E M E R G E N C Y P O W E R S I N Z A M B I A

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PAULSEN AFRO HIMWIINGA, LL.B (ZAMBIA)

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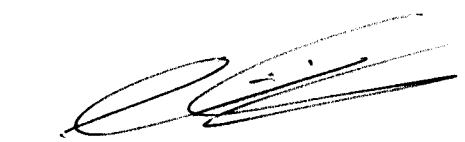
I declare that this thesis represents my own work, and that it has not previously been submitted for a degree at this or another University.



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PAULSEN AFRO HIMWIINGA

This dissertation of Paulsen Afro Himwiinga is approved as fulfilling part of the requirements for the award of the Master of Laws by the University of Zambia.

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ABSTRACT

One striking feature which the Zambian constitution shares in common with other constitutions of Commonwealth Africa is the phenomenon of wide emergency powers which exist under the constitution and also under the various emergency or security statutes and regulations made thereunder. These laws confer on the Executive (in effect the President) unusually extensive powers to deal with both potential or threatened emergencies and actual emergencies. It is often argued in support of the conferment of these powers that of necessity the Executive needs wide powers of action and despatch in order to preserve public order, peace and security during crisis moments when the nation is faced with grave danger.

Unfortunately it has at the same time been observed that the powers granted are often so vast and wide in extent (largely discretionary in nature and therefore lacking sufficient checks and controls) that in the absence of adequate self-restraint or a strong democratic tradition they provide fertile ground for the possible emergence of an absolute or tyrannical rule. This study seeks to examine this possibility in the Zambian context of emergency powers and proceeds to recommend how the frightful possibility of absolute or tyrannical rule could be avoided whilst preserving national security, public peace and order.

Part I of the dissertation is divided into two chapters. In chapter one, the theory of Emergency Powers as it developed in the Western political tradition is examined. Chapter two on the other hand, looks at the application of Emergency Powers in the histories of selected countries.

Part II (which consists of four chapters) mainly examines the situation in Zambia. In chapter three an account of the Emergency Powers during the colonial era when the country was a British Protectorate is made. The next two chapters in this part, chapter four and five, constitute the main thrust of the present investigation or research on Emergency Powers in Zambia. A comparative analysis and critical examination of the extent, manner of formulation, application of emergency powers is made in chapter four. Chapter five examines judicial interpretation of Emergency Powers in the post-independence era.

In the last chapter, chapter six, a constitutional framework for avoiding a dictatorship or tyrannical rule has been proposed.

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PART I

CHAPTER ONE

THE THEORY OF EMERGENCY POWERS

A time comes in a nation's history when external or internal forces threaten the entire existence of the nation. The peace and security hitherto enjoyed by the citizens are put to severe peril by threat of, or actuality of, a foreign invasion, rebellion or a great economic depression. Naturally during these trying moments the citizens cast their eyes upon the government which feels called upon to protect its people. The question is, through what acceptable legal manner can this objective be attained?

The question posed above has intrigued and exercised the minds of rulers throughout various nations' critical moments or times. The question is raised because it is often realized by many a Government that the existing machinery of government with its built-in systems of checks and balances, separations of powers between the judiciary, legislature and executive and its commitment to the protection of the fundamental freedoms and liberties of the citizens is geared for peaceful times, when the national is at rest. This machinery of government may not, without fundamental adjustments, be adequate to contain a crisis situation.

It is in appreciation of the above point of fact that the practice of according to one arm of government, usually the executive, extra-ordinary powers to enable it deal with the crisis has emerged and, in most cases, has been provided for in the constitutions of nearly all nations, young and old. In the interests of authority and despatch the appointed defender of the nation is justifiably armed with disproportionate powers. These are often so vast in extent and discretionary in nature that they provide ample possibilities for dictatorial rule. The dictionary meaning of dictator is "one appointed to exercise, or exercising absolute authority in government, especially in a republic." In our use of the term in this investigation the qualification 'constitutional' will be taken to denote a dictatorship understood more or less in this dictionary meaning but with the additional characteristic of being inadvertently provided for in the nation's constitution. Hence the phrase, constitutional dictatorship, will serve as a general concept for a whole spectrum of emergency powers and procedures used by constitutional governments during moments of national crisis.

(i) Justification of Emergency Powers

Leading politicians, lawyers and political scientists and other men of scholarly eminence have in history advanced various theories in support of the institution

of constitutional dictatorship or emergency powers.

All these reasons hinge upon the pathetic recognition that the existing structure of government is basically established or constructed to work under normal and peaceful moments. Such structures may therefore not be adequate to meet the demands of severe national crisis. The pathos of democracy requires that there be a government of the elected representatives of the people controlled by the people and which must protect their fundamental rights and freedoms enshrined in the constitution. Unfortunately this normal democratic government with such fetters upon it and high regard for fundamental rights and freedoms is not, unless appropriately adjusted, suitable for dealing with an emergency situation. An emergency situation demands among other things, quick but firm decisions and actions by the leadership which a government operating in peaceful times may not be able to disperse.

Consequently a nation, conscious of the possibility of crisis moments, must provide in its constituion, a mechanism by which the government would easily be able to handle a grave national crisis. Accordingly provision must be made for a temporary alteration of the normal system of government to an extent necessary to end the crisis and restore peace and order.

In effect inevitably this alteration entails the granting to and exercise of wider powers, by the government and restriction or suspension of certain liberties or rights of the citizens in order to give the executive the much needed freedom of action. It is argued in support of the grant of extraordinary powers to the government, usually at the expense of the rights and freedoms of the citizens, that the nation must first be preserved and survive before citizens can freely enjoy their rights and freedoms. Championing this viewpoint during the American civil war (1861-1865) Abraham Lincoln, then President of the United States of America engulfed in civil war, aptly said "often a limb must be amputated to save a life, but a life is never wisely given to save a limb"[1] The President was obviously providing justification for a number of unconstitutional or dictatorial actions which the war situation forced him to take. Of this Clinton Rossiter, a leading Political Scientist, records: "The constitution and certain statutes told him that he could not raise the limits of the army and navy, pay money to persons unauthorised by law to receive it or contract a public debt for the United States - but Mr Lincoln decided and candidly declared that the necessity for preserving the Union was sufficient for him to go ahead and do these things anyway."[2]

Over and above the foregoing reasons advanced in support of emergency powers, the developing countries like Zambia have put

up additional reasons which they claim are particular to their situations. We shall consider these here.

(a) The Problems of National Integration

Most of the developing countries do not have a long tradition of nationhood. In case of African countries the nation-status started to emerge only after the Berlin Conference of 1884 when the continent of Africa was partitioned for colonial possession mainly by Britain, France, Germany and Belgium. The created nation-states generally took the form of loose groups of peoples or kingdoms with different socio-cultural backgrounds and often without a unified political leadership.c These nation-states were nurtured in an atmosphere of inter-tribal jealousies, rivalries between ethnic groups, and, with the birth of political parties with their regional or tribal affiliations and bias, divisions based on political, regional and tribal considerations became pronounced. In view of this background of a lack of a long tradition of nationhood and national integration, it has been argued that the countries concerned require strong Executives equiped with wide emergency powers to deal with this potentially explosive and divisive situation. Speaking in defence of his country's Preventive Detention Act during the inauguration of the University College of Dar-es-Salaam, President Julius Nyerere of Tanzania summed up the position as follows:-

"Our Union has neither the long tradition of nationhood nor the strong physical means of national unity which older countries take for granted. Until the vast mass of the people give full and active support to the country and its Government, a handiful of individuals can still put our nation into jeopardy and reduce to ashes the efforts of millions."[3]

(b) Threat posed by External Enemies and by Internal Political Dissidents

If the developing countries of Africa internally lack a long history of national integration their situation has been worsened by the fact that they are targets of assault by political dissidents either acting alone or in collaboration with external forces who have their own interests to advance in these rather fragile politics. The histories of developing countries like Zambia, Nigeria, Uganda, etc. are full of many competing political parties which are in effect splinter groups that broke away from the main nationalist movement at one time or another. After the attainment of independence these parties continued to struggle against the victorious parties and were at times reinforced by other rebels who in due course left

the ruling parties to either join the opposition parties or to form their own parties. In some cases political dissillusionment produced strong dissent or violent anti-government tendencies in some of these politicians. Lest the "efforts of millions" are reduced to ashes by the dissidents, argues the protogonists of emergency powers, the executive need wide powers to contain the dissidents and to ensure that the nation is not put in jeopardy by them. Such apprehensions are exercaubated by the fact that after losing the political hold on their former colonies to the nationalists, the departing imperial powers still wanted to perpetuate their economic interests in the former colonies, usually through the medium of political dissidents in the newly-independent states. In case of Zambia, an irrebutable case is the Mushala gang of terrorists who were alleged to have been organised to carry out terrorist activities in the North-Western Province, after their leader, Adamson Mushala(later killed in ambush by Zambian Security Forces) fell out of favour with the Government. Mushala and his gang are alleged to have been trained in military warfare by South Africa - Zambia's more visible external enemy. In this atmosphere it is often feared that the new young nations like Zambia which are surrounded by hostile neighbours run the risk of being infiltrated by imperialist agents operating from the neighbouring countries which are not yet independent.

Granted this state of affairs, it is argued that the ordinary process of law is found by the young governments to be too ill suited to deal effectively with the situation since, in Babu's[4] summary of the argument, "the agents could freely enter any one of the independent countries with legitimate travel documents and without breaking any laws of the country concerned."[5] In the circumstances, the argument goes, the executive needs extraordinary powers to deal with the extraordinary situation, such as the powers of preventive detention. President Julius Nyerere of Tanzania gave the argument a philosophical coating when he said the following on the power of detention without trial given to him by his country's Preventive Detention Act:-

> "I agree that, in the idealistic sense of the word, it is "better" that 99 guilty men should go free rather than one innocent man being punished. But in the circumstances of a nation like ours other factors have to be taken into account. Here, in this Union conditions may well arise (emergency conditions) in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation.

It would certainly be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person."[6]

(c) Geo-Political Position

For Zambia, the case is further argued on the lines of her sensitive geo-political position. Zambia shares a border with the former minority Rhodesian regime (now an independent country called Zimbabwe) and the former Portuguese territories of Mozambique and Angola, also now independent, and South Africa, through Namibia which it administers and control. Infuriated by Zambia's support for these countries' liberation movements which Zambia supported and to whom she offered operational bases, the Portuguese, Rhodesia and South Africa agents and troops infiltrated into Zambia and sabotaged the countries' strategic installations like rail/road bridges.

It was, therefore, argued by the Zambian Government that the Executive needed to be armed with wide discretionary powers in order to organise resistance to these subversive onslaughts against her and to save her economy from disruption by the hostile neighbours. In the words of Dr Zimba "the country needed to secure itself a united and vigilant population under the guidance of one party and a strong executive."[7]

(d) Effects of Underdevelopment and Economic Crisis

At independence the new leaders of Africa were inheriting terribly underdeveloped countries characterised by abject poverty, lack of socio-amenities and economic opportunities. With the coming of political independence the people looked to the new governments, run by their own brethren to drastically improve their socio-economic situation. The governments therefore felt hurried to start socio-economic projects which would satisfy the basic needs of the people, lest the opposition groups or parties exploit governments' failure to quickly deliver the goods to their advantage. This state of affairs called for a provision of wide powers of authority to and vigour in the executive to enable it fight the "economic war" effectively, without being unduly constrained by the niceties of private property law as understood in the capitalist sense.

(e) Lack of Democratic Traditions

Another argument advanced to justify emergency powers in the developing countries is the one that, historically these countries lack strong democratic traditions.

This viewpoint traces the problem back to the traditional African system of government. In the tribal organisations of many pre-colonial African Societies the argument goes, the tribal leader, the Chief, was vested with wide powers of action and decision. On the other hand the subjects felt traditionally inclined to show a large

measure of deference towards authority. It was generally considered sacreligious to flout the Chief's authority, believed to have a religious base and extreme cases of abuse of power were accepted. The traditional African Socio-political system showed considerable toleration of arbitrariness by the Chief. According to this school of thought this attitude towards authority was applied to the modern political leader and was covertly admired by the new leaders of independent Africa. The President was, in effect, the Chief of the emergent nation and in this capacity needed to wield the wide powers associated with traditional chiefs, to generally act freely without being unduly fettered by restraint mechanisms inherited in democratised institution or systems of government.

This conception is reinforced by what is generally viewed to to be the traditional African notion of authority. In his unpublished sociological investigation Alvin W. Wolfe found that "authority in theAfrican Society is conceived as being personal permanent, mystical and persuasive."[8] In this sense concludes Nwabueze, "the chief is a personal ruler, and his office is held for life, which pervades all other relations in the community, for he is both legislator, executive, judge, priest, medium, father, etc."[9] These characteristics augur well with the modern practice of granting dictatorial emergency powers to the President which the new leadership of post-independence African

did not fail to adopt. The other argument presented with equal force is the one that if the adoption of emergency powers in the post-independence Africa is the result of a lack of democratic traditions or practices in the traditional African system of government, then the situation was worsened during the colonial era by the imposition of a colonial system of government which was, to say the least, autocratic and pitifully lacking in democratic practices. In the enext chapter of this study we have pointed out that the colonial system of government was constructed in an atmosphere of intense racial tensions between the white settler community and the indigenous black populace and that in order to perpetually subject the latter race to a life of servitude and poverty the colonial government passed authoritarian and discriminatory laws. Under some of these laws, the Governor was granted wide autocratic powers which, among other evils, authorised him to detain people without trial, once he had declared an emergency, seize property and bannish political opponents, in essence the leaders of the African Nationalist Movements. In the telling words of McAustan "the whole tradition of colonial Government was autocratic and carried with it a dislike of opposition of any sort and a willingness to override, disregard or amend the law, where necessary, to suit its own convenience."[10] The foregoing is the machinery or system of government which the new leaders

of independent Africa inherited at the time of achieving political independence in their respective countries. Evidently the system lacked democratic traditions. Hence Nwabueze's assertion that the system of emergency powers adopted by the new African leadership "accords with the African political experience during the colonial era,"[11] Out of the foregoing exposition of the justifications for the system of emergency powers, anumber of key note questions of consitutional law have arisen. It has for instance been asked as to what extent should or can a government abridge or trampel upon the fundamental rights or freedoms of the citizen and justify its actions on the existence of a national crisis. What type or amount of emergency powers must a Government be granted without it turning to be the peril of its subjects or becoming dictatorship? In the words of Abraham Lincoln, "is there in all republic this inherent and fatal weakness? Must a Government of necessity be too strong for the liberties of its people or too weak to maintain its own existence?"[12] Where should the delicate balance be? The answers to the foregoing questions have slightly varied from constitution to constitution and from nation to nation. In the chapter to follow we shall look at how the old democracies of Ancient Rome, the Germany Republic of 1919-1933, Great Britain, and the United States of America answered or attended to these questions during their various moments of near national disaster. This task accomplished, we shall examine, in the chapters to follow later, the situation in Zambia and make a comparative analysis.

FOOTNOTES

1. Letter by Lincoln to Hodges, in J Nicolny and J Hay, Complete Works of Abraham Lincoln, (New York, 1905) IIp. 508.

2. C Rossiter, Constitutional Dictatorship; Crisis Government in the Modern Democracies, (Harcourt, Brace and World Inc., 1963) p. 11

3. Nyerere J, speech inaugurating the University College of Dar-es-Salaam reprinted in issue No. 2, Review of Contemporary Law, (1964), 11-13.

4. A M Babu, African Socialism or Socialist Africa? (London; Zed Press, 1981)

5. Ibid p. 169

6. Nyerere J., speech inaugurating the University College of Dar-es-Salaam, op. cit. 11-13.

7. See Dr L Zimba's Ph.D thesis The Constitutional Protection of Fundamental Rights and Freedoms in Zambia; An Historical and Comparative Study, Chapter III (unpublished and presented to the University of London in 1969.

8. Wolfe A, "African Conseptions of Authority" unpublished paper (1965) Cited by K W Grundy and M Weinstein, "The Political Uses of Imagination" (1968) Transition 31, p.5.

9. B O Nwabueze, Presidentialism in Commonwealth Africa, (London: C Hurt and Company, 1974) p. 107

10. McAulan "The Republican Constitution of Tanganyika" (1964) 13. I.C.L. Q502, pp. 561-66.

11. B O Nwabueze, Presidentialism in Commonwealth Africa op. cit at p. 6

12. Lincoln A, Message to Congress in Special Session on 4 July 1961, in R S Hirchfield (Editor), The Power of the Presidency Concepts and Contravercy, (New York: Atherton Press, Inc. New York 1968) p. 76

CHAPTER TWO

EMERGENCY POWERS IN WESTERN DEMOCRACIES

(i) The Roman Republic.

The Roman Republic holds a good moral yardstick for measuring modern institutions of constitutional dictatorship in that the Roman dictatorship was an institutionalised and yet adequately circumvented dictatorship.

Upon the conviction of the Senate that the safety of the Republic was endangered and that the ordinary administrative officials were not competent enough to contain the situation, the Senate could propose that the consuls appoint a dictator. Alternatively, but subject to the approval of the Senate, the consuls themselves could make a proposal.

The office of the dictator was a revered one and the person appointed had to be an eminent public figure, usually someone who had led a successful career and had reputation for ability and devotion to the Republic. The dictator had his *imperium*, his sacred and absolute power, conferred upon him by a *lex curiate*, which though a matter of form

only had the significance of giving the dictatorship a stamp of legality. Thus by law a new office was established especially for the emergency and a private individual outside of the existing government machinery was called upon to fill it. This feature prominently distinguishes Roman crisis management from those of modern governments.

The lex curator, establishing the dictatorship defined the purposes of the dictatorship. Recorded history[1] says that dictatorships were normally established for "getting things done"(the dictatura rei / garundae causa) or for "suppressing civil insurrection" (the dictatura seditionis sedandue et rei geruulae causa) in times of crisis.

The Roman dictator was an absolute ruler. He was free from the numerous limitations cast upon the ordinary magistrates and he was not responsible to anyone. He was given all the powers which might contribute to the execution of his task. Thus he had tremendous capacity granted by the law for moving quickly and with authority to all measures he might, in his sole discretion, consider necessary for the preservation of the republic.

However the Roman dictatorship prides itself on one remarkable limitation - the term of office of a dictator

was six months. This restriction was obeyed all the time. Another important convention of the Roman Constitution required the dictator to leave office immediately the the purpose of his dictatorship came to an end. Of this machiavelli was to write: "If any of them arrived at the dictatorship, their greatest glory consisted in promptly laying this dignity down again."[2] A dictator who dared to prolong the tenure of his office could be forced out of office by the tribunes and risked being prosecuted on a charge of illegally prolonging his tenure of office.

The foregoing limitations mark out the Roman dictatorship as an emergency institution established by law, which whilst being wide in its powers, was adequately checked in its duration and where the beneficiary of the powers was a person outside of the government system.

(ii) The German Republic (1919 - 1933)

In 1919 the German Republic, hurt by its defeat in the First World war which had ended only the previous year, was almost collapsing. Clinton Rossiter tells the story dramatically, "separate movements and provincial rebellions threatened to dismember completely the bleeding corpse of the Reich, the spirit of the people lay broken

beneath the vain sacrifices and hardships of the previous five years, extremists of right and left ran riot in their efforts to establish state and local governments of their own tastes, the allied blockade continued unabated, inflation had already begun its infinite skyward spiral and unemployment was reaching threatening heights with the abandonment of war industries and the Heimkehr of the soldiers."[3]

Clearly this was a very grave crisis situation and it was in this turbulent atmosphere that the German National Assembly, desirious of a strong executive with adequate emergency powers, formulated article 48 in the new German Constitution.

Under the provisions of Article 48 the way for a constitutional dictatorship was paved. The Article reposed in the President immense powers of government to be applied once he declared a state of emergency.[4] Among other things, he was empowered to suspend the seven fundamental rights provided for in the constitution. By this article the president was able to assert the total powers of government in disregard of the usual checks and balances and the guarantees of fundamental rights and liberties set up to protect German citizens

from arbitrary action by the Government.

