courts are expressly barred from questioning any order made under the Public Order and Security Act 1967.[68]

(D) GHANA

As we observed in the last chapter, Ghana till the military coup of 1966, did not provide for a declaration of a state of emergency in its constitution. However, there was on the statute books security legislation which gave the government enormous powers. The most notorious of which was the Preventive Detention Act[69] passed in 1958. This Act, under section 2(1), empowered the President to order the detention of any citizen of Ghana if satisfied that the order was necessary to prevent that person acting in a manner prejudicial to -

(a) the defence of Ghana,

(b) the relations of Ghana with other countries, or

(c) the security of the state.

The maximum duration of detention stipulated was five years[70] but a person could be detained up to ten years in certain circumstances.[71]

The Preventive Detention Act had a life-span of five years[72] but it could be extended from time to time for a further peiod of three years by a resolution of the National Assembly.[73] It was repealed when the military took over in 1966.

(E) KENYA

Although the epithet "emergency" has been deleted from the constitution and replaced by the expression "security measures" Kenya does possess legislation which confers on the executive extra-ordinary powers to deal with situations of crisis. The explanation given by the government for the change of terminology was that the word "emergency" was "unnecessary and misleading.... It has for us the most distasteful associations of memory. We prefer to talk about our public security."[74]

The Preservation of Public Security Act[75] distinguishes between public security measures, which are available under Part II and are brought into operation by a declaration of the President which does not require the approval of the National Assembly,[76] and special public security measures which fall under Part III and are brought into force by an order under section 85 of the constitution.[77]

The 'preservation of public security' is defined widely to include: the defence of the territory and people of Kenya; the securing of fundamental rights and freedoms of the individual; the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the government or the constitution; the maintenance of the administration of justice; the provision of supplies essential to the life and well-being of the community, their equitable

distribution and availability at fair prices; and the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.[78]

The primary effect of the Act coming into force is to enable the President to make regulations. The President's power to make regulations under Part II is considerably more limited than under Part III, and such regulations are invalid if they are inconsistent with any provision in the constitution or any other law,[79] except during any period when Kenya is at war or to parts of Kenya to which section 127 of the constitution applies.[80]

The purposes for which regulations may be made under either part are extensive and include the detention or the compulsory movement of persons, censorship or the prohibition of communications, control or prohibition of processions and meetings, compulsory acquisition of property, forced labour, control of trade and prices and the modification of any law.[81] Though the specified purposes are sufficiently wide to comprehend any regulations, the Act has a residual provision which permits regulations on any matter not expressly specified which is necessary or expedient for the preservation of public security.[82]

General provision for the regulations, rules and orders made under the Act is made under Part IV. All subsidiary legislation must be laid before the National Assembly after

it is made, unless already approved in draft form, and can be a annulled by it if it passes a resolution of annulment within twenty-eight days.[83]

Subsidiary legislation may be made applicable to the whole or part of Kenya and may discriminate between classes of persons.[84]

The regulations may also provide for the trial of such offenders by such courts (excluding court martial) and in accordance with such procedure as prescribed therein.[85] The Regulations may also authorize the search of persons and the entry of premises, etc.[86]

4. CONCLUSION: SCOPE OF EMERGENCY STATUTES

We may conclude from this survey of emergency statutes that governments in African Commonwealth Countries do possess enormous powers for dealing with semi and full emergencies. The similarities in the provisions of the various statutes are striking. All the statutes examined, for instance, provide for detentions and restrictions of individuals without trial.

The regulations providing for detention and restriction are framed in such a way as to confer unfettered discretion on the government. Furthermore, none of the statutes attempts to define precisely what is meant by 'public security', leaving it to the government to decide what constitutes a threat to public security. The situation is exacerbated by the absence of effective control on the legislative competence of

the executive, by the legislature. The statutes confer powers on the executive, which when invoked, seriously curtail basic human rights. As Professors Ghai and McAuslan have aptly commented:

> "Whatever the justification for them, there is little doubt that they strengthen the hands of the government enormously, and since the checks on their exercise are minimal, one cannot be sure of the bona fides of the government in their use. The very existence of these powers has an unhealthy and inhibiting effect on the assertion of democratic rights, and their prolonged use is clearly inimical to the growth of democratic institutions."[87]

Needless to say that basic human rights are in an extremely precarious position where the government can invoke extra-ordinary powers without the need to make an emergency proclamation, as is the case in Malawi, Tanzania and Kenya. Governments in those countries can assume these powers indefinitely without obligatory public accountability.

