the detention or restriction of persons; the exclusion of persons from any part of Uganda and for the deportation or exclusion from Uganda of aliens; the entering and search of any premises; the amending of any law, the suspending of the operation of any law,

and the applying of any law with or without modification; the election, constitution, suspension, dissolution or reinstatement of any District Council or local Authority at any time or for any period of time; the prohibition of strikes; the acquisition on behalf of the government of any property including land, etc.[67]

Section 2(2) makes it categorically clear that the regulations shall not,

(a) provide for the expropriation or destruction of lawfully held property without just compensation;

(b) provide for the trial of persons by military courts.

The Public Order and Security Act 1967 is not, strictly speaking, emergency legislation as it is mean t to operate when there is no emergency proclamation in force. Yet it vests drastic powers in the President equivalent to those contained in the Emergency Powers Act vis-ā-vis the detention and restriction of persons. The main object of the Act is "to provide for preventive detention and the imposition of restrictions on the movement of persons in the interests of public order, public security and defence..."

Section 1(1) provides:

> "Where it is shown to the satisfaction of the President, (a) that any person has conducted, is conducting or is about to conduct himself so as to be dangerous to peace and good order .. or that he has acted, is acting or is about to act in a manner prejudicial to the defence or security of Uganda...; and
> (b) that it is necessary to prevent such person from so conducting himself or so acting the

President may..... direct the restriction or detention of that person."

Section 1(5) authorises a police officer of or above the rank of Inspector who has reasonable suspicion that any person has conducted, is conducting or is about to conduct himself or has acted, is acting or is about to act in such a manner as is referred to in paragraph (a) of subsection (i), to apprehend that person without warrant and place him in protective custody for a period not exceeding fourteen days pending any order under the section.

Section 2 stipulates that where a person is detained under or by virtue of the Emergency Powers Act and the President is satisfied that in the interests of public order, security or defence of Uganda or any part thereof, the continued detention or restriction of such person is necessary when the emergency proclamation ceases to have effect, the President may direct the restriction or detention of that person.

Section 12 authorises the President to delegate the powers and duties conferred upon him under the Act to any Minister he may designate in that behalf.

It may be noted that the powers vested in the executive are, without doubt, wide-ranging and vast. Personal liberty is most threatened as the government is given power to detain or restrict without trial any person both during emergency and normal times. The courts have little power to protect individual liberty as the powers are framed in a manner that gives the government untrammelled discretion. Furthermore,