In arming the president with these extraordinary powers the German Assembly devised an instrument of emergency government which left enough room for despotism. Too much was put to personal trust. It was hoped that only men of good will and trust devoted to the German Republic would ever be in a position to invoke these extraordinary powers in the interest of the republic. These pious expectations were soon dashed. Within a period of thirteen years Article 48 was used on more than 250 separate occasions and Lindsay Rodgers et al have recorded a list of 233 decrees issued under Article 48.[5] As part of government efforts to suppress communist outbreaks and having suspended fundamental rights as authorised by Article 48, public assemblies were prohibited and there was rigid censorship of newspapers. Summary arrests and detentions and other arbitrary police actions became prevalent. Special executive courts to try certain crimes against the state were established on several occasions and the powers of the courts were wide and arbitrary. During certain periods there was an abeyance of the regular laws and armed troops were often used on areas threatened by insurrection.

Whereas some of the foregoing measures may have been justified in a war situation, it can not be denied that there was also excessive and arbitrary use of the powers granted by Article 48. The measures which were taken sometimes were far too strong for the correction or handling of a particular political or social problem. The irony of the matter is that these measures could be justified by the authorities on the constitutional provision, Article 48. Hitler's NAZI Germany, that terribly despotic dictatorship the world has ever known, found its germ or ancestry in this constitutional arrangement. Once Hitler emerged on the political scene he sought and obtained from the new Reichstag powers of executive decree and, armed with extraordinary powers, he proceeded with arbitrary and dictatorial actions in total disregard of the Weimar Constitution. Thus what had started on as an emergency institution to enable the government preserve the republic during trouble-torn moments ended up an easy road to despotism once the reigns of government came into the hands of personalities like Hitler. Unfortunately, whilst all this was taking place the courts were not of much help. A decision of the Reichsgericht, declared that the President under Article 48 could "unquestionably take any

measures necessary to the restoration of the public safety and order ..... Absolutely everything that the circumstances demand is to be allowed him to ward off the dangers that imperil the Reich."[6] What more dictatorial possibilities could an evil man desire!

The courts consistently stood aloof, maintaining that any measures taken under Article 48 fell within the exclusive jurisdiction of the President or of the Reichstag and this way foreclosed any judicial censure on the necessity of the various use of the power granted by the Article. Any purported examination by the courts into Article 48 were merely superficial since they always ended up upholding the actions of the Government. The other formal checks on the President's application of Article 48 such as the requirement of ministerial countersignature and the obligation cast upon the President by Section 3 of the Article to "immediately inform the Reichstag of all the measures taken in conformity with this article..."[7] proved equally ineffective. In the absence of prior positive approval by the Reichstag of all the measures taken under article 48 there was no way that the rise of an unrestrained Presidential/Cabinet dictatorship could be prevented. The Weimar Constitution also erred in

giving the president unrestrained power of dissolution of the Reichstag without instituting some way through which Reichstag suprintendence could be maintained in the interim period between the dissolution of the Reichstag and the convocation of a new one. Surely if the Reichstag was meant to be a control over the use of Article 48, this control should have been there all the times and not removable on the whim of the President himself. Perhaps the framers of the constitution relied too much upon the normal responsibilities of government order to act as a check on the abuse of Article 48. Whereas this reliance may have worked to a president of goodwill and trust it was certainly ill-placed to a man like Hitler. Rossiter nicely sums up the issue when he says "power is one thing in possession of good men and another in the group of evil men ... In 1922 Article 48 was a blessing, in 1932 it was a curse ..."[8]

(iii) British Experience.

The British mechanism for handling emergencies sharply constrasts the systems obtaining on the Continent. Whereas both the ill-fated German Republic of 1919 to 1933 and France, a country which had too many times known

civil strife and revolution endorsed crisis institutions in the constitutions such as Article 48 and the state of siege respectively, Britain has lacked this special constitutional arrangement for emergencies. The reasons are embedded in British History. Unlike the countries of the continent which had experienced violent upheavals at various stages of their national histories, Britain enjoyed relative peace and quiet, was free from fear of invasions and possessed a parliamentary system capable of handling crises if they arose.

However, although Britain lacked the institutionalisation of crisis government in the fashion of the German Republic or France, the impact of the First War and the Great Economic Depression of the early nineteen thirties compelled Britain to move, though less bodly, towards the continental pattern of crisis government. The distinguishing and reigning philosophy of English emergency government was a minimum of statutory provision for emergency situation, action by parliament led by the cabinet to meet any serious crisis which may have arisen and, if parliament was unable to function, independent exeeutive action based on the royal prerogative or common law.

The common law institution of martial law facilitated the extension of military government to domestic areas and civil persons if there was any invasion or rebellion. Martial law could be perhaps duped the British instrument of constitutional dictatorship because it entails a suspension of normal civil government in a crisis moment and abridges the fundamentals rights and freedoms of the citizens. However, Martial law is one British tradition circumscribed by stringent conditions calling for a cautious execution of it. Those who wield power granted under martial law must stand ready to prove to the courts, when the crisis is over and normal government has returned, that general conditions were extraordinary and thus justified martial rule. Further they must be prepared to prove that the particular actions taken were necessitated by the exigencies of the situation, otherwise these actions may be proceeded against both criminally and civilly. These characteristics distinguish martial law from institutions like the French state of siege because under the latter the sole limit upon arbitrary use of emergency power is the legislature and

the regular courts only offers scant refuge to aggrieved individuals whilst under martial law the courts are the main deterrent to deplorable acts by those wielding extraordinary powers.

With the coming of the First World War (1914-1918) Britain felt compelled by the war situation to pass various emergency laws. The most reknowned of these laws was the Defence of the Realm Act (DORA) of August 8, 1914. This Act stipulated that "His Majesty in Council has power during the continuance of the present war to issue regulations for security, the public safety and the defence of the realm." The Act also gave the Admiralty, Army Council, Air Council or the Minister of Munitions power to utilise or take possession of any factory and/or regulate the working of any factory as necessitated by the war effort.

With regard to this Act it is important to note that the power of the Majesty in Council to issue regulations was limited to the duration of the war and that the regulations issued were to be directed specifically at security public safety and the defence of the realm. In

fact the first regulations issued under this Act clearly stipulated that "the ordinary avocations of life and the enjoyment of property will be interferred with as little as may be permitted by the exigencies of the measures required to be taken for security the public safety and the defence of the realm." Thus persons enforcing these regulations were required to observe this principle and it remained for parliament to ensure that the actions taken under these regulations were necessary and proper. Additionally theoratically since these regulations were in form little more than administrative rules, unlike acts of parliament, they could be challenged in the courts as ultra vires. In fact after the conclusion of the war there were instances where regulations were being voided by the courts.

The Defence of the Realm Act of 1914 came to an end on 31 August, 1921, the date declared by the Crown-In-Council as the legal end of the war. However, during the same period the Government of Lloyd George was faced with severe political confusion originated by a bitter strike

in the coal mines. In fact the government had to contend with the possibility of a general strike. In these circumstances the government clammered for extraordinary authority, to enable it take drastic measures to protect the community from a sudden halt in the production of an indispensable commodity. The cabinet asked parliament for a permanent statute which would more or less be a peaceful substitute for the Defence of the Realm Act, 1914.

It was in this atmosphere that the Emergency Powers Act of 1920 constituting a notable break with martial law and common law traditions, was passed. The significant provisions of this Act which in its modified version, was perhaps the grandfather legislation to similar acts in Britain's African colonies like Zambia (then called Northern Rhodesia) were as follows:

"An Act to make exceptional provision for the protection of the community in cases of emergency.

1. If at any time it appears to his Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated by interfering with the supply and distribution of food, water, fuel, or any substantial portion of

the community, of the essentials of life, His Majesty may, by proclamation, ... declare that a state of emergency exists. No such proclamation shall be in force for more than one month.

2. Where a proclamation of emergency has been made, the occasion thereof shall forthwith be communicated to parliament, and if parliament is then separated by such adjournment or prologation as will not expire within five days, a proclamation shall be issued for the meeting of parliament within five days, and parliament shall accordingly meet and sit ... and continue to sit.

... It shall be lawful for his Majesty in council, by order, to make regulations for securing the essentials of life to the community and those regulations may confer or impose on a secretary of state or other government department, or any other persons in His Majesty's behalf, such powers and duties as His Majesty may deem necessary for the preservation of the peace, for security and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of

transit or locomotion, and for any other purposes essential to the public safety and the life of the community ...

Provided that nothing in this Act shall be construed to authorize the making of any regulations imposing any form of compulsory military service or industrial conscription.

Provided that no such regulation shall make it an offence for any persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

2. Any regulations so made shall be laid before parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both houses providing for the continuance thereof.

3. The regulations may provide for the trial, by the courts of summary jurisdiction of persons guilty of offences against the regulation ... the maximum penalty ... shall be imprisonment with or without hard labour for a term of three months, or a fine of one hundred pounds, or both.

4. The regulations so made shall have effect as if enacted in this Act .....

Clearly this statute was an instrument of crisis government and constituted an important landmark in Britain's constitutional history. However, the Emergency Powers Act, 1920, was much less dictatorial piece of legislation than the Defence of the Realm Act, 1914 to say nothing of Article 48 of the German Republic. In its words the Act contained numerous limitations which were absent from the loose terms of Article 48 and which go along way towards providing extraordinary powers which are well restricted.

a) Each proclamation of a state of emergency was limited to one month only.

b) The proclamation only applied to clearly categorized strikes of only the most serious nature and the most pressing inconvenience to the citizens.

c) Upon the duration of the emergency parliament was immediately convened and was to continue sitting throughout the emergency.

d) The continued validity of all regulations issued by the order-in-council required positive parliamentary approval within seven days.

e) There was a maximum penalty in the Act itself for the punishment of breaches of the regulations issued under it.

f) There was freedom against industrial conscription and military service and freedom to strike.

It is also a remarkable feature of the self-restraint by British Government steeped in long democratic tradition that the Emergency Powers Act, 1920 has been used only on three separate occasions to enable the hard-pressed government maintain public safety and welfare. One such occasion is when a royal proclamation of an emergency was made was during the great Coal Strike of 1921 which threatened stoppage of work in the coal mines. An order-in-council prepared by the Home Office conferred all powers necessary to ensure the continued supply of coal which was vital to the British nation. With the termination of the strike on 4 July, 1921 the emergency ceased. The second emergency was proclaimed on 28 March 1924 under the compulsion of a London transport strike but was immediately revoked when the issue was resolved by the government before a full strike ensued. The third occasion was

during the time of the great General Strike of 1926 which evoked a number of emergency proclamations under which ordinancies directed to the production and distribution of fuel and food were made.

It is perhaps a shining mark of British statemanship and self-restraint that since 1926 the Emergency Powers Act 1920 has never been resorted to.

Britain statutorily answered the exigencies of the Second World War (1939-1945) mainly with the Emergency Powers (Defence) Act, 1939. This act was in many respects the counterpart to the Defence of the Realm Act of 1914. The new Act however, made specific provision for the sub-delegation of ordinance power to the authorities enforcing the regulations issued under the Act and the requirement to submit all order-in-council containing Defence Regulations to Parliament which might annul any regulation through the resolution of either House passed within twenty-eight days. The duration of the Act was limited to one year although this period could be extended for another year by Order-in-council

pursuant to an address of both houses. Finally the Crown was given authority to declare the termination of the emergency "that was the occasion for the passage of this Act" and therewith the termination of the Act itself.

In concluding the British experience it can be confidently asserted that there was more remarkable checks on the exercise of people even during the time of crisis which was never completely lost. Understandably in the heat of the moment the liberties and traditions of the individuals may have been invaded by the government but this was not done on so extensive a scale as was the case in the German Republic or under the French state of siege. This point was forcefully emphasised in the dissenting judgement of Lord Atkin in the famous English Second World War case of Liversige V Anderson 14 where the Home Secretary's power of detention under defence regulation 18E was put to question before the court. Dissenting from the majority opinion of the House of Lords who held that it was for the Home Secretary alone to determine whether "reasonable cause" for detention existed, and that

his discretion was not subject to challenge for ultra vires, Lord Atkin said, "In England amidst the clash of arms laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty ..... that the judges are no respectors of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law."[15]

Lord Atkin further highlighted the British legal system's high regard of personal liberty when in this same dissenting opinion he quoted the following dictum of Pollock C.B. in Bowditch V. Balchin [16] which Lord Wright had cited before Lord Atkin in another Second World War case of Barnard V. Gorman:[17] "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute."[18]

(iv) <u>The United States of America.</u>

The American approach to the issues of emergency powers

and constitutional dictatorship during a national crisis is relevant to our appreciation of the situation in Zambia before and after independence because America, like Zambia, had undergone a similar experience of colonial rule and of independence, and also because it governed under a written constitution in which the executive power has, as is the case in Zambia, been lodged in an independence President who is not immediately responsible or tied up to the legislature in the prosecution of his constitutional and statutory duties.

The American way of crisis management has three major characteristics embeded in the country's political system: the lack of conscious institutionalization of emergency powers, the adherence to normality, and the selection of an executive president, who operates through his personality as well as through established institutions and procedures, as the central figure of crisis management. Further the combined effect of the Bill of Rights, Federation and the doctrine of separation

of powers enshrined in the constitution make it difficult to establish an emergency dictatorship in the United States. In this respect it can not be doubted that whereas regard is given to the necessity for the preservation of the nation, the traditional view is the constitution is not easily amenable to the establishment of crisis institution and procedures. The founding fathers of the American Constitution contended that the constitution which they had devised would, ipso facto, be adequate for all moments, calm and troubled and that it would hot be necessary for governments in any situation to go outside the perimeters of the constitution. Championing this view during his inaugural address at the height of the Great Economic Depression which bedecked the early nineteen thirties Franklin D. Roosevelt said: "Our Constitution is so simple and practical that it is possible to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced. It has met every stress of

vast expansion of territory, of foreign wars, of bitter internal strife, of world relations."[19]

Indeed although in certain odd moments of severe national emergency, strong Presidents like Abraham Lincoln during the Civil War (1861 - 1879) violated the constitution, the general text of the American constitution is so generally written that the Government could contain crisis situation within the bounds of the constitution. The following are the crisis provisions of the American Constitution:

Art. 1.8. The congress shall have power ... to declare war ... to raise and support armies ... to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the union, suppress insurrection and repel invasions ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States; or in any department or officer thereof.

Art. 1.9. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion

or invasions the public safety may require it.

Art. 11, 1: The Executive power shall be vested in a President of the United States of America ... Before he enters on the execution of his office, he shall take this following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States.

2: The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

3: He shall from time to time give to the congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may on extraordinary occasions, convene both houses or either of them ... he shall take care that the laws be faithfully executed.....

Article IV, 4: The United States shall guarantee to every state in this Union a republican form of government,

and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

Generally all the institutions and periods of constitutional dictatorship in 'merican history hinged on these clauses. In particular the presidency has been the focal point of crisis moments. This stems from the facts that the constitution gives the president broad and flexible power to enable him deal with normal situations as well as extraordinary situations. Thus in moments of crisis people look to the president for protection and preservation of the nation. Proclaiming this view of the presidency in the Federalist, number 70, Hamilton explained: "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the laws; to the protection of property against those irregular and high handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction and anarchy."[20]

Stressing the height of the presidency in his celebrated

"stewardship Theory" Theordore Roosevelt President of America from 1901 to 1909, declared himself competent to take just about an action demanded by an evident national necessity as long as it was not specifically forbidden him by the constitution or by duty enacted by laws of congress.[21]

The foregoing grandiose conception of the presidency has the practical effect in an emergency of facilitating the President to deal with the situation within the spirit of the constitution and without having to seek extra constitutional sanction or authority for his actions. If the actions so taken are wide and arbitrary the end result is a constitutional dictatorship in the personification of the president.

The courts have equally been emphatic in asserting the view that the constitution sufficiently cater for all situations, peaceful and turbulent.

During the Civil War one Milligan had been tried, convicted and sentenced to death by a Military commission, with the approval of the President on a charge of conspiracy against the Government by giving aid and comfort to the rebels

while in the Loyal state of Indiana. The court unanimously held that the trial, conviction and sentence were illegal for want of authorisation by the constitution and the laws.

Maintaining that as long as the ordinary courts continued to function, the independent and impartial administration of the law by them could not, even in a war situation, be suspended or superseded, the court observed as follows:[22]

"Martial Law can not 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 naturally 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 this government is continued after the

courts are reinstated, it is a great ursurpation of power. Martial law never exists where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[23] Impugning the view that certain provisions of the constitution can be suspended in an emergency the court said:

"The constitution of the United States is a Law for rulers and people, equal 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 pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine 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 ..."[24] The foregoing words were repeated in 1945 in the second world war case of Duncan V. Kahanamoku.[25]

The Milligan case must however not be misunderstood to have inferred that the government should not have any form of extraordinary power to enable it deal with an

exigency threatening the existence of the nation. The case simply underscored the view that an exigency which will justify interference with individual liberty must not only be real but also grave and immediate. This is the yardstick upon which the alleged emergency situation must be vigorously tested. In the circumstances the authority will have been left with no choice but to take the necessary extraordinary measures to preserve the nation. As Abraham Lincoln proclaimed in justification of the actions he had taken at the outbreak of the American Civil War in July, 1861. "It became necessary", he said, "for me to choose whether using the existing means, agencies and processes which Congress had provided, I should let the government fall at once to ruins or whether, availing myself of the broader powers conferred by the constitution in cases of insurrection I would make an effort to save it, with all its blessings, for present age and for "posterity."[26]

The most obvious emergency situation is war and of this the America Constitution had provided for sterner measures such as a general suspension of the writ of habeas corpus in clause 9 of Article 1. It is however an

exclusive executive decision not subject to review by the courts to determine whether Public Safety requires a general suspension of the writ and the courts could only decide whether there had in fact been an invasion or rebellion within the meaning of the constitution. The extent of justification of the interference with personal liberties and freedom would of course depend on and vary with the seriousness of the exigency.

It is clear from the foregoing discourse on the situation in the United States that, save as provided for in the constitution there in no formal institutionalization of crisis Government, that the presidency is a focal point of emergency handling, deriving its power from the liberal terms of the constitution and that the courts have played and continue to play a key role in guarding personal liberties and freedoms against undue encroachment or curtailment under the pretext of an emergency.

FOOTNOTES

1. A detailed discussion can be found in J.H. Hexter, The vision of Politics on the eve of Reformation; More, Machiavelli, and Seyssel, (London, Dent 1973)
2. Ibid
3. C. Rossiter Constitutional Dictatorship: Crisis Government in the Modern Democracies, o.p. cit at
4. See F.M. Marx, Government in the Third Reich, (New York, 1936) pp. 53 -61
5. Lindsay et al "German Political Institutions-Article 48" "Pol. Sci. Q. XLVII" (1932) p. 576 pp. 583 - 594.
6. Rastr., Vol 55,pp. 115 ff. Referred to in C. Rossiter Consitutional Dictatorship: Crisis Government in the Modern Democracies, op. cit. Chapter III.
7. Section 3 of Article 48 of the Weimar German Constitution.
8. C. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies, op. cit. p. 73
9. Subsection (1) of Section I of the Defence of the Realm Consolidation Act, 1914
10. Ibid, Subsection (3)
11. See Defence of the Realm Manual (1919)p. 41
12. See The Emergency Powers Act, 1920
13. See the Emergency Powers (Defence) Act, 1939
14. (1942) A.C. 206
15. See Lord Atkin's dessenting judgement in Liversige v.Anderson op. cit.
16. (1850) Ex 378
17. (1941) AC 378
18. As per Lord Wright, Ibid
19. F. D. Roosevelt's inaugural address reproduced in Rossiter, Constitutional Government in the Modern Democracies, op. cit at p. 213.