In the next chapter we shall consider specifically judicial control over powers of detention and restriction.

REFERENCES

1. CAP. 108.
2. CAP. 106.
3. CAP. 106, s.3 (2)(b).
4. CAP. 106, s.3 (2)(d); CAP. 108, s.3 (1).
5. CAP. 108, s.3 (2)(b); CAP. 106, s.3 (2)(c).
6. CAP. 106, s.3 (2)(a).
7. CAP. 108, s.3 (2)(c); CAP. 106, s.3 (2)(c).
8. CAP. 108, s.3 (3); CAP. 108, s.3 (2)(a).
9. CAP. 108, s.3 (3)(a).
10. CAP. 106, s.3 (1).
11. CAP. 108, s.3 (2)(a).
12. CAP. 108, s.3 (2)(b); CAP. 106, s.3 (2)(c).
13. CAP. 108, s. 3 (2)(d).
14. CAP. 106, s.4 (c)
15. CAP. 108, s.5 (2).
16. CAP. 106, s.5 (3).
17. CAP. 106, s.4; CAP. 108, s.3 (2).
18. CAP. 108, s.4; CAP. 106, s.5 (2).
19. (1979) ZR 245 at p.248.
20. (1980) ZR 10 at p.35. See also Sakala, J. in Maseka v Attorney-General (1979) ZR 136.
21. (1980) ZR 65.
22. (1972) ZR 248 at p.260, see post
23. Kaira case, supra, Page ?
24. 1981/HN/713 (unreported). Shamwana also argues that public security means no more than organized mass public violence against lawful Authority and that it cannot mean security in the limited sense meaning an inconvenience caused to society. It must be an act which goes to the root of the society

itself.
see E.J. Shamwana, "Police Have Too Much Power of Detention" (1980) 7 Law Association of Zambia Journal, p.2.

25. B.O. Nwabueze, Presidentialism in Commonwealth Africa (London: C. Hurst and Co., 1974), p.298.

26. CAP. 1, art. 15.

27. Ibid, art. 18.

28. Ibid, art. 19.

29. Ibid, art. 21.

30. Ibid, art. 22.

31. Ibid, art. 23.

32. Ibid, art. 24.

33. Ibid, art. 25.

34. (1978) Z.R. 163.

35. Preventive Detention Act 1958, s.2 (Repealed in 1966)

36. Act IV of 1950 (as amended), s.3(1)(a) (since repealed).

37. Jain, Indian Constitutional Law (1962), p.459.

38. (1978) ZR 233 at 239. Thus in Mulwanda v The People (1976) ZR 133, where 87 witnesses were detained for the purpose of coercing them to give information and were released as soon as they had done so, the Supreme Court stigmatized the police action and held that even if it could be said that the offence being investigated was one which impinged on the security of the state, detention of witnesses purely for the purpose of coercing them into giving information concerning such offence is a flagrant misuse of the powers given by the legislation.

39. SCZ. Judgement No.6 of 1981 (unreported).

40. Ibid, pp. 4-5.

41. (1975) Z.R. 69.

42. Supra, at p.263.

43. Chisata and Lombe, supra.

44. 1981/HN/713. Also Kaira v Attorney General, supra.

45. Chiluba case, Ibid.

46. (1950) SCJ 174 at 263. See also the judgement of Lord Finlay L.C. in R v Halliday, ex parte Zadig (1917) A C 260 at 265, where he said: "Any preventive measures, even if they involve some restraint or hardships upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state."

47. (1975) ZR 69.

48. (1972) ZR 248.

49. Ibid, p.260. See also M.C.J. Kagzi, "Judicial control of Executive Discretion under Preventive Detention Law: An Indian Experience, "(1965) Public Law 30.

50. (1974) ZR 156.

51. CAP. 110.

52. (1974) Z.R 156 at 160. See also Maseka v Attorney-General (1979) ZR 136 where the court held that there was nothing improper to detain a person under regulation 33 (1) upon criminal charges which had earlier been withdrawn.