20. Hamilton A: "The Federalist No. 70" Address to the People of the State of New York repoduced in Hirschfield (ed) The Power of the Presidency: Concepts and Contraversy, op. cit at p. 37

21. See W. Andrews (Editor) The Autobiography of Theordore Roosevelt (New York: Scriners, 1958) pp. 197 - 200

22. Ex parte Milligan 4 Wall (1966)

23. Ibid at pp 120 - 121

24. Ibid

25. 327 U.S 304 (1945)

26. See J.D. Richardson. Messages and Papers of the Presidents Washington, (1897) VI p. 78

PART II

CHAPTER THREE

EMERGENCY POWERS UNDER COLONIAL RULE

(i) History of Northern Rhodesia

As was the case with the older nations of Western Europe and the United States of America whose institutions of government we examined in the preceeding chapters, the emergency situations that arose in Zambia (called Northern Rhodesia before attaining independence in 1964) are products of the country's history. The socio-political circumstances prevailing in the country shaped the nature of the emergency provisions which were embodied in both the constitution and the other emergency legislations. A striking feature of Zambia's history is the fact of colonialism. As a colony of Britain, Northern Rhodesia, as Zambia was then called, was the subject of British notions of constitutionalism which were however smouldered accordingly to suit the troubled

conditions of a colony steeped in bitter antagonisms between the ruling settler-government determined to impose its will and authority on an unwilling native population and the indigenous African populace, roused to national consciousness and equally determined to overthrow foreign rule and attain self-rule. It is in this context that the emergency constitutional provisions and legislation prevailing in the territory must be understood. Consequently it is therefore imperative that we dwell on the history of Zambia before proceeding to undertake an appraisal of the effects of the situations that the country experienced. This exercise will form the purview of this chapter.

(ii) Founding of Northern Rhodesia

The enterprise of the British South Africa Company (the B.S.A. co,) steered by a known South African diamond magnate, John Cecil Rhodes, and propelled by Britain's empire building designs, was instrumental in the founding of Northern Rhodesia.[1]

As the nineteenth Century draw to its close, the emissaries of the British South Africa Company, which

by its charter granted in October, 1889, was given extensive rights to prospect and work minerals and engage in commerce on the territories on both sides of the Zambezi River, were frantically persuading African chiefs to the North of the Zambezi to enter into treaties with the British South Africa Company. In June, 1890 Lewanika, the King of the Lozi, signed the Lochner Treaty which gave B.S.A. Company exclusive mining and commercial rights over the whole of his dominions.[2] In June 1898 the Lochner Treaty was extended by the Lawley Treaty which apart from repeating the important clauses of the Lochner Treaty gave the B.S.A. Company power of administration and jurisdiction over Lewanika's territories in the North-Western region. The position of the B.S.A. Company was eventually defined by the British Government in the order-in-council of 1899. Lewanika's territory was called North-Western Rhodesia while the area from the Kafue River eastwards to the border of Nyasaland became North-Eastern Rhodesia. Each of these areas had its own B.S.A. Company appointed Administrator who

was subject to the British control through the High Commissioner. The applicable law, where customary law was inapplicable, was to be English law.[3]

The dual administrative system whereby North-Eastern Rhodesia was administered from Fort Jameson and North-Western Rhodesia from Kalomo and then Livingstone after 1907 was found to be clumsy and cumbersome by the B.S.A. Company. Consequently in 1911 the two areas were amalgamated under one administration.[4] Northern Rhodesia was born under the governance of the B.S.A. Company. The powers of Government were vested in a Company administrator and a council of Company officials who were ultimately subject to British control through a Resident Commissioner.

Until the opening up of the Copperbelt at the end of the 1920s the economy of the country was basically one of rural subsistence. The inhabitants numbered about 3,500 in 1921 and more than half of these were administrators or traders. The cash economy of the European settlers brought into its web thousands of African workers who were paid very low wages for their labour.

The discovery of copper deposits on what is now the copperbelt in the 1920s transformed the hitherto stagnat economy and socia-economic arrangement of Northern Rhodesia. Whereas the new copper mines made the economy of Northern Rhodesia one of the most dynamic in the world in terms of percentage growth there was great imbalance and unfairness in the distribution of this wealth. Skilled jobs were the prerogative of the European miners whilst African miners undertook unskilled work. The existing social and economic system imposed restrictions on the advancement of African miners and hampered their opportunities for higher level of skills. In the agricultural sector the African farmers were discriminated against through a policy of prices and quotes in which, whilst keeping the domestic price of crops like maize above the world prices to the benefits of Europeans farmers, unfairly limited the Africans' share of the more lucrative local market.

The economic discrimination which the Africans suffered was augmented by restrictions from education,

social services and a share of political power. There was no doubt that under the B.S.A. Company's rule the interests of the European settlers were paramount.

In 1924 the B.S.A. Company rule was terminated. Northern Rhodesia became a British Protectorate. A typical Crown Colony system of government was instituted. The government machinery consisted of a Governor, an Executive Council of senior Government Officials and a Legislative. Council of nine officials members and five elected unofficial members.

The Governor took the place of the Administrator under the 1911 Order-in-Council. He was the Commander-in-Chief of the territory and was established as the principal imperial officer. As the territory's principal officer the Governor was therefore given extraordinary wide powers whose exercise was made subject only "..... to the tenor of any orders in Council relating to the territory and ..... according to such instructions as may from time to time be given to him ....."[6] by Her Majesty's Secretary of State. Thus the Governor held the executive power. Although Executive Council had been provided for its role was merely

advisory to the Governor who was not bound to act as per advice rendered. In the event of the Governor's disagreement with the Executive Council the members of the Executive Council were entitled to have their views placed on record, for subsequent transmission to the Secretary of State.[7] This provision was intended to check arbitrary action by the Governor. It was thought that this provision would have a restraining effect on the Governor's decisions and that it would generate rational thought.

The Northern Rhodesia (Legislative Council) 1924 which was proclaimed on 8th May 1924 effectively established the territory's Legislative Council.[8] This body was recommended by the Buxton Committee appointed on 7th March, 1921 by the Secretary of State to advise on a number of matters contained in the White Settlers' petition about the constitutional future of the territory.[9]

During the first meeting of the Council, Sir Henry Stanley, the first Governor of Northern Rhodesia, described the stature of the Legislative Council as follows:

"It is hardly necessary for me to emphasise that a Council such as ours is not a Parliament in the generally accepted sense of that term. It is constituted on a different basis, which obviously places the Government in a position to exercise effective control."[10]

The Legislative Council comprised the Governor, and ex-officio members, officials nominated by the Governor, and elected unofficial members,[11] and in the Canadian Case[12] of 1928, it was ruled that the tenure of office of the members of the Legislative Council was during the pleasure of the Crown, or for life as they were appointed during pleasure.

Although the Legislative Council had full power and authority to make ordinances "as may be necessary for the administration of justice, the raising of revenue and generally for the peace and good Government of Northern Rhodesia",[13] the Governor stood supreme above it since he could veto the making and passage of all such laws. It is perhaps this elevated status of the Governor which prompted Wight to comment that in the end all the ordinances which were made for the territories were "enacted by the Governor ... with the advise and consent of the

Legislative Council."[14] The arrangement placed the Governor in the position of a Legislature unto himself.

The combination of executive and legislative power in the Governor (to whom the legislature was surbodinated) *who was only responsible to the Secretary of State* created an autocratic regime where the Governor was clothed with wide executive and legislative powers. The full import of this arrangement will be seen in the next chapter when we examine the exercise of emergency powers by the Governor during the colonial era and the imprint on the new post-Independence Government Systems left by this Colonial Governmental set-up.

The transformation of Northern Rhodesia into a British Protectorate did not, ipso facto, cause any substantial change in the direction of the country's affairs. Africans continued to be discriminated against in all matters ranging from land to wages. The land policy stopped Africans from settling in the territory's best farming lands (crown land) and were relegated to the unfertile reserves.[15] In the mines the African mineworkers, continued to be underpaid, to live in housing unsuitable for permanent settlement and to labour without any guarantee of social security. The

only attempt in the form of the Passfield Memorandum[16] of 1930 by the British Government to assert the paramouncy of African interests remained a dead letter.

The slow pace of economic and social development for Africans conditioned African responses to colonial rule. Groping for a platform for the advancement of their welfare and the articulation of their grievances, the literate Africans began forming welfare associations, the seed from which African political parties were to grow in latter years. After the experience of the Mwenzo Welfare Association founded in 1912, various welfare associations sprang up along the line of rail between 1929 and 1931.[17] Unfortunately although these welfare associations did much to bring African grievances to the attention of the government and to create an informed African opinion they could not mount effective prolonged action against the government. In the absence of remedial action by the government, the African discontent and disillusionment continued to simmer, fanned in the 1940s by the emergent nationalism.

As the new copper mines brought together thousands of ill-treated African mineworkers, the copperbelt began emerging as the centre of bitter struggle against settler domination and inhuman treatment. In 1935, the first strike by African mineworkers took place at Mufulira,

Nkana and Roan Antelope mines. At Roan six strikers were killed in the clash with the police. The strike, though sparked off by a government plan of revising the assessment of poll tax in favour of rural areas, crystallised long-standing African dissatisfaction with living and working conditions and highlighted the Africans' consciousness of their common interest. The strike also revealed the potential strength of African miners and European miners began to fear for their jobs. Inter-racial uneasiness was very much in evidence. When the African Welfare Societies began emerging in the mining towns they became effective for bringing the problems of the mining communities to the attention of the mining companies and the government. The Welfare Societies were however handicapped in negotiating effectively with employers on wages and terms of employment, the domain of trade unions.

In 1947 the first trade union in Northern Rhodesia was formed by the Shop Assistants and by 1948 there were African Trade Unions in all the four mines. In 1949 these unions joined together to form the Northern Rhodesia African Mine-Workers Union. Other unions were

formed in the transportation and building industries.[18]

(iii) The birth of the Federation of Rhodesia and Nyasaland.

The growth and potential strength of African Associations alarmed the European settler community. By the 1940s most Europeans in the country began to feel that their position could best be safeguarded through some form of closer association with the self-governing white regime of Southern Rhodesia. They argued that this would be an effective way of stopping Northern Rhodesia from becoming an African controlled territory. The British Government on the other hand had all along resisted settler pressures for the amalgamation of the two Rhodesias. However there was support in British political circles for a federal scheme to encompass not only Rhodesia but Nyasaland as well. Accordingly the conservative government which had come to power in Britain consented, inspite of intense African opposition, to the formation of the Federation of Rhodesia and Nyasaland. The federation came into existence in August 1953.

The European settler campaign for federation stirred Africans who had now founded a political party-the

Northern Rhodesia African Congress - to violent opposition against the federation and white domination in general. The Africans were too well aware that any form of association with the settlers in Southern Rhodesia would dampen prospects for African advancement in the territory. They also strongly d●●●sted the extremely racial and discriminatory policies of their southern neighbour. Thus the campaign for federation had the effect of rallying Africans together in their determined opposition to the federal ideas and white domination. The tribal chiefs and politicians alike protested against the federation and gave a ringing voice to popular fears and discontent on the issue. The transformation of the federation of African societies into political party - Northern Rhodesia African Congress - in 1948 provided the Africans with an ideal platform for confrontation with the government. In 1951 the new party was renamed the Northern Rhodesia African National Congress and the Makerere and London educated Harry Nkumbula was elected its president. The congress united the Africans in a common opposition to federation. The Africans were growing impatient with the Federation. In March 1953 Nkumbula publicly burned the

British white paper on federation and called for two days of national prayers in April during which no Africans would go to work. As the struggle of the Africans intensified the awakened African nationalism required a political party which was more militant than the African National Congress in its opposition to the Federation which had by now been imposed in 1953 and in its demand for self rule. Thus when in 1958 Nkumbula agreed to take part in elections based on a new constitution for Northern Rhodesia, the militants, led by Kenneth Kaunda, broke away to form a new political party - the Zambia African National Congress (ZANC) which was later to become the United National Independence Party (UNIP) which steered the country to political independence in 1964.

The events leading to this split-up are worthy recounting here.[19] By a motion of the Legislative Council passed in December 1956 on account of pressure from the Northern Rhodesia African National Congress calling for constitutional changes, it had been arranged that constitutional talks would commence during the first quarter of 1957 and that the proposed constitutional changes would be released in 1958. Although the Northern Rhodesia Government held talks with the various political parties like the Northern Rhodesia

African National Congress, who represented their views to the - Government, the constitution which was finally drawn up and released in 1958 did not, in the opinion of some more militant members of the African nationalist movement like the Congress' Secretary General, Kenneth Kaunda (later to become the country's first President at independence), reflect the wishes and aspirations of the Africans. The constitutional proposals presented to the Legislative Council on 28 March 1958 did not satisfy the Congress' demands for parity of representation between Africans and Europeans in the Legislative Council. Instead there was an entrenchment of European power. By some complicated electoral arrangement which provided that some European candidates need African electoral support and vice versa it was stipulated that there would be nominated members and officials.

When the proposals were published as the Government White Paper on the new constitution, the Congress rejected the proposed constitution. However during the Congress Emergency Conference held in October 1958, Nkumbula, the Congress President, implored the Congress to co-operate

with the Government and to accept the proposed constitution which at that time provided for eight African members of the Legislative Council. The more militant members of the Congress led by forceful personalities like Kenneth Kaunda, Simon Kapwepwe, Reuben Kamanga etc., all of whom were to hold important positions in the future Government of Independent Zambia, rejected Nkumbula's moderate views. Consequently the militants broke away from the Congress and on 24 October 1958 proclaimed the birth of a new political party, the Zambia African National Congress (ZANC), led by Kenneth Kaunda. The new party gained popular support especially in the northern and eastern regions and the copperbelt. The settler government felt driven to the wall by the surging African nationalism. Thus driven, on 11 March 1959 the Governor declared a state of emergency in the country. Once the state of emergency was declared the Governor invoked the extraordinary powers granted unto him by Section 4 A (i) of the Emergency Powers Ordinance, 1948 as amended in 1957 to make regulations to deal with what he considered to be an emergency situation or one likely to lead to to an emergency. He banned the Zambia African National

Congress and under the authority of the regulations made gaoled several of its leaders. The banned party was soon succeded by the United National Independence Party (UNIP). Unable to contain African opposition any longer the Federation came to a shameful end in 1963. In the meantime after election of October 1962 organised on the basis of the 1962 constitution and in which UNIP did not win a large enough majority to form a government, a government, a coalition of UNIP and ANC was formed and the country granted self-rule. The elections in January 1964 gave UNIP a decisive victory and Kaunda now became Prime Minister of an all UNIP Government. On 24 October 1964 the country was granted political independence and on the same day became a republic with a Presidential system of government. In conclusion it could be asserted that like most former British colonies in Africa, Zambia was born in a cradle of deep seated racial antagonisms, and an imposition of a repressive and discriminatory colonial rule on an unwilling and resistant indigenous population.

It is this turbulent socio-political atmosphere which in our view partly led to the constitutional provision of a strong Governor vested with extraordinary constitutional

powers for stiffling and handling disturbances against peace and order which were likely and actually became prevalent in this highcharged political atmosphere. Nurtured from a position of fear with a combination of stubborn determination to contain the onslaught of African nationalism and maintain the status quo of foreign rule, the powers given to the government were so wide in extent, discretionary in nature and indiscriminately used that the country can be said to have had heavy doses of authoritarian rule. In the following section we shall show how these powers were formulated and applied by the colonial governments.

(iv) Emergency Powers during the Colonial Period.

During the colonial times there were three pieces of legislation in Northern Rhodesia intended to deal with full political emergency situations. There were the Emergency Powers Order in council 1939-61 which applied to other British colonies in Africa and Asia as well, the Emergency Powers Ordinance[20] and the Preservation of Public Security Ordinance 1960.[21]

(a) Manner of Formulation of Emergency Legislation

The Emergency Orders in Council 1939-61

The emergency powers orders in council gave authority to the Governor, the principal officer of government in the colony to declare, if he was satisfied that a public emergency existed, that the provisions of the order-in-council should come into operation in the whole or part of the territory of Northern Rhodesia. The declaration was made by formal declaration and it was left to the Governor's unchallengeable discretion to determine when a public emergency justifying invocation of the discretionary and wide power granted unto him by the order should exist. In short the determination of the existence of a public emergency depended upon the Governor's subjective satisfaction.

Once a state of emergency was proclaimed and the order-in-council brought into operation, the Governor would then make any kinds of regulations which to him appeared necessary or expedient for security, public safety, the maintenance of public order, the defence of the territory, the suppression of mutiny rebellion or

riot and for maintaining essential supplies and services to community. One pertinent observation here is this that these regulations could and did in fact, authorise the detention of persons without trial, the arbitrary apprehension and / punishment of persons offending against these regulations and other affronts against fundamental rights and freedoms of the individuals.

The full impact of this provision of excessive powers of restriction of persons to the colonial executive was felt in the case of Ex Parte Mwenya,[22] discussed at length in the next section. Mr. Mwenya was a native of Northern Rhodesia. He suffered two restriction orders made by the Governor of Northern Rhodesia in accordance with the powers granted to him by the Emergency Regulations, 1956, of Northern Rhodesia. Upon his restriction, to the rural district of Mporokoso in rural Northern Rhodesia, he applied for a Writ of Habeas Corpus to the English Divisional Court directed to the Secretary of State for the colonies, the Governor of Northern Rhodesia, and the Commissioner for Mporokoso District on the grounds that he had unlawfully been detained and therefore sought to be released. As we indicated earlier on in this

thesis, the Secretary of State was supposed to have control over the colonial executive and the legislative powers of the Governor-in-council by virture of the requirement of his approval or consent to certain legislative or executive matter.

Amongst other issues, the Court was now asked to decide if an English Court had jurisdiction to issue the Writ of Habeas Corpus to persons like the Governor and District Commissioners in a Protectorate. An affirmative answer to the question would somewhat weaken or limit the authority or independence of action of these colonial executive whilst a negative reply would assert their power and independence of action and by implication therefore weaken the position of the colonial subjects restricted by the colonial executives.

The Court ruled that an English Court could not issue a Writ of Habeas Corpus to the Governor or Commissioner in a 'foreign territory' like a Protectorate. The authority and independence of the Governor's powers was affirmed and by reverse implication the protection of the colonial subjects weakened.

An unfortunate characteristic of these extraordinary powers granted to the Governor was that unlike the Roman dictatorship which was limited in duration to six months or the one month maximum limitation provided in the British Emergency Powers Act of 1920 these extraordinary powers, once in force, continued indefinitely until the Governor, by another proclamation, ordered that they cease to operate. In this respect this legislative provision resembled article 48 of the German Republic (1919-1933) discussed earlier on. Vis a vis these wide powers of the colonial executive the efficasy of judicial control as a check on executive action was weakened by the fact that the powers granted were widely discretionary in nature and therefore generally not subject to judicial determination. Moreover in the context of the superstructure of Colonial politics which were conducted along racial lines, it would seem that the colonial judiciary which was regarded as a sister institution to the Executive, lacked the courage to stubbornly challenge executive actions backed by wide discretionary executive authority.

The Emergency Powers Ordinance 1948.

The Emergency Powers Ordinance 1948 contained provisions similar to the orders in council. Section (1) of the Ordinance read "if at any time it appears to the Governor that any action has been taken or is immediately threatened by any persons or body of persons of such a nature or on so extensive a scale as to be likely to endanger t public safety or to deprive the community, or any substantial portion of the community, of any of the essentials of life, the Governor may by proclamation in the Gazette, declare that a state of emergency exists in the territory or any portion thereof, there upon the provisions contained in this Ordinance shall immediately come into force." Section 3 of the Ordinance authorised the Governor or "any person duly authorised by him," once a state of emergency had been declared to:

1. assume and regulate
   (a) all means of communication and transport, all fuel, buildings, plant and materials necessary to the working of the same

(b) all food and liquor supplies and all necessaries

(c) all electric, water and other stations

(d) all arms, ammunition and explosives

2. to regulate and control the price which may be charged by traders for necessaries which shall include clothing, fuel and foods

3. to take any other measures which he deems essential to the public safety and the life of the community"[23]

Also worthy noting in our examination of this ordinance is the provision in section 4 that the Governor could make and publish regulations and issue orders and instructions for the purpose of exercising the powers confered on him by the ordinance and that these could be issued or given by merely proclaiming them orally or affixing them to public buildings! Section 5 of the ordinance went as

far as providing an indemnity to person who could other wise be liable to a suit or action in respect of any act done under lawful direction and authority of the ordinance.

The Preservation of the Public Security Ordinance, 1960. The invocation of the Preservation of Public Security Ordinance 1960 was contingent upon the declaration by the Governor of the existence of a situation which, if it is allowed to continue, may lead to a state of public emergency pursuant to paragraph (b) of subsection (1) of section 29 of the constitution. Thus unlike the Emergency Powers Ordinance which operated during a full emergency, the Preservation of Public Security Ordinance came into operation during a state of a semi-emergency, usually prior to or soon after a full emergency. Section 8 of the Preservation of Public Security Ordinance, 1960.repeated the Emergency Powers Ordinance, 1948. Under the ordinance the Governor was vested with wide powers to regulate many aspects of community like and venture into sacred areas of human rights and freedom. In particular he was authorised to do the following:[24]

(a) To make provision for the prohibition of the publication and dissemination of matter prejudicial to public security.

(b) To make provision for the prohibition,/restriction and control of assemblies.

(c) To make provision for the prohibition/restriction and control of residence movement and transport of persons, the possession acquisition use and transport of movable property and the entry to, egress from occupation and use of immovable property.

(d) To make provision for the regulation/control and maintenance of supplies and services.

(e) To make provision for and authorise the doing of such other things as appear to him to be strictly required by the exigencies of the situation.

(f) To make provision for the detention/persons.

(g) To make provision for compulsory work and service rendering.

(h) To make provision for suspending the operation of any law other than an enactment of the Federal Legislature or an imperial enactment which is paramount over any Legislation which may be enacted by the Legislative Council.

The breadth of the foregoing powers granted to the Governor (President after independence) is made glaringly evident by the fact that the Preservation of Public Security regulations made under the authority of this Act run into fourty-six pages of print, out of which nearly twelve pages are devoted to regulations on the detention of persons.

In addition to the foregoing statutes which came into operation during a full emergency or semi-emergency there were also other statutes which made inroads into the liberties and freedoms of the individual and operated during normal times as well. Notable among these were the Penal Code, Chapter 76 of the Laws of Northern Rhodesia and Sedition Act whose manner and extent of application by the colonial authorities in their efforts to arres the rising African nationalist tide is discussed in the next section.

Nature and Application of Emergency Powers

It is clear from the foregoing statement of the manner of formulation of colonial emergency legsilation that the declaration of a state of a full or semi-emergency was a matter for subjective determination by the Governor. It was up to the Governor alone to determine when an emergency should be declared to exist and this discretion could not be questioned in a Court

of Law. The constitutional provision for a subsequent approval of the proclamation by a resolution of Legislative Assembly within five days (Article 29 (2)) while theoretically a check upon the power of the Governor was never a practical deterrent since it was in practice highly improbable that a parliament subservient to the Governor, and perhaps sharing his anxieties could disapprove the action taken by the Governor. It is therefore not far fetched a conclusion to suggest, in this respect, that the position of the Governor was similar to that of the President of the Germany Republic (1919-1933) as laid down in article 48 of the Germany Republic. Thus as was the case in the Germany Republic, in the absence of prior positive approval by parliament of the intended proclamation of the emergency, the Governor was not restrained, in a practical sense in his exercise of the power to proclaim a state of emergency in the electric atmosphere of opposition to colonial rule by the nationalist movement. What was there to stop the hard pushed Governor from proclaiming a state of emergency arbitrarily in order to avail himself of the extraordinary powers available to him under the emergency statutes? The presence of the Legislative Council as a watchdog institution was superficial because apart from the negative observation made above in relation to this institution the Governor had authority, under the constitution to dissolve parliament. With the dissolution of parliament would therefore crumble the illusion of parliament

as watchdog institution on the Governor's powers. The Governor could now act arbitrarily if he wished without any practical or theoretical restraints. What better possibility for a dictatorship could there be? Whereas this dictatorial possibility may not be availed to by a well-disposed Governor, this is no assurance that an ill-disposed person would not do the same once he found himself in this situation. As Rossiter correctly point out "power is one thing in the possession of good men and another in the grasp of evil men". The experience of Germany under article 48 in this respect is too telling to be lightly ignored. In fact a near parallel was to be found in the action of the British Colonial Governors in Britain African Colonies.

In his article on emergency legislation in the commonwealth D.C. Holland stated that between 1946 and 1960 above there had been made twenty-nine proclamations of emergency in different parts of the British Colonial Empire.[25] In the African atmosphere where, in the words of McAuslan in his commentary in 1964 on the Republican constitution of Tanganyika "the whole tradition of colonial government was autocratic and carried with it a dislike of opposition of any sort and a willingness to override, disregard *or amend the law, where necessary to suit its own convenience*"[26] it cannot be argued that all these proclamations were made in good faith or purely on grounds of public security or safety.

The regulations made under the authority of the emergency legislation and at the pleasure of the Governor did, among other evils, authorise arbitrary arrests and detentions. Naturally in the charged political atmosphere of the struggle for political independence by the African nationalists the toll could not be anything but high. For instance in the case of Nyasaland, now called Malawi, the Delvin Commissioners appointed by the British Government to inquire into the political disturbances of 1959 to 1960 sadly reported that during the emergency which subsisted from 1959 to 1960 about 1,000 persons were detained, most of them on mere suspicions of subversion.[27] The Delvin Commission also found that these detentions were effected through arbitrary and unlawful arrests usually involving more force than necessary and denial of the right to be informed of the reason for arrest.[28] A situation arose in Northern Rhodesia in 1959 which the Governor exploited to invoke the extraordinary powers granted to him in 1957 by virtue of the Emergency Powers Ordinance, 1948 as e amended in 1957. Under this amendment the Governor had been given powers to make regulations to deal with a situation which, whilst not amounting to an emergency, could in his opinion lead to one if allowed to continue. The Governor used the pretext of an alleged plot by the nationalists to murder Europeans to issue regulations authorising the restriction of persons in certain circumstances and then restricted the leaders of the Zambia African National Congress who were against the elections due to

be held under a new constitution unilaterally made for the territory by the colonial Government.

Further under the authority of the same regulations, the Safety of Elections and Public Safety Regulations, 1959[29] a competent authority" (that is the Governor and his Provincial Commissioners) or a District Commissioner or a Police Officer at or above the rank of ssistant Superintendent had power to prohibit the holding in any area of a Public Meeting or Procession if he was satisfied that this would lead to a breach of the peace or order, and that it would also affect the conduct of elections. As if this was not enough travesity against the people's freedoms, the police officers and other administrative officers were given wide and arbitrary powers of arrest; they were empowered to arrest without warrant any person guilty of or reasonably suspected of being guilty of an offence against the regulations. Wide Powers of search were also given to the Police.[30]

Granted these wide powers to act arbitrarily, the authorities ruthlessly acted against the nationalists agitating against the elections. Unfortunately and much to the anger of the colonial authorities, the brutal action of the authorities, far from quietening the nationalists, had the effect of making them more incensed in their opposition and resistance to colonial rule. Desperate, the authorities left no stone unturned. Their

provisions for arbitrary powers under the emergency regulations were supplemented by the resorting to the law of criminal sedition and, in case of the freedom of expression, the law of sedition was used to drive the death-nail into it.

Not long, in 1959, the Government acted against Mainza Chona the then Secretary of the United National Independence Party (UNIP) which had succeeded Zambia African National Congress, the political party which had violently opposed the elections under the 1959 constitution. According to this case, R.V. Chona[31] in his capacity as an officer of this political party, Chona issued a document, styled a press statement, which, inter alia set out to show the evils of colonial rule. The circular read in part.[32]

> "Those of you who have attended the courts while trying your political colleagues must have the same impression as myself, i.e. that the courts are here to rubber stamp oppression and to administer mock justice. As for the Native Courts, all of you must have got the impression that they have been reorganised to jail any African that the Government Administration Officials want to be jailed, whether he has committed an offence or not".

Reacting to the foregoing, the colonial authorities charged Chona with the offence of publishing "seditious publication contrary to Section 53 of the Penal Code. In his defence the accused argued that the above words were not "seditious intention" as defined by the Penal Code. He stated that his statements were merely intended

to highlight the errors in the government or conditions of the territory as by law established, or in the administration of justice and that this was done in order to persuade the inhabitants of the territory to redress the situation by lawful means. The answer of the High Court of Northern Rhodesia to these submissions did not fail to show the judiciary's sensitivity to the disturbed political climate of the country, and in the end, to uphold the will of the colonial government even if it meant compromising the law of sedition as understood and practiced in the mother country, Britain.

Entitling itself to take judicial notice of the situation prevailing in the territory, the Court asserted that the "seditious intention" associated with the publication of the accussed's statements should be abstracted from the outbreak of politically motivated violence which reigned in the territory from 1959 to 1961. Many members of UNIP had been convicted by the Courts or restricted to certain parts of the country for alleged acts of violence. With this hinde sight the Court ruled that "When the statement was written it was a seditious publication because it intended to bring into hatred or contempt, and to excite disaffection against the administration of justice in the territory for the purpose of propagating the policy of UNIP".[33]

Unfortunately this judgement of the High Court of Northern Rhodesia sharply contrasts with the ruling of the English Court

in an earlier and less favourable case of R.V. Burne and others.[34] In this case the accused were members of the Social Democratic Federation charged with the offence of uttering seditious words by denouncing the House of Commons. They stated that the House "was composed of capitalists who had fattened upon the labour of the working men ... and added that" to hang these would be to waste good rope and as no good to the people was to be expected from the representatives there must be a revolution to alter the present state of affairs".[35] The applicable law, i.e. the English law of criminal sedition as found in leading authorities like Stephen's Digest on the criminal law is the same as that found in the then Penal Code of Northern Rhodesia. Whilst it was admitted by the Jury that the words used by the accused were "inflamatory", the accused were acquitted of the charge. Yet there was in this case more likelihood, than in the Chona Case where contrary decision was reached, that such words could positively excite disaffection or bring hatred on members of the House of Commons. Above all the accused expressly advocated "revolution" the harbinger of blood, as a way of changing th status quo, something which was not suggested in the Chona Case. Where then was the sense of justice of the High Court of Northern Rhodesia? What was its notion or source of the law of sedition and how far was this a disinterested or non-partisan notion? The attempted answer to these questions which was given in another Northern Rhodesia case of Buchaman V.R.[36] clearly shows that as and

when it suited them or suited the desires of their political authorities the colonial Courts were willing to make subtle distinctions with English precedents and apply a law which they found suitable.

In Buchaman V.R. the appellant had been convicted of publishing a seditious publication in contravention of the Penal Code. He had published a sheet called "Gothic Review" whose theme, abstracted from the title "Emergency Regulations For Whom?", was that the Government of Northern Rhodesia was mistaken in using Emergency Regulations to stop criticisms of what was wrong in the territory. The question which fell to be considered was whether the publication amounted to a "seditious publication". Affirming the rule laid down in Wallace Johnson V The King[37] the court reiterated that although the elements of "seditious intentions" under the Northern Rhodesia Penal Code corresponded closely to the intention of Common Law[38], "it is in the criminal code (of Northern Rhodesia) ...and not, in English or Scottish cases that the law of sedition for the colony is to be found". In the absence of any convincing reasons to support this distinction one is left with the impression that this was a statement of interested expediency and duplicity on the part of the Court to give itself the latitude of choice it needed to pander to the will of the colonial authorities in the politically-charged atmosphere of Northern Rhodesia. After all,

their record had already shown that when it came to such politically sensitive cases, the colonial courts were generally inclined to uphold the stand or acts of the Government.

There is also a pertinent suggestion from the other leading cases decided during the colonial period that as a protection against arbitrary detention the writ of habeas corpus, duped "the greatest of all monuments of Anglo-American liberty" by E.S. Corwin,[39] became a subject of long-drawn battles. Could the English Courts issue the writ of habeas corpus in respect of a person detained or restricted in a protectorate and, in any case, could the writ be used by a British protected person to challenge the abuse of power by the colonial government in the field of personal liberties? And how far could the Secretary of State control the actions of the Governor under the cons constitutional arrangement of the protectorate?

The foregoing questions received exhaustive judicial attention in the landmark case of Ex Parte Mwenya.[40] In this case, whose facts we have already cited in this thesis but find necessary to recount here again, the applicant, who was a native of the Protectorate of Northern Rhodesia, suffered two restricted orders made by the Governor of Northern Rhodesia in accordance with the powers granted to him by the Emergency Regulations, 1956 of Northern Rhodesia. He was restricted to the district of Mporokoso in rural Northern Rhodesia. He applied for a writ of habeas corpus to the English Divisional Court

directed to the Secretary of State for the colonies, the Governor of Northern Rhodesia, and Commissioner for Mporokoso District on the ground that he had unlawfully been detained and therefore sought to be released. As we have explained earlier in this thesis, under the constitution of the Protectorate of Northern Rhodesia, the Secretary of State had wide powers to control the executive and legislative powers of the Governor-in-Council or the Governor through the requirement of his approval or consent to certain legislative or executive matters. However, the specific emergency legislation under which the restriction order against the applicant had been effected did not require the approval or consent of the Secretary of State and he did not take part in the detention.

In considering this case the Court was called upon to resolve the following key issues:-

(i) Whether an English Court had jurisdiction to issue the writ of harbeas corpus to persons like the Governor and District Commissioners in a Protectorate;

(ii) Whether the Secretary of State possessed, by the fact of his constitutional position, sufficient custody of the applicant to be amenable to the writ.

(a) <u>JURISDICTION OF AN ENGLISH COURT</u>

The applicant argued that there was a duty on the part of the Crown to safeguard the liberty of all subjects within

the realm, and that in principle the writ could issue wherever there had been an unlawful act by a servant of the Crown, "for if Her Majesty may not enquire why someone entitled to her protection is unlawfully detained then that protection is endangered".

The Attorney General, relying on past authorities, answered that Northern Rhodesia, being a Protectorate and not a Colony, was not a part of Her Majesty's dominions in the territorial sense and that therefore according to the Foreign Jurisdiction Act, 1890, it was a foreign territory in which Her Majesty exercised power and jurisdiction by treaty, grant, usage etc. Earlier authorities supported this view. Thus whilst in the case of Ex Parte Anderson decided in 1861 an English Court issued the writ to the County of York in Canada which was part of the Queen's dominions, the judgement in the case of Ex Parte Sekgome[41] rejected an application for a writ of habeas corpus on the ground that the writ applied "only to the territorial dominions of the Crown" and not to Protectorates like Bechuanaland which were not part of His Majesty's dominions. It was further contended, as it had been done in Ex Parte Mwenya, that in fact the Courts of Law established by the Protectorate's constitution had jurisdiction to deal with the issue of the legality of the detention and that therefore by Section 1 of the Habeas Corpus Act, 1862, the writ could not issue.

Although the issue was essentially argued on the basis of the concept of sovereignty and its implications that there was no complete sovereignty in the Protectorate where some other "competing sovereignty" abound, the Divisional Court which decided on Ex Parte Mwenya continued the trend of the old authorities.

(b) THE POSITION OF THE SECRETARY OF STATE

Under the Provisions of the Orders-in-Council and the Royal instructions the Secretary of State was vested with some power and de facto control over many activities of the Governor. This provision was now used by the applicant in Ex Parte Mwenya to argue that the Secretary of State could control the exercise of power of the Governor vis a vis the colonial inhabitants and that therefore he had sufficient custody of the applicant to be amenable to the writ. The Secretary of State swore that his constitutional position in the Protectorate was only advisory, i.e. to advise Her Majesty on matters relating to the exercise of her jurisdiction and powers in the territory. Possession of any power to order the Governor to revoke the restriction order was denied by the Secretary of State, a contention which was upheld by the Court through Parker C.J.

Dissatisfied with the judgment of the Divisional Court of Appeal, Lord Evershed, M.R. reversed the decision of the Divisional Court with the following brilliant words:

"But, as it seems to me, if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British Colony or a country acquired by conquest, then in conformity with the nature of the writ ... I see for my part no reason for denying jurisdiction on the Court ... if the fact is that the power and jurisdiction of the Crown vis-a-vis Northern Rhodesia is no writ different from that exercised in a "colony" or "dominion" then in my view, there is nothing historically or logically, which bars the making of an order of habeas corpus".[42]

Whilst this turn of events could be said to confirm the view from some academic quarters that the citizens of the territories were accorded protection of their personal liberties to almost the same degree as the people of England since they also enjoyed entitlement to the writ of habeas corpus, it is important to know from the arguments advanced against this view in the Divisional Court that the writ was not an automatic provision but a subject of great and longdrawn contraversy in which the colonial government showed its hostility to this extention of the writ. In this atmosphere of express state of government hostility to such an important protection like habeas corpus it took a rare act of courage, usually lacking

among colonial Judges, to adjudicate for the writ and probably this needed a more safe moment or time to do so.

Further, as Dr Zimba aptly observes, the issue is further left begging by the unfortunate fact that "this case came up for decision rather late (i.e. 1959) when the British Colonial era in Africa was coming to an end (five years before Zambia attained independence)".[43] It is perhaps not idle speculation to infer that the decision was probably made with an awareness of the impending demise of the colonial institution or that colonial self interest could not, as shown by previous decided authorities in which a contrary position was upheld, allow this type of decision to be made much earlier in the history of British Colonialism or at any rate, not until the afternoon of British Colonial interest.

The foregoing discourse on the colonial record of emergency powers and infringements of personal liberties and freedoms under the cloak of preservation of public security and order is a dismal record of arbitrary use of powers of control, arrests and detentions of the indigenous population by an unsure administration determined to maintain itself in power despite fierce opposition and resistance from the majority of the subjects of its rule. What is particularly unfortunate about the colonial situation is that the powers given to the Executive through the office of the Governor

and supposedly to handle crisis in emergency situations were so wide in extent and discretionary in nature that attempts by aggrieved persons to assert their personal liberties and freedoms or to defend themselves against executive encroachments on their freedoms could not but fail. A constitutional dictatorship had come to stay. The absence of a code or bill of fundamental rights under the colonial system made the position of the governor even more precarious because whereas in case of older democracies like Britain with long histories of nationhood, constitutionalism and democratic practice the ordinary law secured fundamental freedoms for the citizens the ordinary law could not, as we have proved in our analysis of the Chona and Buchaman cases, be so effective in the colonial atmosphere charged with grave political and racial antagonisms and frictions. Equally ineffective was the British Government guardianship of African interests, through authorities like the Secretary of State with some controlling jurisdiction over the activities of the colonial authorities and institutions. In the latter part of this chapter we have shown that the position of guardian authorities like the Secretary of State was rather shaky and questionable in law as deterrent against the infringement of the personal liberties of the disaffected indigenous people struggling to rid themselves of colonial oppression. The reports of various commissions of inquiry sent by the British Government

to study, post-humously, various incidents of disturbances in the colony such as the UNIP-organised political agitations of 1959 revealed that being territorially distanced from its African colony, the British Government did not usually know or detect the excess of the colonial authorities in time, leaving the way open for any insufficiently restrained or monitored colonial dictatorship.

FOOTNOTES

1. Amongst the many books on the history of Northern Rhodesia reference has been made to the following:
   A. Martin, Minding Their Own Business: Zambia's Struggle Against Western Control, (London: Hutchinson, 1972).
   A. Roberts., A Short History of Zambia (London: Heinemann, 1976)
   P.E.W. Tindall., A History of Central Africa (London: Longmans, 1968).