53. CAP. 14: 03 (LAWS OF MALAWI).

54. Ibid, s.5 (1).

55. Ibid, s.4 (f).

56. Regulation 2 defines an "authorised officer "as including a police officer not below the rank of Inspector, a person holding a commission in the armed forces and any person duly authorised in writing as an authorised officer for the purpose of the regulations by the Minister or by the Commissioner of Police.

57. CAP. 14: 03 (LAWS OF MALAWI).

58. Act 24 of 1968 (SWAZILAND).

59. Ibid, s.3 (1).

60. Ibid, s.3 (2).

61. Ibid, s.4 (1).

62. Ibid, s.4 (2).

63. Ibid, s.4 (3).

64. Ibid, s.7.

65. Act 23 of 1968 (UGANDA).

66. Act 20 of 1967 (UGANDA).

67. Emergency Powers Act 1968, s.2 (1).

68. Ibid, s.13.

69. Act No. 17 of 1958 (GHANA).

70. Ibid, s.4 (1).

71. Ibid, s.3 (3).

72. Ibid, s.5 (1).

73. Ibid, s.5 (2).

74. House of Representatives, Debates, Vol. IX, Part 1 (2nd June, 1966), Col. 279. Another Minister who disliked the use of "emergency" said, "it gives a misleading picture of a country, it gives a bad picture of a country, and it gives too many sweeping powers that might not really be necessary in dealing with a localized situation." (Col. 286).

75. CAP. 57 (KENYA).

76. Ibid, s.3 (1).

77. Ibid, s.4 (1).

78. Ibid, s.2.

79. Ibid, s.3 (2), (3).

80. Ibid, s.3 (4).

81. Ibid, s.4 (2).

82. Ibid, s.4 (2) (m).

83. Ibid, s.6 (1), (2).

84. Ibid, s.7 (1).

85. Ibid, s.7 (2) (a).

86. Ibid, s.7 (2) (b).

87. Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political change in Kenya - A study of the Legal Framework of government from colonial times to the present (Nairobi, Oxford University Press, 1970), p. 257.

CHAPTER FIVE

JUDICIAL CONTROL OVER THE EXECUTIVE'S POWER OF DETENTION AND RESTRICTION WITHOUT TRIAL

1. INTRODUCTION

In this chapter the focus is on the judicial response to alleged violations of the guaranteed rights and freedoms during the subsistence of a declared emergency.

The safeguards accorded to detainees and restrictees under both the Constitution and the various emergency statutes will be considered together with the way courts have gone about interpreting them.

It is a prerequisite of a lawful detention that the arrest must have been effected in accordance with the requirements of law. As Brett, L.J. pointedly stated in Dale's case:

> "The courts will not allow any individual to procure imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment."[1]

It is in this context that the safeguards provided for detainees and restrictees will be examined.

2. SAFEGUARDS AVAILABLE TO DETAINEES AND RESTRICTEES UNDER THE ZAMBIAN CONSTITUTION: THEIR JUDICIAL ENFORCEMENT

The courts in Zambia have been given powers to review any legislative or executive actions which adversely affect fundamental rights provisions in the Constitution.[2] The

Constitution lays down certain procedural safeguards which must be adhered to in order to effect a lawful detention or restriction.

A. THE SAFEGUARDS

Like the provisions relating to the declaration of a state of emergency the procedural safeguards have undergone some amendments since Independence. It is, therefore, necessary to look at the safeguards entrenched under the Independence Constitution and contrast them with those that exist under the present constitution. In this regard it will be necessary to refer to the 1969 amendments, which have already been mentioned elsewhere in this work.

(i) Safeguards under the Independence Constitution

Section 26 (2) of the Independence Constitution stipulated that a detained person was entitled to the following safeguards:

(a) to be supplied with a statement in writing in a language that he understood specifying in detail the grounds of detention within five days of the commencement of his detention;

(b) to have a notification of his detention published in the gazette within fourteen days of the commencement of his detention;

(c) to have an automatic review of his case by an independent and impartial tribunal not more than one month after the commencement of his detention and thereafter at intervals of six months;

(d) to be afforded reasonable facilities to consult a lawyer of his own choice who would be permitted to make representations to the Review Tribunal; and

(e) to appear in person or by a lawyer of his own choice at the hearing of his case by the Review Tribunal.