2. For detailed account of this see A. Roberts, A Short History of Zambia, op. cit, Chapter 14.

3. See Article 21 (2) of the North Eastern Rhodesia, Order in Council, 1900.

4. The Northern Rhodesia Order in Council 1911 was generally similar to the North-Eastern Rhodesia Order in Council, 1900.

5. See A. Martin, Minding Their Own Business: Zambia's Struggle Against Western Control, op. cit. Chapter 2.

6. Article 7 of the 1924 Order in Council

7. Article 12, Ibid

8. Proclamation No. 3 of 1924

9. Between 1911 and 1923 the White Settlers had been agitating for an effective say/representation in theGovernment office

10. Legislative Council Debates, 23 May, 1924, Col. 3

11. See Article 3, 4, 5, 6, and 7 of the Northern Rhodesia (Legislative Council) 1924.

12. Attorney General for Nova Scotia v. Legislative Council of Nova Scotia (1928), A.C. 107, at page 115.

13. See Article 20 of the Northern Rhodesia Order Council, 1924

14. See M. Wight British Colonial Constitutions. Oxford 1952 p. 20.

15. See A. Martin. Minding Their Own Business: Zambia's Struggle Against Western Control op. cit. Chapter 2.

16. In this memorandum on Native Policy for East Africa in 1930 Lord Passfield, then Secretary of State for the Colonies, affirmed that "The main responsibility of Great Britain in East African wasaa trustee for the native people not yet able to stand on their own feet" and that "This would necessitate the retention of final control by His Majesty's Government.... "of the colonial administration, of particular note, the paper emphasised that "the interests of African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict, the former could prevail". An extended discussion of memorandum can be found in Davidson J.W., The Northern Rhodesia Legislative Council, London 1947 at pp. 69-73.

17. For a detailed account of this see A. Roberts. A Short History of Zambia op. cit.

18. Ibid.

19. For a detailed discussion see Sikalumbi W. Before UNIP, (Lusaka: NECZAM, 1977)., K. Kaunda, Zambia Shall Be Free, (London: Heinmann 1962), page 87-88

20. Cap. 29 of the laws of Northern Rhodesia

21. Ordinance No. 5 of 1960

22. (1959) 1 Q B p. 241

23. See Section 3 of the Emergency Powers Ordinance 1948

24. See Section 3 (2) and 5 of the Public Security Ordinance, 1960

25. Holland D.C. "Emergency Legislation in the commonwealth" (1960) 13. C.L.P. 138

26. McAuslan "the Republican Constitution of Tanganyika" (1964) 13 I.C.L. pp 561-6

27. See the Devlin Report Commd 814 1959

28. This commentary is made by Nwabueze B.O. Presidentialism in Commonwealth Africa, op. cit. page 312

29. See Safety Elections and Public Security Regulations 1959 in Northern Rhodesia Government Notice No. 81 of 1959, Northern Rhodesia Government Gazette (Lusaka: Government Gazette 1960)

30. Ibid, regulation number 7.

31. (1962) R.N.L.R. page 344

32. Quoted at page 346 in R.V. Chona, Ibid

33. R.V. Chona, op. cit.

34. (1886) XII, T.L.R. 510 The Case is also discussed by Dr Aihe ZLJ, Vol. 3 and 4 (1971) and (1972) pp 46-47 and L. Zimba in his doctoral thesis presented to the University of London in 1979 entitled "The Protection of Fundamental Rights and Freedoms in Zambia: An Historical and Comparative Study, Chapter III.

35. Dr. Aihe op. cit. at page 46

36. (1957) R. and N.L.R. 523

37. (1940) A.C. 231 at page 240

38. See Halsbury 3rd Edition para. 1054 also Stephen's Digest of Criminal Law, Article 114.

39. E.S. Corwin The President: Office and Powers (1957) p. 144.

40. (1959) 1 QB p. 241

41. (1910) 2 KB D.

42. Ibid, As per Lord Evershed at pp. 302-3

43. Dr L Zimba, Constitutional Protection of Fundamental Rights and Freedoms in Zambia, An Historical and Comparative Study, op. cit. Chapter 111.

THE DECLARATION OF ANY EMERGENCY DURING THE POST-INDEPENDENCE ERA

(i) Succession and Adaptation of the Colonial Emergency Legislation

In the preceding Chapter we have examined the manner of formulation, extent and use of emergency powers during the colonial rule in Northern Rhodesia. This colonial background is very useful because it explains, to a substantial degree, the formulation and practice of emergency powers adopted at independence by many former British dependencies like Zambia.

Whilst independence in 1964 entailed changes of administrative personnel and, to a substantial degree, in the liberalization of the government administration, abolition of racial discrimination etc. Zambia's attainment of political independence did not cause a structural or revolutionary change in the existing system or machinery of government, let alone the socio-economic base. The institutions of government, administrative practices and procedures generally remained unchanged. The President succeeded the colonial Governor while the Cabinet became heir to the Executive Council and on the ashes of the Legislative Council emerged the National Assembly. In the realm of emergency powers the Governor passed on to the President

and the new administration of the nationalists inherited the attitudes and practices of the colonial government towards the protection of personal liberties and freedoms.

This is however not to say that nothing changed in the nature and application of emergency powers after the attainment of political independence. In some cases the new Independence Government made certain salient innovations and changes to the Colonial Government's conception and manner of application of emergency powers. In this Chapter we shall examine the succession and adaptation of the colonial emergency legislation in thepost-independence era.

In 1964 the African nationalists inherited a tradition of colonial government which was to a large measure, despotic, disliked opposition and showed a willingness to trampel upon fundamental liberties in order to perpetuate itself in power. This system of government had been ruthlessly condemned and violently opposed by the nationalists during the struggle for independence.

However when these same nationalists came into power they adjusted their views on the issues of emergency powers and personal liberties and freedoms. The old arguments in favour of extra-ordinary powers during an emergency and abridgement of individuals liberties, which have been

outlined at the beginning of this work, were revived and used as a legitimate justification for authoritarian rule. It was for instance argued that a much stronger executive was more required in the new nation which not only lacked a long tradition of nationhood but comprised antagonistic tribes or ethnic groups, lest the nation extinguished itself in fractricidal war. The Congo Civil War of the sixties was quickly cited as an example of what could befall a young weak nation which allowed itself to be engulfed in a bloody turmoil. Speaking during the second reading of the Preservation of Public Security bill in the Northern Rhodesia colonial legislative council on 26 January 1960, only four years before the attainment of political independence, Mr Burney, M.P. for Ndola Constituency had this to say: "We have had several experience in this Territory of political leaders so inciting their followers that intimidation is practised and that the ordinary rule of law is threatened. The main argument we have from the Hon. Gentlemen, opposite for Eastern Rural and Western Rural is that the Government should try to use the normal laws of the land and not exceptional powers. I submit that this Government is not

in a position to be able to do that because the conditions under which that is possible namely a closely governed country and a closely knit country, just do not apply here".[1]

Advocating for autocratic powers, the Hon. Member of Parliament added:

"The Government in my view has the overriding responsibility for seeing that law and order is at all times maintained and that, if the circumstances in this large and very thinly populated country are such that they cannot apply the normal processes of the law, then we must have regard to somewhat more autocratic or dictatorial processes".[2]

When their time came the new leaders of Zambia added that being surrounded by hostile white regimes of Rhodesia and Apartheid South Africa to the South, the Portuguese colonies of Mozambique and Angola to the South-East and West respectively, Zambia was open to enemy infiltration from these unfriendly regimes and therefore needed a powerful unified executive which could move with relative easy in the ever-present emergency situation. In a concise citation of the foregoing arguments Babu[4] writes that this authoritarianism was justified in the early days of independence on two grounds: "Firstly, since most countries attained independence at different times those that got

theirs earlier were confronted with the possibility of imperialist agents being infiltrated into their countries from neighbouring countries which were not yet independent. The ordinary process of the law was considered too cumbersome to deal effectively with such emergency situation, since agents could freely enter any one of the independent countries with legitimate travel documents and without breaking any laws of the country concerned. At the same time the police force was largely composed of foreign excolonial officers, some of whom were not too happy about our independence."[5] The powers to detain people were therefore necessary to defend the young state before the damage was done.

"Secondly, "Babu argues on, "since colonial rule was notorious for its 'divide and rule' policies and tribal loyalties, which had been deliberately encouraged by colonialists, threatened the peaceful evolution of a homogeneous nation and therefore it was felt necessary for a young state to arm itself with sufficient pre-emptive powers to forestall any such disruptive development".[6]

Ironically the colonial authorities had also justified emergency declarations and legislation on the basis of what they saw as disruptive developments in the territory calling for extraordinary powers on thepart of the

government. Moving a motion for the Emergency Powers (Amendment) Bill, 1959 which sought to extend the emergency declared on 11th March 1959 (during the height of the nationalist struggle) for another six months Mr. Nray, Northern Rhodesia Government's Chief Secretary said: "I think that in this country and in many others there have been developments which make it essential that the law shall be strong enough to defeat acts or planned campaigns of violence or other undesirable activities at a stage before they become full-blown emergencies"[7]. In the same debate, the Acting Chief Secretary, Mr. Nicholson, went as far as alleging that "a large proportion of the people of this Territory are very susceptible to the malign influence of the many self styled leaders and agitators who conduct a continuous campaign of vilifications and untruths".[8]

One other view in support of the inheritance by the nationalist leaders of extraordinary powers is the one which Nwabueze states in his discussion of the African Executive Presidency namely, that the practice "accords with African political experience during the colonial era".[9] "In that experience", observes Nwabeuze "the Governor was the dominant political figure, epitomising the sort of strong, authoritarian and irresponsible executive incarnated by the medieval European Mornarch Commander-in-Chief, sole executive and legislator he

was empowered to exercise all such powers and jurisdiction as Her Majesty had or may have within the territory, and to that end to take or cause to taken all such measures and to do or caused to be done all such matters and things therein as are in law and as in the interest of H.M. service he may think expedient".[10] The new rulers coveted these discretionary powers of government. After all, apart from being effective weapons against national or political foes, did not these powers symbolise the acme of personal power and authority?

It was in these circumstances of the foregoing arguments and consideration that extraordinary emergency powers were perpetuated and promulgamated in the post-independence era, at the expense of fundamental rights and freedoms.

(ii) Manner of Formulation of Emergency Powers

In the preceding Chapter we have mentioned that there were three pieces of legislation which formed the basis of, and governed, the exercise of emergency powers and that these were the Emergency Pwers Order-in-Council 1939-61, the Emergency Ordinance 1948 and the Preservation of Public Security Ordinance, 1960.

Upon Zambia's attainment of independence in 1964, the Emergency Powers Order in Council was terminated by a provision in the Zambia Independence Order 1964 which

stipulated that the order in council should "cease to have effect as part of the Law of Zambia".[11] The Emergency Powers Ordinance was also revoked at independence and replaced by theEmergency Powers Act, 1964[12] which came into force on the eve of Zambia's independence. However, the Preservation of Public Security Ordinance continued into force after independence although it was now renamed the Preservation of Public Security Act.[13]

The sine qua non for the invocation of the Acts is the existence of a state of emergency declared under the relevant provisions of the constitution by the President.[14] This provision empowers the President to declare by proclamation published in the Gazette that:

(a) A State of public emergency exists; or

(b) A situation exists which if it is allowed to continue may lead to a state of public emergency[15] (i.e. semi-emergency)

Under the independence constitution the declaration of an emergency or semi-emergency required to be approved by the National Assembly within five days. The independence constitution also had provided that the continuation of

declaration of an emergency; full or semi; would require to be sanctioned by the National Assembly every six months.

Except for a Presidential pronouncement in 1976 at the height of the Civil War in Angola to the effect that a state of public emergency existed,[16] a pronouncement which does not seem to have had any legal force, as the formalities attendant upon the declaration of a full emergency were not done, there has been no declaration of a full emergency in Zambia to bring the Emergency Powers Act into force. The full import of Emergency Powers has therefore been brought to bear through the Preservation of the Public Security Act which comes into force upon the declaration of a semi-emergency. By force of the Zambia Independence Order, the state of semi-emergency which was declared by the colonial Government in July, 1964 during the period of the Lumpa Church disturbances, discussed in detail hereinbefore,[17] was continued in force after independence Under the provisions of the Preservation Public Security Act which comes into force during a state of semi-emergency the President is granted wide discretionary power to act on matters which mostly affect the personal liberties of the citizens. Amongst other things he is empowered, in order to preserve public security, to do

the following:[18]

(a) to make provision for the prohibition of the publication and dissemination of any matter which, in his opinion, is prejudicial to public security;

(b) to make provision for the prohibition, restrictions and control of assemblies;

(c) to make provision for the restriction, prohibitions and control of residence and movement, and possession, acquisition or sue of property.

Above all, he may make regulations to provide for the detention of persons[19] and he may "make provision for, and authorise the doing of such other things as appear to him to be strictly required by the exigencies of the situation in Zambia".[20] The Act further provides that any regulations made under it "shall have effect notwithstanding anything in consistent therewith contained in any written law <u>other than</u> the Zambia Independence Order, 1964, or the Constitution".[21] Dr Zimba computed at the time of researching for his Doctorate of Laws degree in 1979 that since the declaration of the semi-emergency prior to independence, there had been a total of nine statutory instruments made under this statute and all designed to regulate various aspects of public security.[22]

It is saddening to note that wide as the powers which may be exercised by the President once he has declared a state of emergency are, the powers to declare an emergency the sine qua non for the exercise of these wide powers, is not adequately controlled but left for the exercise in his sole discretion.

(iii) A new Twist in Zambia's Emergency Legislation

The constitutional provisions on emergency legislation and other matters pertaining to the personal liberties of persons affected by various pieces of legislation and statutory instruments made during the period of a semi-emergency which Zambia adopted at independence received a new twist in 1969 and 1974. This change came about through two constitutional amendments which were made by the post-independence Government.[23] These constitutional ammendments effected key changes to certain aspects of the emergency laws which Zambia inherited at independence.

(a) The Constitutional Amendments of 1969

The Constitutional Amendment made in 1969 had profound effect on both the manner of effecting a proclamation of a state of emergency, its period of tenure and the safeguards available to a detained person.

Firstly whereas under the original Independence Constitution the declaration of an emergency or semi-emergency required to be approved by the National Assembly within five days the 1969 Constitutional amendment extended the period within which Parliamentary approval must be given to twenty-eight days. Secondly, the requirement under the Independence Constitution that the continuation of the declaration of an emergency, full or semi, should be approved by the National Assembly every six months was replaced in 1969 by the stipulation that the declaration could continue in force until revoked by the President or the National Assembly or upon a change of the holder of the Presidential office after an election. The implication of these changes is the subject of detailed comment in the latter part of this work. As regards the detainee's safeguards the Constitutional amendment brought changes to several facets of the bill of rights.[24] To begin with, the time for furnishing grounds to a detained person was extended from five to fourteen days and the time for gazetting the detention was extended from fourteen days to one month. Further the detainee's right to automatic review of his detention after a duration of one month was abolished and replaced by a review on request made by the detainee himself which could only be made after one year of detention and thereafter at yearly intervals. The constitutional amendment

brought a new clause concerning the functioning of the tribunal. This clause provided that "Parliament may make or provide for the making of rules to regulate the proceedings of any such tribunal including ... rules as to evidence (including reports) in the absence of the restricted or detained person and his legal representative, and the exclusion of thepublic from the whole or any portion of the proceedings".[25]

Although this provision could be justified by the need to withhold from the detainee or the public certain information which could be prejudicial to national security or which could be offensive to a foreign country, I am inclined to concur with Dr Zimba's fears that "this provision can be used by the government deliberately to arrange the receipt and admission of evidence in such a way as to prejudice the position of a detainee especially in cases coloured with political issues."[26] Claiming this privilege the state could simply refuse to make certain disclosures or forestall public opinion or outcry against controversial proceedings by holding the proceedings in camera, even when there is no legitimate justification, from an objective point of view, for doing so. These facts were expressed by Mr B Kakoma, then opposition MP for Sesheke, during the Parliamentary debate on the amendment Bill. The Hon. MP said:[27] "Mr Speaker, Sir, at the moment, section 24 and 26 of

the Constitution gives provisions for a detainee to have his case heard in an open court. But now the Government wants to cut out the public from what is happening. They want to introduce legislation so that these cases are being heard behind closed doors, so that the masses are locked out from the information".[28]

On a happier note the amendment brought a situation unique to Zambia in the whole Commonwealth Africa by extending all the new provisions enacted thereunder to restricted persons as well. This put the restricted person in the same position as the detainee as far as their rights and safeguards are concerned.[29]

The significance of the 1969 constitutional amendment as far as the issue of personal liberties vis-a-vis the executive's wide emergency powers which the amendment broadened is highlighted by the highly charged attacks against the amendment bill when it was introduced in Parliament.

Making his contributions in Parliament, Mr, Kayumba, then opposition MP for Monze East, went to the extreme of fearing that through this bill they "were giving the Head of State too much power"[30] and that as "the leader of a political party in the country and given all these powers he would make sure that all his opponents are detained or restricted."[31] Arguing,

further on, in favour of retaining the parliamentary review, every six months of a declaration of a State of Emergency, the Hon. opposition MP said "Sir, I think this Parliament here is high-powered enough to remain exercising the powers of reviewing a state of emergency rather than transferring these to the President because in future when we shall have a bad President, these powers will be abused."[32]

(B) The Constitutional Amendment of 1974

In 1974 the rights of the detainees were adversely affected. This sad picture was brought into focus by the constitutional amendment[33] which was made in response to a series of cases, referred to in the latter part of this work, where heavy damages were awarded against the Government for unlawful detentions and ill-treatment of detainees in violation of personal liberties.

The initial Government proposal was that no Court of Law should "make an order for damages or compensation against the Republic in respect of anything done under or in the execution of any restriction or detention order signed by the President."[34] This proposal was not well received by the majority of the MPs because as one of them moaned the bill posed dangers to "the judicial protection of the individual liberty".[35] In view of the hostility from the Parliamentarians the Government withdrew the Bill and effected some amendments to it which retained the jurisdiction of the court in respect of claims for damages or

compensation arising from physical or mental ill-treatment during detention or from error of identity of the detained or restricted person. Unfortunately the jurisdiction given to the court was not extended to claims based on technical errors, such as the failure to furnish grounds within the prescribed period, or failure to gazette the detention. In respect of these it was provided that "... the tribunal reviewing the case of a restricted or detained person in pursuance of Article 27 may, if it finds that such person has suffered loss or damage as a result of anything done under or in the execution of a restriction or detention order signed by the President, recommend to the President that compensation should be paid to such person, or to any dependant or such person."[36] The provision additionally provided that the President would not "be obliged to act in accordance with any such recommendation."[37]

Doubtlessly, the amendment reposed authority in the President to determine the amount, if any, of compensation awarded to a detainee who has suffered loss or damage while in detention. Examined against the hindsight of the facts that the President is also the detaining authority, that in the regulation of national security he legislates on emergency laws conferring wide powers upon himself, and that on these accounts he is at once a legislator and executor, the conferment on the President of the power to decide upon compensations and

the quantums thereof to aggrieved detainees or restrictees is a very dangerous affront to personal liberties.[38] We maintain the view that the jurisdiction to award damages and determine the quantum thereof should have remained in the court and the onus should have been left to the Government to improve its standard of performance in the administration of detention orders.

We contend that personal liberties are too sancrosact to be compromised by considerations of financial costs to the Government whose functionaries have failed to follow the established procedures for the curtailment of someone's personal liberties. Why should the detainees, whose freedom of movement has already been restricted, be placed at a disadvantage just to avoid the Government paying for the deficiencies of its functionaries? An instructive dictum in the matter should be the rule established in Dale's Case[39], referred to by Justice Magnus in the Zambian detention case of Chipango V. Attorney General,[40] that "when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act ...".[41]

Unfortunately this pious expectation is confounded by the reality engendered by the manner in which emergency powers have been formulated and the style in which they have been designed to be exercised by the executive.

When discussing the power of the Governor to declare a state of emergency during the colonial era we observed that the

declaration of a state of emergency was purely a matter for subjective determination by the Governor. Similarly during the post-independence era it was left to the President to decide, in his sole discretion, whether a state of emergency exists. War apart, there is no definition of what constitutes an emergency. This absence of a definition of an emergency leaves the door open for an arbitrary determination by a President who may not be well disposed to democratic practice or who may be facing leadership problems. Our fear of this possibility of abuse of discretionary power were proved to be genuine in Nigeria when an emergency was declared in the Western Region in 1962 simply because there had been a fight among members of Parliament within the chamber of the region's legislative assembly.[42] Equally alarming is the absence of an effective check on the President's power to declare a state of emergency. Elsewhere in this work we have already argued that the constitutional provision for a subsequent approval of the proclamation by a resolution of the National Assembly is not an effective check, for practical purposes, because experience in post-independence African politics shows that the Parliamentarians will generally support the actions of the President. This observation does not only apply to One-Party states alone where the supremacy and independence of the legislature has been watered down in preference to Party supremacy. The observation also applies even in states where

opposition parties exist or have existed since the number of opposition MPs in Parliament has generally been too small to effectively check or block the wishes of the Government as expressed through the Presidency. This ineffectiveness of ex-poste parliamentary approval as a check on Presidential power to declare an emergency makes the Zambian President's power as ineffectually controlled as that of the German President during the dictatorial German Republic of 1919-1933. It is therefore no prophesy of doom to state that if a less democratic person assumed the Zambian Presidency the consequencies which befell the German Republic could possibly become the lot of the Zambian people. Our despair and fear in this respect are increased by the fact that under Article 93 (2) of the Constitution of Zambia[43] the President has authority to dissolve Parliament and the twenty-eight days period which the National Assembly is required to approve the declaration of a state of emergency made by the President does not include the period when Parliament has been dissolved. This therefore means that if the President timed the declaration of an emergency in such a way that it is made when he has dissolved Parliament for a long time, and does not convene Parliament for a very long time after the declaration of an emergency, the emergency would reign legally, for a considerably long period without any violation of the constitutional safeguard of parliamentary approval of the declaration of an emergency.

In this respect the experience of Lesotho ably illustrates the point. After losing an election to the opposition party, the reigning Prime Minister Leabua Jonathan declared a state of emergency, suspended the constitution and with this action, dissolved Parliament.[44] Once Parliament had been dissolved who could check, other than the declaring authority himself, the necessity or the continued existence of the state of emergency? If the other African leaders granted similar constitutional provisions or powers have not been as bold as Leabua Jonathan it is so by pure luck or due to their democratic tendencies and our view is that the fate of a people should not be left to luck or goodwill as if it were a lottery game or a matter of personal feelings or inclinations. In fact to assume that leaders will always be good men is as presumptious and dangerously assuming as Mr Nicholson's statement when moving a motion for the introduction of the Preservation of Public Security Ordinance that "... Governors are responsible men and they are selected for that office for their qualities including their judgement and sense of responsibility".[45]

This presumption is dangerous as it could prove to be catastrophic to people's personal liberties if a leader of tyrannical disposition came to power. This point was raised, in 1969 during the Post-Independence parliamentary debate on a constitutional amendment Bill which sought, inter alia,

to remove various existing parliamentary checks on the exercise of the President's discretion in the declaration of a state of emergency. Making his contribution against the Bill, Mr Kayumba, then Opposition MP for Monze East said:[46] "Let us not make these laws because we know the present Head of State is a good man, a Christian ... I know of people in this House who would like to become Head of State. Once these people have taken over, they will stop at nothing. They will make sure that everyone influential, even in their own political parties, is restricted. They will declare unnecessary states of emergency and these will remain in force for a time that no one can tell."[47] These dangers are real and frightening.

Being a matter for the subjective determination of the President, the declaration of an emergency can not be challenged before a court of law. This poses a serious danger to democracy, especially the fundamental liberties and rights of the citizens because anticipation of possible judicial determination or review of the emergency declaration would have made the President exercise the required self-restraint in the exercise of his power to declare a state of emergency. The absence of a constitutional definition of an emergency leaves room for our apprehension that an insecure or misinformed President could declare an emergency when, prima facie, emergency conditions do not exist and he simply wants to avail himself of the wide

discretionary powers available to him under emergency legislation.

The infringement of individual rights and liberties under the onslaught of a declared emergency is constitutionally provided for by Article 26 of the constitution which stipulates that with the exception of the right of life, protection of the law and freedom from forced labour which cannot be derogated from, all rights guaranteed under Articles 15, 18, 19, 21-25 of the constitution, the constitutional provisions for fundamental rights and liberties, can be derogated from during any period of war or any period when a state of emergency declared under Article 30 is in force. What better provisions could there be for a possible executive misuse of this power?

Perhaps the most unfortunate thing is that if a tyrannical leadership established itself following a declaration of a state of emergency, the declaration, the sine qua for the dictatorship, would continue for as long as the President, the supreme leader, remained in office or decided, in his sole discretion, that the emergency should continue. In this way like the colonial constitutional system, the present post-independence constitutional provision on the duration of a declared emergency differs from the time-controlled emergency proclamation under the British Emergency Powers Act 1920 whereby an emergency is limited to one month. In fact the

present constitutional provision is worse than the colonial one or the one which existed before the Constitutional Amendment made in 1969[48] since under these earlier constitutional provisions, the continuation of the declaration of emergency was subject to the ritual of parliamentary approval at fixed intervals, i.e. yearly during the colonial era and every six months under the Independence constitution. The issue is pathetic. Suppose having declared a state of emergency, a President did not want to revoke the emergency in doubtful circumstances, what remedy, other than an unconstitutional one, is there for a disaffected citizens willing to rid themselves of the emergency imposed on them without their prior consultation or approval? None! In this respect it is interesting to note, in case of Zambia, that the semi-emergency which was declared in July, 1964 by the Governor during the disturbances caused by the fanatically disobedient Lumpa Church led by a self-styled prophetness, Alice Lenshina, and which brought into force the notorious Preservation of Public Security Ordinance, has not been revoked to date, over 15 years after the Lumpa Church disturbances were quelled down, and continues to be justified by the leadership under new grounds, i.e. hostility from Zambia's southern neighbours. The Government did not even review the situation when the immediate neighbour Rhodesia, attained political

independence as Zimbabwe in 1980 and ceased to be a hostile neighbour endangering Zambia's security. Suppose the Government chooses to be silent for ever, even after Namibia becomes independent? In any case how immediate or real is the alleged security risk posed by the allegedly hostile neighbours with whom, like South Africa, in fact the country maintains clanderstine and open trade in essential commodities like soap, cooking oil and even maize? In the light of the long history and catalogue of situations advanced by the Government as justification for the continued existence of the semi-emergency what guarantee is there that after the whole of Southern Africa is liberated, a process which in itself is going to take long, what guarantee is there that other reasons will not be advanced to justify the continuation of the semi-emergency? And suppose the alleged hostilities from South Africa do not end soon, will the Zambian citizens continue to live under a state of semi-emergency? As it is the continued existence of the semi-emergency with its consequent effect of the imposition of the notorious Preservation of Public Security Act for the whole of the post-independence era renders credibility to the suggestion that much as Zambia does not have on its statute books the dreaded Preventive Detention Act like Nkrumah's Ghana or Nyerere's Tanzania, it is in effect a permanent emergency state, with all the unfavourable consequences which this state of

affairs implies or expressly behold. Unfortunately, this is a state of affairs whose stated justifications are, whereas they could have been so at the time of independence, now no longer acceptable because as Babu eloquently argues in his general commentary on post-independence, Africa;[49] "If insecurity still exists after nearly twenty years of independence, it can not any longer be blamed on external forces; and if it emenates from internal forces then it is an admission of the leadership's own political and administrative failure".[50]

FOOTNOTES

1. See Northern Rhodesia Legislative Council, Debates (26th January 1960) Col. 740

2. Ibid

3. See A Martin, Minding Their Own Business: Zambia's Struggle Against Western Control, op. cit

4. See A M Babu, African Socialism or Socialist Africa? (London Zed Press, 1981) at p. 169

5. Ibid

6. Ibid

7. See Northern Rhodesia Legislative Council Debates (25th June 1959) Col. 93

8. See Northern Rhodesia Legislative Council, Debates (26th January 1960) Col. 724

9. B O Nwabueze Presidentialism in Commonwealth Africa, op.cit, at p. 68

10. Ibid

11. S. 13 of the Independence Order in Council, 1949

12. Cap. 108 of the Laws of Zambia

13. Cap. 106 of the Laws of Zambia

14. See Section 29 (1) of the Independence Constitutiona and Article 30 (1) (a) of the One-Party State Constitution

15. S. 28 (1) (b) and Article 30 (1) (b) respectively, Ibid

16. The Presidential pronouncement was a leading Article in the Times of Zambia newspaper edition in January, 1976

17. Lumpa Church disturbances is discussed in Chapter 4

18. See Section 3 (2) (a) (b) (c) (d) (e)

19. S. 3 (3) (a) Ibid

20. S. 3 (2) (c) Ibid

21. S. 5 (2) Ibid

22. Dr L Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia, An Historical and Comparative Study, op. cit. at p. 122. The Statutory Instruments made include the following: Preservation of Public Security Regulations, S.I. No. 8, 66, 107, 127, 331, 359, 370 of 1965 and S.R. Nos. 15, 53, 75, 187, 218 of 1966, and S.F. No. 116, 239, 361, of 1968 and S.I. Nos. 335 and 357 of 1969; Preservation of Public Security (Prohibition of Certain Activities) Order, S.I. No. 384 of 1969; Preservation of Public Security (Detained Persons) Regulations, S.I. No. 8 and 60 of 1965; Preservation of Public Security (Railway) Regulations, S.I. No. 5, 230 and 394 of 1966 and 130 of 1967; Preservation of Public Security (Control of Air Services) Regulations, S.I. No. 76 of 1966, Preservation of Public Security (Control of Waterways) Regulations S.I. No. 325 of 1967; Preservation of Public Security (Control of Waterways) Regulations - The Kariba, S.I. No. 273 of 1968; Preservation of Public Security Regulations (Employers and Employees) Regulations, S.I. No. 175 of 1968; Preservation of Public Security (Movement of Vehicles) Regulations S.I. No. 231 of 1966

23. These two constitutional amendments are Constitution (Amendment) (No. 5) of 1969 and the Constitution Amendment (No. 18 of 1974)

24. See Constitution (Amendment) (No. 5) of 1969

25. See Section 7 of the 1969 Constitutional Amendment, op. cit.

26. Dr L Zimba, The Constitutional Protection of Individual Rights and Freedoms in Zambia; A Historical and Comparative Study, op. cit. at p. 307

27. Zambia National Assembly Debates (10th October 1969) Col. 191

28. Ibid

29. B.O. Nwabueze makes this observation in his book Presidentialism in Commonwealth Africa, op. cit.

30. Zambia: National Assembly, Debates, (10th October, 1969) Col. 174

31. Ibid, Col 174-175

32. Ibid, Col 175

33. See the Constitution Amendment of 1974

34. See Section 4 (b) of the Constitution of Zambia (Amendment) Bill No. 18 of 1974

35. Zambia: National Assembly, Debates, (31st July, 1974)

36. See Section 4 (b) of the Constitutional Amendment, op. cit.

37. Ibid

38. The author recalls that at the time of the introduction of the amendment Bill in Parliament in 1974 the University of Zambia Students, of which the author was one, staged a public demonstration against the Bill which they described as "draconian".

39. (18881) 6 QBD, 376

40. (1970) Z.L.R. 31

41. See Dale's Case op. cit, quoted by Magnus, J. at p. 182

42. This incident is reported in by B Nwabueze in Presidentialism in Commonwealth Africa, op. cit., see Chapter

43. See Article 93 (2) of the One-Party Constitution of Zambia

44. Among others Nwabueze has reported this incident in his book Constitutionalism in Commonwealth Africa, op. cit.

45. Northern Rhodesia Legislative Council, Debates, (26th January 1960) Col. 732

46. Zambia: National Assembly, Debates, (10th October, 1969) Col. 175

47. Ibid

48. Constitution (Amendment) (No. 5) of 1969

49. See A M Babu, Socialism or Socialist African, op. cit.

50. Ibid at p. 169

CHAPTER FIVE

JUDICIAL RESPONSE TO THE EXERCISE AND APPLICATION OF EMERGENCY POWERS

In the preceding Chapter we have stated that the emergency powers granted to the President under the provisions of emergency legislations like the Emergency Powers Act and the Preservation of Public Security Act became exercisable only if there had been a declaration of a full or threatened emergency. In view of this fact our discussion on the judicial response to the exercise and application of emergency powers should begin with a study into the status of the declaration of an emergency itself.

(i) Is the declaration of an emergency a justiciable issue?

The text of Article 30 of the Constitution which allows the President to declare a state of emergency if he thinks that a state of public emergency exists or if he is of the view that a situation exists which if it is allowed to continue may lead to a state of public emergency suggests that the declaration of a state of emergency is a matter for subjective and exclusive determination by the President and is therefore not a justiciable issue. The available case law confirms this interpretation of the constitutional provision.

The question of the justiciability of a declaration of an emergency by the executive fell for consideration in the Malaysian case of Ningkan V. Government of Malaysia.[1] In this case the appellant was the Chief Minister of the State of Sarawak of the Federation of Malaysia who had received a letter from the Governor of the State asking him to tender his resignation from his position on the ground that a majority of the members of the Council of Negri (Parliament) had made representations to the Government that they had lost confidence in the Chief Minister. Despite protests from the Chief Minister over the decision he was informed by the Governor that he had ceased to hold office. The Chief Minister then brought an action in the High Court, seeking a declaration that he was still Chief Minister of Sarawak. Judgement was given in his favour by the Court which held that the Governor had no power to dismiss him. A state of emergency was then proclaimed by the Federal Government. During the emergency, the Government passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, which, inter alia, empowered the Government to dismiss the Chief Minister if he refused to resign his office upon a vote of no confidence in him. By authority of this new legislation, the appellant was dismissed. Thereupon he brought an action

in the Federal Court of Malaysia in which he challenged the validity of the proclamation of the emergency and with this, the validity of the Emergency (Federal Constitutional and Constitution of Sarawak) Act, under which the Government had acted in dismissing him. The appellant argued that the purpose of the proclamation was to dismiss him from office and on this account he attributed an improper exercise of the power to declare an emergency by theGovernment. For its part, the Government argued that the validity of the proclamation was not a justiciable issue; that the power to make the proclamation is satisfied if the authority in which that power reposes is satisfied that there is an emergency or a threat to the security of the country; and that there is no limit to the grounds on which it may act. The Federal Court of Malaysia held that the validity of the proclamation was not justiciable and it is unfortunate that this issue was not discussed by the Privy Council on appeal. However the view of the Federal Court of Malaysia is supported by the two leading Nigeria Cases which were decided earlier. Under the Nigerian Constitution, the power to declare an emergency was vested in the Federal Parliament. In Williams V. Majekodunmi, Adenola,[2] C.J.F. ruled as follows: "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 the state of emergency is declared, it would seem that according to the Constitution, it is the duty of the Government to look after thepeace and security of the state, and it will require a very strong case against it for the Court to act."[3] This view about the non-justiciability of the existence of an emergency was stated more emphatically by the same learned Chief Justice Adenola in another Nigerian case of Adegbenro V. A.G.[4] Passing Judgement, the Chief Justice said:

> "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 bona-fide in making a declaration of a state of public emergency, the Court could not hold invalid, since it is impossible to say in the present case that there was no ground to justify a declaration".[5]

The cases cited above assert the predominance of the view that the declaration of an emergency is not justiciable issue. In the Zambian context the responsibility for the preservation of the nation and the preservation of public security lies with the President and to this end he has been granted an unchallengeable discretion to declare,

in his own and sole discretion, a state of emergency in apprehension of any activities which may be prejudicial to the existence and security of the nation.

However, desirable as it may be, this conferment of wide discretionary power on one authority has its own dangers. These dangers were aptly summed up in Baron J. P's obiter in Kapwepwe and Kaenga V. Attorney-General for Zambia when he said that the powers granted to the President under the Zambia detention laws are far-reaching powers.

> "In Particular", observed Baron J P "It must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain ..."[6]

Defining the ghastly meaning in practical terms of detention without trial President Julius Nyerere of Tanzania remarked as follows: "It means that you are imprisoning a man when he has not broken any written law, when you cannot be sure of proving beyond reasonable doubt that he has done so. You are restricting his liberty, and making him suffer materially and spiritually for what you think he intends to do, or what you believe he has done. Few things are more dangerous to the freedom of a society than that.

For freedom is indivisible, and with such an opportunity open to the Government of the day, the freedom of every citizen is reduced. To suspend the rule of law under any circumstances is to leave open the possibility of the grossest injustices being perpetuated."[7]

The issue could not have been stated in more clearer language. This aspect of emergency law presents one of the greatest affronts to personal liberties and freedoms which, unfortunately, has been legally provided for. What is even more distressing is that the existence of the circumstances (i.e. an emergency) under which it becomes permissible to detain a person without trial is, as we have just argued, not a justiciable issue, being a matter for the subjective and sole determination of the declaring authority, the President in case of Zambia.

(ii) The Judicial Interpretation of Emergency Statutes

In Chapter Four of this work we mentioned the constitutional safeguards available to a detainee or restrictee such as the requirement to be furnished with grounds for detention and to have the detention gazetted within prescribed periods, the periodic review, on the request of the detainee's detention etc. The majority of cases of detention of persons which have been brought up before the Zambian

Courts have revolved around the question of whether or not regard was given to the safeguards in the exercise or enforcement of emergency powers by the executive. In view of the fact that if one chooses to ignore, for lack of legal force, the Presidential pronouncement at the height of the Civil War in Angola in 1976 that a full state of emergency had come to be, the Emergency Powers Act, which becomes operative during a full emergency, has never come into operation in Zambia, the emergency legislation under which these cases have been heard has been the Preservation of the Public Security Act and the various Statutory instruments made thereunder. Paragraph (a) of subsection (3) of Section (3) of the Preservation of Public Security Act empowers the President to make regulations to provide for the detention of persons. Regulations 33 (1) made under authority of this enabling Act stipulates that: "Whenever the President is satisfied that for the purpose 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 shall be arrested whether in or outside the prescribed area, and detained". Regulations 33 (6) authorities any police officer of aor above the rank of Assistant Inspector (a surprising lowering of the minimum rank requirement since under the colonial security legislation the minimum rank was higher, an Assistant Superintendent) 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 whether a Presidential Detention Order should be made against him. The proviso to Regulation 33 (6) states that such person shall be released where, before a decision is reached as to whether or not a detention order shall be made against him, the police officer who arrested him finds, on further inquiry, that there are no grounds which could justify his detention under the regulations.

From the foregoing statement of the power of detention it is clear that the manner of formulation of this power allows only little scope for challenge of this power in a court of law. From the enabling Act where words or phrases like "satisfied" and "has reason to believe" are used to define the President's mental disposition it is clear that the authority to issue a detention order is an entirely discretionary one requiring only that the President or Police Officer above the rank of Assistant Inspector should be subjectively satisfied that there is necessity for the order. The implication of this situation is that neither the reasonableness of the President's or Police Officer's truth of the facts providing the grounds for the

detention order can be questioned by the courts, lest the courts, substitute their own subjective determination for that of the President or the concerned Police Officer. This issue fell for determination in Zambia in the leading case of Simon Kapwepwe and Elias Kaenga V. the Attorney-General for Zambia[8] over an application for a writ of Habeas Corpus ad subjiciendum. The applicants were appealing against the refusal of the lower court, the High Court, to issue a Writ of Habeas Corpus ad Subjiciendum following their detention under theprovision, of regulation 33 (1) of the Preservation of Public Security Regulations which stipulated that "Whenever the President is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person the President may make an order against such person, shall be arrested, whether in or outside the prescribed area, and detained." Dismissing Magnus J's obiter in Chipango V. Attorney-General,[9] relied upon by Counsel for the applicants and in which it was stated that "the grounds for detention must be at least as particularised as they would have to be in a pleading in an ordinary action." Baron J P explained the position of the law as 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 suspicion,

the question is purely for his subjective determination".[10] These are indeed far-reaching powers given to the President, the detaining authority, and purely dependent on his unquestionable subjective satisfaction, these powers could easily lead to unchecked encroachments on the rights of others, especially the political opponents of the Government who from the available data swell the ranks of those detained under security regulations in the presidential regimes of Commonwealth Africa. It is also therefore, no wonder that except where the executive made a procedural error such as the case of Nalumino Mundia V. Attorney-General[11] where the grounds for the applicant's detention was given five days out of the stipulated period of 14 days, detainees rarely won their contests against detention orders, made by detaining authorities with wide descretionary powers. In fact the courts have gone so far as to decide that the detaining authority is not under any obligation to give very detailed grounds for detaining someone. Grounds for detention, it has been asserted, are not charges but reasons for the detention and as Kania C J said in the Indian case of State of Bombay V. Atam Ram Vaidya[12] "by their nature the grounds are conclusions of fact and not complete detailed recital of all the facts".[13] In the case of Simon Kapwepwe and Elias Kaenga discussed above, the court was emphatic in its statements that a detention order

could be a precautionary action based on suspicion and that it was therefore distinguishable from a criminal charge whose standard of fact was proof beyond reasonable doubt. The court was resolute in its statement that where the matter falls within Regulation 33 (1) even if a person is believed to have committed a criminal offence there is no legal obligation on the executive to prosecute in the criminal courts. The practical implication of this relaxed view of detention order as far as a detained person is concerned is that it becomes extremely difficult for him to challenge a detention order on the grounds that the grounds for his detention are not sufficiently detailed. On the other hand the detaining authority, enjoys the advantage of a subjective and relaxed consideration of the grounds for detaining someone and does not have the exacting task in setting out to encroach upon someone's rights through the mechanism of a detention order. The decision in Kapwepwe and Kaenga V. Attorney-General was followed in the case of Re Buitendag.[14] In this case the applicants were tried before the High Court on four counts under S 3 (c) the State Security Act and was acquitted on all the four counts. On the same day of acquittal he was detained by order of the President under Regulation 33 (i) made pursuant to the provision of the Preservation of Public Security Act. The grounds of detention which were provided to

the applicant was identical to the particulars of the fourth count on which he had been acquitted at the trial. The applicant submitted that his detention was therefore unlawful and applied for a writ of habeas corpus. The decision of the court underscored the fact that the power of detention given to the president overrides, in extent and effect, even the fine view of a court of law presumed to be the doyen of justice and protector of fundamental rights and liberties as outlined in the constitution. The court held that where a detaining authority decides to lay a criminal charge first, 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 since the question is at all times one purely for the detaining authority's objective determination. It was further said that if mal fide on the part of the detaining authority is alleged, the onus of proving it is on theapplicant as the court will presume good faith on the part of the high officers of the state in the discharge of their duties. This presumption had also been made in the famous case of Kachasu V. The Attorney-General.[15] In this case a schoolgirl had been expelled from school because she had refused to salute the National Anthem on religious grounds. The substantive issue revolved around Article 21 of the Constitution of Zambia which, amongst other freedoms, provides for the freedom of conscience. This right is however a qualified one

because under sections 5 this freedom or guarantee thereof could be derogated from if such derogation is for the public interest, defence or security etc. The court was now called to determine whether the Ministry of Education Regulations whose enabling Act was the Education Act[16] and which made it compulsory for school children to sing the National Anthem and salute the flag on threat of suspension or expulsion from School by the Headmaster were reasonably required in the interest of defence, public safety, public order or for the purpose of protecting the rights of others and whether these regulations were reasonably justifiable in a democratic society. What is however of concern to us in this case is the fact that the High Court like in Re Buitendag, laid the onus of proving that the regulations enacted by the Minister of Education were not reasonably justifiable in a democratic society on the applicant. It had been presumed that the Regulations made by a Minister under statutory power conferred upon him by the legislature were constitutionally enacted and were necessary and reasonably justifiable. The presumptions and placement of onus of proof made in the above mentioned cases cause us considerable worry. How do you, without violating an important principle of justice, call upon an aggrieved person to prove for instance that there was mal fide on the part of the authorities and that the

regulations made by the authorities of the state were not reasonable and justifiable in a democratic society? The difficulty placed on the aggrieved party is immeasurably heavy and unfortunate in a sensitive field like the area of fundamental rights and freedoms. Our view is that in such cases of, prima facie, infringement of a fundamental right, the presumption should be to the contrary and the onus placed on the state to justify the enactment of the regulations. This safeguard is important in a continent where the practice of Parliament has shown that even Parliament is not beyond reproach where hybersensitivity to alleged national security is concerned. The continent of Africa is soiled with records where Parliament is rushed to quickly pass an Act in order to give the executive arm of government some power or authority which, at the height of court proceedings against the state, is realised to be lacking to the executive. At the height of presidential despotism in Ghana a Bill, the Deportation (Othman and Abadi Buba) Bill, was rushed through Parliament in 1959 to authorise the deportation of Buba and Ottman Larden from Ghana whilst their claim that they were Ghananian citizens was pending in the High Court. In Uganda following political unrest in the Buganda Kingdom in 1966 the Ugandan Parliament also rushed a special Act, the Deportation (Validity) Act 1966, to regularise retrospectively the Government deportation of eight ministers. These are glaring examples of a despicable abuse of the constitutionally established due

process of law by an unholy conspiracy of twin institutions of Government, i.e. the executive and the legislative. Zambia may lack a similar example now but tomorrow may not be like today and in this respect we should not leave the protection of fundamental rights and freedoms to chance or in the pious hope of a complacement woman who lives on the fragile hope that as long as her good husband continues living, no harm will come to her family. In fact if what occured at Mulungushi in 1978 when the General Conference of the only political party, the United National Independence Party, rushed up amendments to the Party Constitution in order to block the candidature of two aspirants, Simon Kapwepwe and H M Nkumbula, to the Presidential office is anything to go by then we have cause for apprehensions about the homefront as well. Unfortunately in the face of the combined assault of executive and legislative powers, the judiciary has found itself lacking the courage and authority to be the all-time defender of fundamental rights and liberties. Thus even where they have not been restrained from interfering with the wide discretionary powers of action and decision granted to the executive, usually through the President, they have strained themselves hard to side-step the real issues where a consideration of these would lead to a judgement which is unfortunate to the state. In my view this is what happened in one of the High Court holdings on the Kachasu Case referred to above. Wishing to evade the difficulty of rationally explaining its decision the court said

that it was not the applicant's freedom of religion which had been invaded but her freedom of education which is not constitutionally guaranteed. It is clear from this curious reasoning that the court did not address itself to the problem of causation. Is it not in fact self-evident that the cause of the applicant's suspension from school was her refusal to salute the National Flag and to sing the National Anthem on religious grounds? Clearly the applicant was suspended from school as a result of her religious conviction which did not allow saluting the National Flag and singing the National Anthem and the denial of education was just a consequence of her religious convictions.

The courts here have been intrigued by the difficulty of establishing the meaning of the phrase "reasonably justified" in a democratic society. The phrase is value-loaded and places a taxing burden on the court to determine the elusive extent to which this phrase should be allowed to permit an executive or legislative infringement on individual liberties and freedoms. Whose value judgement and to what extent should this value judgement determine "what is reasonably justifiable in a democratic society?" The pretence of the court at arguing that the determination of what is reasonably justifiable in a democratic society as evidenced by the argument in the instructive case of Patel V. Attorney-General,[17] rests on shaky grounds. When judges sit in judgement to decide what is reasonably justifiable in a democratic society there are in actual fact influenced by their own values, shaped by their own class

backgrounds or position in the political system of what they consider to be in the public interest. But how public is public interest? Too often than not and from a dialectical point of view, it has turned out to be that in a class society public interest is generally the interest of the class in power, to be that which would not endanger or challenge its existence as a ruling class.

Consciously or subconciously the Judges have acknowledged this in their deliberations over the matter. In another leading detention case of Chipango V Attorney-General refered to earlier on, Doyle, then Chief Justice, admitted his bias or helplessness: "In any event" he said "no danger to the security of the state can arise from this decision. It is open to the detaining authority in this case the President, if he is still satisfied that it is necessary for the purpose of preserving public security to detain the respondent."[18] Consoling himself he added: "The only way in which the state suffers by reason of this judgement is that it follows from it that the state has, by reason of its failure to comply ... laid itself open to an action for damages."[19] A question arises. Suppose that whilst this case was going on it so happened that the learned Chief Justice learnt that the case he was handling was such that if he found against the state, his decision would prejudice state security, is it not probable that he would, with much injury to Chipango, have found in favour of the state? Where is the justice of this shifting or conditional scale of "justice"? As it happened judgement in favour of the applicant could be

entertained or tolerated, because the President could still detain the applicant if he still thought necessary to do so as the state had only failed on a mere procedural error. But how often is it that the political leadership has not found it to be in "public interest" to detain political opponents or those like Chipango alleged to have plotted against them? Very rare. Vis a vis this state of affairs how secure is the ordinary citizen who has got into trouble with the ruling class? Noteworthy in this matter is the absence, in the relevant laws of Zambia and the constitution of a restrictive definition of public security. The meaning of "public security" in the Preservation of Public Security Act is widely construed as including ... "the security or safety of persons and property, 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 the administration of justice".

This dragnet is very wide and can net even the smallest and perhaps inconsequential fish as the author and his University friends learned in 1976 when following student's demonstrations at the University of Zambia in 1976 in support of MPLA, a liberation movement which the Zambian authorities did not favour at the time, he was detained for six months under a Presidential detention order, issued under the Preservation of Public Security Regulations, which

simply read:

"TO PAULSEN HIMWIINGA

WHEREAS on 23rd February 1976 you were detained by Order of the President made on the said date under Regulation 33 (1) of the Preservation of Public Security Regulations

AND WHEREAS it is provided by Article 27 (1) (a) of the Constitution that every person detained shall not more than fourteen days after commencement of his detention be furnished with a statement in writing specifying in detail the grounds which he is detained.

NOW THEREFORE you are hereby informed that the grounds upon which you are detained are:-

That on divers dates in January and February 1976 you collaborated with certain persons in plotting and indulging in subversive political agitation amongst students of the University of Zambia, whereby the loyalty and discipline amongst the student body was undermined;

THAT you participated in illegal meetings, demonstrations and strikes within the campus;

THESE activities are prejudicial to public security and for that purpose it is necessary to detain you."

How far is it possible, without stretching the imagination beyond reasonable limits, that a small group of 17 unarmed students organising demonstrations by equally unarmed students not exceeding 3,000 in number, and demonstrating within a small University campus can endanger public security to an extent which justifies their detention? Yet under the wide definition of public security the action of the students detained could be effectively argued as having fallen within the statutory definition of public security.

In view of this position of the law, is it saying too much or crying wolf unnecessarily to say or fear that this loose definition of public security does not help the citizen much in his challenge of a detention order effected against him pursuant to this loose definition of public security or in his assertion of his political views? My apprehensions are heightened by the fear-ridden political climate in the Presidential regimes of Africa which Nwabeuze has observed to be "very sensitive to criticism and very jealous and suspicious of rivals or competition"[20] and where "The President is a personal ruler; he is indeed the Government, and as such he is identified with the state and national security is given personal dimension too".[21] In this context adds Nwabeuze, national security "involves not only the security of the state but also the security of the President's tenure of office (and) anything that threatens the security of his continuance in office is also a threat to the security of the Nation."[22] In the next section of

this chapter we have expressed in detail our doubts over the application of emergency powers under the disguise of the desire to preserve public security.

If an individual is detained in doubtful, though constitutionally or statutorily legal circumstances, it is worse if the mechanism for his release is again subject to the final and subjective determination of the detaining authority. Yet this is the case under the Zambia constitution. Although under the provisions of paragraph (c) of Article 27 (1) of the constitution a detainee is allowed, if he so requests, any time during the period of detention ... after one year of the commencement thereof his case shall be reviewed by an independent tribunal established by law, the duty of the tribunal so established is merely advisory. The tribunal only makes recommendations to the detaining authority concerning the necessity or expediency of continuing the detention and Article 27 (2) of the consitution expressely states that such recommendations are not binding on the detaining authority. Although it has been speculated that the detaining authority would not lightly disregard the strong recommendations of the tribunal, I am still worried by the absence of any mandatory force on the part of the tribunal's recommendations which the detaining authority may disregard without being constitutionally wrong or liable for any action. This has infact happened in Zambia on a few occasions, among which is the failure of the detaining authority to release some members of the notorious terrorist gang operating in the

Northwestern Province and led by Adam Mushala, now killed, despite the tribunal's recommendation to have them released. A more secure position would in my opinion, be the adoption of the position prevailing under India's Prevention Detention Act whereby the report of an advisory board in favour of a detainee's release is binding and conclusive on the detaining authority. In our review of the modus operandi of the tribunals we could not help noticing, with considerable unease, the fact that whereas during the colonial era there was a constitutional provision for an automatic review of a detainee's detention by a tribunal every six months, the post-independence Government changed this to an annual affair made only upon the request of the detained person. This put the detainee in a worse position than he was during the much dreaded colonial era, a very interesting irony.

From the foregoing discussion of the manner of formulation of emergency powers in Zambia, the interpretation of these powers as stated in judicial pronouncements in the leading cases which were litigated upon a gloomy picture emerges.

Without ignoring or understating the necessity or justification for emergency institutions andpowers, we found that the emergency powers are formulated in such a manner that their exercise is generally wide and without meaningful or effective controls. The courts feel restrained from inquiring into discretionary powers constitutionally granted to the executive just as the general

exclusivity of the grant of these emergency powers to the President leaves the legislature a toothless bulldog. The end result as I shall try to show in the next section, is an ideal setting for an emergency Presidency which may easily turn out to be too strong and inadequately restrained for the liberties of the governed.

(ii) Manner and extent of application of emergency powers

The illusion entertained in some quarters that the formal existence of potentially dangerous and dictatorial powers or provisions on the statute books need not alarm us as enlightened leadership, restrained by other extra-legal considerations like the political climate of the country will not resort to these powers or provisions except in truly emergency situations where national survival is at stake has been proved to be less credible by the manner or extent to which emergency powers have been used in many Presidential regimes of Africa. At times the slightest stir by one political section has invited an indiscriminate use of emergency powers. Needless to say in most cases the emergency powers have been applied for political ends which had nothing or little to do with the preservation of public security and order. It is this extensive and mal fide use of emergency powers which, as many a detainee or student of African political intrigues will testify, has given them a characteristically fearful reality. This aspect of the matter is our concern in this section of this chapter.

Within the immediate aftermath of the attainment of political independence by the majority of African countries between 1946 and

and 1960 there were no less than 29 declarations of state of emergencies,[23] followed, as we have already shown earlier in this paper, by various constitutional amendments which either gave the new Government even wider powers during emergencies or weakened the safe guards provided by the Colonial constitutions against indiscriminate applications of emergency powers to the detriment of fundamental liberties and freedoms of the individual.

In Zambia a semi-emergency was declared by the out going Governor-General on 27th July, 1964, just on the eve of the country's attainment of political indppendence on 24th October, 1964. This declaration brought into force the Preservation of Public Security Ordinance and the declaration has been in force ever since. The issue which precipitated the declaration of the semi-emergency were the unfavourable activities and hostilities of the Lumpa Church, a fanatical religious organisation led by Alice Lenshina which was refusing to cooperate with the Government. The proclamation of 24 July 1964 was continued in force until 24 April 1965 by the Independence Order in Council which stipulated that the proclamation and the declaration could, once approved by the National Assembly within five days of its declaration by the President, only be continued in force for successive period of six months by the National Assembly. This procedure was used to extend the declaration of 27 July, 1964 from 24th April, 1965 until 1969 when in the Constitution Amendment made in 1969[24] it was decreed that the declaration could continue in force until revoked by the

President or the National Assembly. This signalled the death of the desired time-limitation which the colonial authorities had found advisable to institute, perhaps to check the creation of a permanent emergency state as Zambia, still under a semi-emergency up to do now, is now legitimately feared to be. What worries us greatly here is the fact that to date, nearly two decades after the ashes of the Lumpa menace have long gone cold, the declaration has not been revoked; instead new arguments, whose flaws we detailed in the earlier part of this chapter, have been unconvincingly advanced by the Government to justify the continued existence of the semi-emergency. But why has the emergency continued up to now? In whose interest is it that the country should continue to be a semi-emergency state for so long?

These are sensitive questions to which no honest answers can be expected from the ruling quarters. However, by examining the record and manner of use of emergency powers it is possible to make fair speculations and draw certain conclusions. Available statistics present the grim picture that "between 16 March 1971 and February 1972 alone about 338 persons were detained, and about 15 restricted for alleged but unproved subversive political activities."[25] The detainees were mainly members of the splinter - opposition party led by the country's former Vice-President, the United Progressive Party. Further on two occasions in the history of the University of Zambia, the reality of the President's emergency

powers came to bear upon the university community. In July, 1971 following a confrontation between the Government and the students the university was closed down for one month, and ten student leaders were expelled; all this happened over the heads of the university authorities, apparently by virtue of the President's emergency powers. Again in 1976 following a disagreement between the students and the Government over a foreign policy issue the university was closed down and this time about 16 students, including the author, and five lecturers were detained under the terms of Preservation of Public Security Regulations.[26] The non-Zambian lecturers were subsequently deported without being accorded an opportunity to appear before a court of law. Recently after nation-wide strikes by the workers, mainly the powerful miners some leading trade union leaders were detained on flimsy grounds which they eventually successfully challenged in a court of law.

The Police have also used the power of detention very frequently and widely, even over petty matters that have little or no connection with the Preservation of Public Security in the strict sense of the phrase. Of this unfortunate practice, Edward Shamwana a prominent Zambian Lawyer and one of the 12 persons detained and charged with attempting to overthrow the Government of Zambia in October, 1980 aptly remarked: "Notably it has been used to detain persons in the Mechanical Services Branch thefts, army officers suspected of theft, suspected of breaches of exchange control

regulations, common conspiracies, espionage, murders, robberies etc. In fact its use is so frequent that it is feared that in some cases the police are believed not to begin any detailed investigation into the commission of any offence until a suspect is detained."[27] These fears are not just emotional outbursts of an angry detainee. Similar apprehensions were in fact expressed by the court in 1978 in the two Zambian case of J Banda V Attorney General[28] and Sharma V Attorney General[29] which came up before the Supreme Court of Zambia.

In the case of J Banda V Attorney General the appellant, J Banda, had been detained under an order made by the police and expressed to be made under regulation 33 (6) of the Preservation of Public Security Regulations which gave authority to a Police Officer at 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 the regulation and to order that such person should be detained for a period not exceeding twenty-eight days pending a decision when Presidential detention order should be made against him. No reasons were given to the appellant for the detention and she was released after being detained for nine days. The appellant brought a case in the High Court against the Government, arguing that her arrest and subsequent detention were unlawful since she had not been furnished with grounds for her detention. The High Court held that her detention for a period of nine days was lawful and that there was no duty to provide her with grounds for her detention since in the

Judge's opinion the requirement to furnish grounds did not apply in the case of detention by the police unless and until thepolice became aware of grounds for detention within twenty-eight days. On appeal to the Supreme Court of Zambia, a contrary view was expressed by the Superior Court: In his Judgement Baron D C J observed that "the obligation to justify a deprivation of liberty is a common law obligation and that the release of the detained person does not relieve the person responsible for a deprivation of liberty of the obligation to justify it in any case where its lawfulness has been put in issue".[30]

For the purpose of this discussion what is particularly important is that the case highlighted the growing practice of the Police in detaining persons before they have established grounds for doing so. In fact it was further observed that although the appellant had been detained under authority of Regulation 33 (6) of the Preservation of Public Security Regulations and for reasons "related to public security" she was in actual fact a suspect in a murder case and that she was detained pending a decision whether she should be charged with an offence. It is common knowledge that a murder case is a criminal case which has nothing to do with public security and even during the police investigations the appellant was not questioned on any matter of public security. Yet she had been detained under the provisions of a security regulation. There can not be a better illustration of abuse of

Public Security regulations by the Police. It is this observation made against the hindsight of the facts in the case of Mulwanda V Attorney General where a Senior Superintendent of Police deliberately used the regulation in a manner which he knew to be unlawful which made the learned Baron D C J to lament that "the way in which Regulation 33 (6) continued to be used becomes increasingly disturbing ..."[31] "...'Alarming' is perhaps a more appropriate word"[32], as the learned Judge added in disgust.

Passing Judgement in the case of Sharma V. Attorney General where the state had argued that in so far as grounds for Sharma's detention were issued to him in a Presidential detention order which was made subsequent to the Police detention order, it did not matter in law that there were no grounds issued in the Police detention order, Baron C J said: "I cannot accept (the) argument that, because the detention is for thepurpose of investigating whether grounds exists for a Presidential detention order, it would be premature to furnish such grounds in relation to a Police detention order; there must be grounds for the detention itself".[33]

As it was with the case of J Banda V Attorney-General this case again brings to the fore laxity or impunity with which the Police have tended to administer the emergency laws. This laxity is dangerous to the citizens' personal liberties, particularly that the powers granted to the executive by Zambia's emergency laws are wide and far-reaching.

This wide use of detention powers, even over petty issues that are not connected, however remotely, to public security and for which there is an established due process of law administered by the regular courts is anathema to democratic tradition and could lead to an institutionalised police state or dictatorship. Such is the grim reality of security legislation in some presidential regimes of Commonwealth Africa. A situation has come to stay where under cloak of the preservation of public security and order, the new presidential regimes vested with wide discretionary powers, have trampled upon the fundamental rights of citizens mainly political opponents with little restraint. The justifications for this are abound, but in view of the observation made herein before that a number of infringements of rights made, in reality had nothing to do with public security stricto senso and were mainly directed at political opponents, one is bound to conclude, as we now do, that the detentions, were motivated by political considerations of the young and still insecure presidential regimes and had little or nothing to do with State Security. In the telling words of Nwabweuze "the detentions and other security measures taken under the Preservation of Public Security Act(s) were motivated largely by a desire to maintain through the instrumentality of the Act the political monopoly of the ruling party".[34] The victim, we hasten to add, has been the fundamental rights of citizens which have been trampled upon by security legislation with little or insufficient constitutional protection. Against the foregoing sad record of the use of emergency powers the statement made by Mr Stanley, the

the Kitwe East Member of Parliament during Northern Rhodesia Legislative Council sounds fatefully prophetic. Speaking against the Preservation of the Public Security Bill without some amendments which was being moved by the Acting Chief Secretary in 1960 Mr Stanley said: "... It is a pernicious piece of legislation ... I believe there is a danger that innocent people might be detained merely on suspicion ... but perhaps the main objection is that it could be used for purely political purposes. It could be used to see that your political opponents can never have a voice and that I believe to be wrong. We have seen this happen through out the world, we have seen dictators rise. This gives the government which wishes to remain in power the opportunity to do so without ever making use of the normal democratic practices".[35] How sad!

FOOTNOTES

1. Malaya Law Review Vol. S 8-9 (1966-7), Page 283. See also the Privy Council decision (1970), A C 379.

2. (1962) 1 All N L R 324, 413

3. Ibid, as per Ademola C J F at page 336

4. (1962) 1 All N L R 431

5. Ibid at page 348

6. (1972) Z L R 248 as per Baron J

7. "Development and State Power: "Speech by Nyerere when inaugurating the University College, Dar-es-Salaam", reprinted in Thomas Frank, Comparative Constitutional Process, op. cit, page 231 (and in J K Nyerere Freedom and Unity, op. cit, page 312.

8. (1972) Z L R 248

9. (1970) Z L R 31

10. Simon Kapwepwe and Elias Kaenga V Attorney- General for Zambia, op. cit, as per Baron J.

11. (1974) ZR 168

12. State of Bombay V Atam Ram Vaidya A.I.R. (1951) S.C. 157

13. Ibid as per Kania C J

14. (1974) ZR 136

15. (1967) ZR 145

16. Cap. 234 of the Laws of Zambia

17. (1967) S J Z I

18. As per Doyle C J in Chipango's Case, op. cit.

19. Ibid

20. See Nwabweuze, Presidentialism in Commonwealth Africa, op. cit at P. 298

21. Ibid

22. Ibid

23. This observation has been made by Nabweuze in Presidentialism in Commonwealth Africa, op. cit, at P. 311

24. See Constitution (Amendment) (No. 5) of 1969 which has already been discussed in Chapter Four.

25. This statistical data was extrapolated from the Gazette notices of detained and restricted persons and are recorded by Nwabweuze in Presidentialism in Commonwealth Africa, op. cit. at p. 240.

26. This incident is recalled by the Author who was one of the students detained.

27. See E Shamwana "Police have too much Power of Detention" in Zambia Law Journal, Vol. 7 at page 2.

28. (1978) ZLR 233

29. (1978) ZLR 163

30. As per Baron D C J at page 239 in J Banda V Attorney-General op. cit.

31. Ibid

32. Ibid

33. As per Baron C J at page 166 in Sharma V Attorney General op. cit.

34. B O Nabweuze, Presidentialism in Commonwealth Africa, op. cit at page 349

35. Northern Rhodesia Legislative Council, Debates (26th January 1960) Cols. 734-5

CHAPTER SIX

CONCLUSION

In the foregoing chapters of this study we have examined the manner of formulation and use of Emergency Powers in Zambia. Our investigations revealed that the Emergency Powers enshrined in the Constitution of Zambia and other emergency legislation are wide in extent and, in most cases, discretionary in nature. There has also been extensive use of these powers by the executive, even where the need for their use was questionable.

In the final analysis we found that the conferment of wide and discretionary powers on the executive can easily lead to a dictatorship which creates antithetical conditions for the preservation of individual rights and liberties. It was regretted that a dictatorship which arises in such conditions could, if its legitimacy was challenged, easily claim that it came to be or acted within the framework of the existing constitution and emergency laws. This is dangerous for democracy. Having observed thus I now wish to advance, in this chapter, certain proposals for a just and democratic administration in the handling of emergency situations.

Proposals for a Just Administration of Emergency Situations

My proposals do not pupport to be perfect solutions to the problems raised in this study. At best they are merely measures which we think could facilitate the management of emergencies in a manner which limits opportunities for absolution or dictatorship. The

measures proposed are essentially drawn from our analysis of the theory and administration of emergencies in Zambia and other western countries like Britain and the United States of America which were covered in our study.

(i) When Should a State of Emergency be declared?

We have noted that in our discussions of Zambia's constitutional emergency provision, Article 20, that the provision for the declaration of a state of emergency is a loose one. This apart, there is no clear-cut definition of conditions which should necessitate the declaration and everything is left to the discretionary and subjective determination of one man, the President. Whilst I appreciate the provision of an emergency institution in a young country like ours which does not have a long history of nationhood, I recommend that the constitution should clearly specify the conditions or circumstances in which an emergency may be declared. This would be a somewhat useful check on thepower of emergency declaration. A heavier burden of proof will now be placed on the authorities to justify and bring within the framework of a clear-cut constitutional provision the necessity for an emergency declaration. In addition this innovation would put the courts in a more useful and controlling position where they could decide on issues relating to the substance of an emergency declaration unlike now when they can not, apart from a superficial

inquiry on whether or not the laid down procedures for emergency declaration have been followed, inquire into the substantive aspect of emergency declaration.

(ii) Who Should Declare a State of Emergency?

The Roman practice of constitutional dictaroship was that a dictator was never self-appointed. He was always appointed by another institution, the Consuls upon the summons of the Senate.

This arrangement was a very vital and effective check against claims to the much-coveted office of the dictator by an ambitious person. Whilst the Roman practice may be too simplistic or primitive for the complex form of modern government, it is one well controlled practice which could not escape our attention for comparative purposes in our study of modern constitutional systems, such as Lincoln's United States during the civil war or the German dictatorship under Article 48 or Zambia's emergency legislation. In the modern constitutional systems the executive is usually the chief administrator of the state of emergency proclaimed by himself alone in his subjective judgement. The inadequacy of subsequent parliament approval of the emergency declared has already been discussed in this paper and does not require to be repeated in detail here except to say that in view of its inadequacy it is futile to look to the legislature for an independent control on the President's decision that emergency powers be called into action. My suggested remedy to this unfavourable situation is that whereas

the use of emergency powers could, with some control be left to the executive, the ascertainment and declaration of the emergency should be positively lodged in another institution, the legislature. Should this suggestion be found too extreme or if it is feared that it could rob the executive or President a vital area of crisis decision, the alternative safeguard could be for the emergency ascertainment and declaration to still lodge in the Presidency or the executive but with the positive check that an emergency declaration shall not take effect unless it has been assented to by Parliament. This arrangement would make it imperative for the President to justify the intended state of emergency before another body, parliament, and get its blessing before the declaration can be made and not as is the case now in Zambia, after the declaration has already been made by him. The decision so made would enjoy the prestige of prior collective thought and representative deliberations rather than the subjective judgement of one man.

(iii) Duration of an Emergency

If a state of emergency is going to be avoided being institutionalised as a permanent feature of a country's system of government there is need for a time limit of some sort on the duration of an emergency declaration. In this respect a country like Zambia which has left it to the will of the President or the National Assembly to determine the duration of a declared emergency, could learn something from the situations prevailing in old democracies. In

France the state of siege is to be determined in the declaratory statute, whilst under Britain's Emergency Powers Act the duration, is fixed at one month. In the United States of America powers are granted for the duration of the present war and in some cases a definite calendar date is set for the validity of the powers. This time limit is lacking in Zambia and this poses the danger of the creation of a permanent emergency state which this weakness entails. As we have seen the Constitution of Zambia Amendment made in 1969 which removed the somewhat comforting ritual of subjecting an emergency declaration to the National Assembly's approval at set intervals, (first bi-annually and then annually) destroyed the only effort which had been made to provide for a residual power base which could halt an unduly prolonged emergency. In view of the danger involved in this sort of loose situation, Zambia should take a leaf from the Constitutional provisions of the old democracies we have just cited and institute some kind of time limit for an emergency.

Finally as a corollary to this and since the justification for the declaration of a state of emergency is the emergency situation itself which may have arisen, a constitutional provisional or mechanism should be provided whereby the end of the emergency situation automatically terminate the emergency declaration. This will avoid the emergency declaration being unnecessarily perpetuated for personal or dictatorial consideration. Above all the end of the emergency situation should not be followed by an unduly delayed

return to the constitutional system of government which existed before the declaration of the state of emergency. This calls for some reform in the order of the government and insistence on a safe return to normality.

Finally once again I am in agreement with Rossiter's suggestion that "the decision to terminate a Constitutional dictatorship (state of emergency) like the decision to institute one, should never be in the hands of the man or men who constitute the dictator." In the context of the Zambian Constitutional system this decision should not lie in the President. It should exclusively lie in the National Assembly if this body will not be a key part of the emergency institution or else the decision should come from an independent watchdog institution.

(iv) Vigilance Against Legitimization of illegal or Otherwise Unconstitutional Acts

It is a common practice during crisis moment for control institutions like the judiciary or the legislature to labour hard to justify/ state actions as Doyle, the Chief Justice, implicitly did in the Chipango case when he alluded that he was passing judgement in favour of an applicant who had been detained by the President only because his release would not endanger what he conceived to be national security and that the President still had the power to redetain the

the applicant again if he so wished.[3] On the other hand the ethos of Constitutional government demand that official actions, especially where they involve human liberties and freedom should stand the test of constitutionalism or legality. The crisis moment should not be used to unduly change this pattern for, as Lord Atkin brilliantly put it in the epochmaking dissenting judgement in the Second World War English case of Liversige V Anderson[4]"

"... amidst the clash of arms, the laws are not silent. They may be changed (legitimately) but they speak the same language in war as in peace."[5] Similar judicial views had been expressed in an earlier American case of ex parte Milligan[6] in 1866. In words which bordered on a judicial arrogance which political reality has at times defeated, the court said: "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 pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."[7]

In another intelligent deference for constitutionalism and legality Machiavelli propounded as follows:- "Now in a well-ordered republic it should never be necessary to resort to extra-

constitutional measures; for although they may for one time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects they will in a little while be disregarded under that pretext for evil purposes. Thus no republic will ever be perfect if she has not by law provided for everything, having a remedy to every emergency, and fixed the rule for applying it".[8]

However,, as we have already pointed out, when a country decides to institutionalise either in its constitution or statutes emergency powers, their sin qua non, purpose, effects and limitations should be clearly defined in these same enabling documents. Too loose or undefined a provision could lead to the tragedy which befell the Germans under the onslaught of the loose wording of Article 48; the same vagueness in the Article 11 of the American Constitution vesting executive power in a President of the United States of America made Patrick Henry, a two-time Governor of Virginia and delegate to the Continental Congress (1874-1878) moan that "if your American chief is a man of ambition and abilities, how easily is it for him to render himself absolute."[9]

In short what is being suggested in the foregoing discussion is that in the formulation of emergency provisions and powers the highest regard should be given to precision and definiteness of the powers granted, their purposes, effect and limitations whilst in the operation of these emergency powers, there must be deference

and adherence to constitutionalism and legality. In the telling words of Rossiter "no dictatorial institution should be adopted no right invaded, no regular procedure altered more than is absolutely necessary for the conquest of the particular crisis."[10] In particular vital institutions like the legislature and the judiciary should as much as possible be allowed to perform their customary roles, instead of being made to defer to the extraneous wishes of an all-powerful executive which can weaken these institutions through the exercise of its power to dissolve Parliament or to dismiss judges from office. After all was it not the absence of the Reichstag after its dissolution which also facilitated the ominous abuse of Article 48 in Weimar Germany? Can it not also be speculated that the non convocation of parliament during the infamous eleven weeks between the fall of Sumter and July 4, 1861 permitted one man, Abraham Lincoln, to run the emergency government single handedly, and in the absence of any control institution, take unilateral and dictatorial actions already indicated in our survey of theAmerican experience of the emergency institution?

(v) Post-Emergency Accountability

The likely practice of providing an indemnity against prosecution to officers of the state who may have acted irresponsibly during an emergency period to the injury of democracy and other persons can easily make the managers of emergency lose self-restraint in the discharge of their responsibilities. Against this danger, and

whilst it is appreciated that it might not be possible or fair to make them account for actions at the height of a grave national crisis, it is suggested here that these officers should be held responsible for their actions or decisions after the emergency has come to an end. I suggest this against the background of my conviction that every public act must be a responsible one and requires to be publicly explained or accounted for and that awareness of future accountability may make the emergency leadership cautious in their handling of emergency situations. No doubt the plea of necessity for some abitrary actions will have its day in democratic institutions like thecourts or the legislature and may be supported by public opinion but it is at the same time only fair that officials who abuse authority during state of emergency should be picked out and appropriately punished after an emergency. In this case Zambia could learn a lot from the British Institution of Martial Law which provides for public accountability by public officials after martial law.

Together with other improvements proposals such as the suggestion to make the recommendations of a detention tribunal mandatory on the detaining authority which either expressly appear or could be inferred in different chapters or sections of this thesis, the foregoing are suggestions which I feel could go a long way towards democratizing the country's emergency provisions in order to minimize the prospects for a dictatorship. For their efficacy most of these suggestions will require extensive

constitutional reforms initiated and supported by an informed, and, sensible political leadership. I do not have any pretensions or illusions that they are perfect solutions and in openly advancing them my wish is that they should excite one more mind to reflect on them and identify their pros and cons, not as a mere academic exercise but as a practical contribution to the cause of democracy.

FOOTNOTES

1. Constitution of Zambia Amendment (No. 5) of 1969)

2. Rossister, Constitutional Dictatorship. Crisis Government in the Modern Democracies, op. cit. p 305

3. See Chipango V Attorney-General for Zambia (1970) Z L R 31

4. Liversige V Anderson (1946) A C 206

5. Ibid as per Lord Atkin

6. Ex Parte Milligan, 4 Wall 2 (1966)

7. Ibid

8. Michiavelli, Discourses, 1.p. 34 Also cited by Rossister, Constitutional Dictatorship, Crisis Government in the Modern Democracies, op. cit p. 30

9. See R S Hirchfield (Editor) The Power of the Presidency: Concepts and Contraversy op. cit. p. 22. See Also debates and other proceedings of the Convention of Virginia, Richmond, 1805, p. 22.

10. Rossister, Constitutional Dictatorship, Crisis Government in the Modern Democracies op. cit. p. 302

BIBIOGRAPHY - BOOKS

1. Andrews W (Editor) The Autobiography of Theodore Roosevelt, New York: Scribner's, 1958

2. Babu A M, African Socialism or Socialist Africa? London: Zed Press, 1981

3. Frank T M, Comparative Constitutional Process: Cases and Materials: London: Sweet and Maxwell, 1968

4. Hirschfield R S, (ed) The Powers of the Presidency: Concepts and Contraversy, New York: Atherton, Inc. 1968

5. Kaunda D K, Zambia Shall Be Free, London: Heinemann, 1962

6. Hexter J H, The Vision of Politics on the Eve of Reformation: More Machiavelli and Seyssel: London: Dent 1973

7. Machiavelli, The Prince, New York: The New American Library, 1952

8. Marshall B (ed) The Supreme Court and Human Rights, Washington Forum Series 1982.

9. Martin A, Minding Their Own Business: Zambia Struggle Against Western Control, London: Hutchinson, 1972

10. Max F M, Government in the Third Reich, New York 1936

11. Nicolay J and Itay J, Complete Works of Abraham Lincoln, II New York, 1905

12. Nwabueze, Presidentialism in Commonwealth Africa, London: C Hurt and Company, 1974

13. Roberts A, A Short History of Zambia, London: Heinemann, 1976

14. Rossister, C Constitutional Dictatorship: Crisis Government in the Modern Democracies: New York; Harcourt Brace and World Inc. New York 1963

15. Sikalumbi W, Before UNIP: Lusaka NECZAM, 1977

16. Tindall P E W, A History of Central Africa, London: Longmans, 1968

17. Zimba L, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An Historical and Comparative Study (Doctorate of Laws dissertation not yet published presented to the University of London in 1979).

BIBLIOGRAPHY: ARTICLES AND DOCUMENTS

1. Debates and other proceedings of the convention of Virginia, Richmond, 1805.
2. Halsbury: Laws of England, 3rd edition, para 1054
3. Northern Rhodesia, Legislative Council Debates 23rd June-7th August 1959.
4. Northern Rhodesia, Legislative Council Debates 24th November 1959 - 3rd February 1960.
5. Pol. Sci & XLXII (1932)
6. Review of Contemporary Law, issue No. 2 (1964)
7. Richardson J D, Messages and Papers of the Presidents VI Washington (1897)
8. Stephen's Digest of Criminal Law, Article 114
9. The Delvin Report, Comnd 819, 1959
10. Zambia Law Journal Vols. 3 and 4 (1971 and 1972)
11. Zambia Law Journal Vol. 7
12. Zambia: National Assembly Debates 10th October 1969
13. Zambia: National Assembly Debates 31 July 1974