The Review Tribunal could make recommendations concerning the necessity or expediency of continuing his detention to the detaining authority but such recommendations were not binding on the detaining authority.[3]

(ii) Safeguards in the post - 1969 period

Many of the provisions above were amended in 1969.[4] The overall effect of the amendments was to whittle down the efficacy of the provisions in favour of the detainees both in content and effect. A new clause was inserted which enabled Parliament to:

> "make or provide for the making of rules to regulate the proceedings of any such tribunal including, but without derogating from the generality of the foregoing, rules as to evidence and the admissibility hereof, the receipt of evidence (including written reports) in the absence of the restricted or detained person and his legal representative, and the exclusion of the public from the whole or any portion of the proceedings."[5]

It would appear that the new provision was designed to prevent detainees and the general public from hearing information the disclosure of which might prove prejudicial to national security, or which might adversely affect some

foreign power. But the provision poses a grave danger to the detainee because the government can use it to deliberately arrange the receipt and admission of evidence in a manner which may adversely affect the position of the detainee especially in cases fraught with political overtones.

Another effect of the amendments was to bring the provisions relating to restrictions in line with those relating to detentions. The importance of this change is underlined by the fact that the restrictee , unlike in the pre-1969 period, is now entitled to the same rights as the detainee.

Furthermore, the period for review of the detainee's case was extended from one month to one year. It is to be noted that automatic review was abolished and replaced with review upon request by the detainee.[6]

The rationale for these amendments was stated by the then Attorney-General, Mr. Chuula in a statement to the National Assembly:

> "We have got in the constitution restriction and detention. This is not a new law, it is merely to amend the existing law. In fact this law is more enlightened. While at the moment a man who is detained is entitled to have a judicial review and one who is restricted is not so entitled, this amendment brings restriction and detention into line so that both restriction and detention can be brought into open court for the state to indicate why it is restricting or detaining.... this amendment in fact is more enlightened and more democratic, because it will no longer be necessary to have judicial inquiry or review outside the court for anyone who is restricted. In other words, it will be a Judicial inquiry in open court to which the restrictee will have recourse to legal representation. Without this measure, the state is forced each time it arrests someone who is engaged in sabotage or espionage, to have all

> the methods that he is using in his actions against the state revealed in open court, so that afterwards the ene mies of the country change their methods... the extension of the period from six months for revision to one year is logical in order that it gives the state, and those who are responsible for security, time to investigate further the activities which the restrictees or detainee has been engaged in and those who have been assisting him to do so."[7]

The rights of detainees were further attenuated by the enactment of a Constitution Amendment Act of 1974.[8] In response to a series of court cases in which the government was ordered to pay large sums of money to detainees by the courts for unlawful detention and ill-treatment in violation of the constitutional guarantees of personal liberty the UNIP National Council directed the government to enact legislation to stop the award of compensation to detainees by courts.[9] In the Bill the government originally proposed that:

> "No court of law shall 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."[10]

There was overwhelming opposition to this Bill both inside and outside the National Assembly. For instance, Mr. S. Zulu, MP condemned the Bill as being:

> "completely contrary to the announced intention, pitiful and leaking with a lot of loop-holes.. persons who are unlawfully detained should be paid compensation. There must be redress in the courts and if the Tribunal finds that there are no grounds for detention then it is quite clear that it must be mandatory on the President to release the detainee. If the tribunal assesses the amount of compensation or damage it must be mandatory on the government to pay the detainee. Why should the government have any discretion? Otherwise there is no point in having a tribunal at all."[11]

The government was forced to withdraw the Bill in order to modify some of its objectionable features. In its modified form the Bill preserved the jurisdiction of the court in respect of claims for damages or compensation arising from physical or mental ill-treatment during detention or from any error in the identity of the person restricted or detained, but not in respect of claims based on technical errors like failure to adhere to procedural requirements. As regards these, and in other cases in which a law court was precluded from making an order for damages or compensation, the amendment stipulated 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, recommended to the President that compensation should be paid to such person or to any dependent of such person, but the President shall not be obliged to act in accordance with any such recommendation."[12]

Dr. Zimba aptly remarks that the effect of this amendment:

> "... was clearly to make the President an effective authority in determining the amount, if any, of compensation awarded to a detainee who has suffered loss or damage while in detention. In saying this it must be remembered that the President is also the detaining authority.. Not only this, but in the area of regulating national security, he is the real legislator of the emergency laws which confer a lot of power upon himself. Thus in the realm of national security, the President combines and performs the functions of a legislator, executor, and now with the passage of the constitutional amendment under reference, he shares the authority to decide upon disputes of when to award compensation and how much in respect of an aggrieved detainee or restrictee. It might, however, be argued that in modern times it is not uncommon to find numerous incidences when the executive arm of the government performs all those functions. However,

> when this practice is extended to cases involving personal liberties of individuals without a proper system of controlling that power, then the matter becomes pretty dangerous."[13]

At this point it will be useful to refer to the report of the National Commission on the Establishment of the One Party State. The Commission observed that many petitioners made strong representation in favour of the right to personal liberty and the right to freedom of movement as enshrined in the constitution. Many aspects of the provisions relating to restrictions and detention without trial came under heavy criticism.[14] Nevertheless, the Commission felt that:

> "... in the interest of security, provisions for detention without trial should be retained in the constitution provided the powers of the executive were curtained, the detention period before the review was reduced, the grounds of detention were served in a shorter period and that detainees were free to communicate with their lawyers and relatives."[15]

Consequently the Commission recommended the following safeguards:

> "(1) that there be no detention without trial except during a state of emergency;
>
> (2) that a detainee or restrictee be furnished with a written statement specifying the grounds for his detention or restriction within ten days;
>
> (3) that the notification of detention or restriction be published in the government gazette within fourteen days of such detention or restriction;
>
> (4) that a tribunal be established to review the detention or restriction within three months and that its decisions be binding on the authority;
>
> (5) that the composition of the tribunal which may sit in public or in camera be as follows: the Chairman and two other persons (one lawyer and one other person) to be appointed

by the Chief Justice in consultation with the President of the Republic;

(6) that detainees be free to communicate with their lawyers and relatives and not be held incommunicado;

(7) that whenever a state of emergency is declared while Parliament is not in session or after the dissolution, the National Assembly should be summoned within twenty-eighty days of the date of the proclamation for approval; and

(8) that a declaration of a state of emergency ceases to have effect after a period of six months from the date of the proclamation unless the National Assembly approves its continuance."

It is apparent that these were radical recommendations, which, if incorporated in the constitution, would have greatly enhanced the detainee's position and curtailed the President's enormous powers. Not surprisingly, the government rejected the suggested safeguards, arguing that:

> "... at this stage in the nation's development and in view of Zambia's geo-political position in Southern Africa these recommendations could not be implemented without detriment to Zambia's security and government."[16]

Having reviewed the safeguards granted to detainees under the Independence Constitution and the amendments made thereto as well as the recommendations of the Chona Commission, it is now appropriate to examine the safeguards that are embodied in the One Party Constitution and the Preservation of Public Security Regulations.

Article 27(1) provides:

> "Where a person's freedom of movement is restricted or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:

(a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;

(b) not more than one month after the commencement of his detention or restriction a notification shall be published in the Gazette stating that he has been restricted or detained and giving particulars of the provision of law under which his detention or restriction is authorised;

(c) if he so requests at any time during the period of such restriction or detention not earlier than one year after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is qualified to be a judge of the High Court."

The other provisions relating to the function of a Review Tribunal and the detainee having access to a lawyer of his own choice remained unchanged.

In addition to these constitutional safeguards, there are also certain rights that are accorded to detainees under the Preservation of Public Security (Detained Persons) Regulations. These are an inheritance from the colonial period.[17] The regulations: permit the legal representative of a detained person to interview him;[18] permit visitors to visit him;[19] permit the detainee to wear his own clothing;[20] permit the detainee to exercise daily;[21] allow the detainee to receive and write letters;[22] permit a detainee to smoke tobacco and to receive newspapers, books and magazines.[23] Moreover, no detainee may be compelled to perform any work[24] nor may any

prison officer use force "unless its use is necessary, and no more force than is reasonably necessary shall be used."[25] The President may appoint two or more persons to constitute a "committee of Inspection" for any place or places of detention, which, inter alia, shall be responsible for ensuring compliance with the provisions of the regulation.[26] The Committee may at any time visit any place of detention and shall hear "any complaint (not being a complaint relating to the validity of a detention order or relating to the grounds upon which such detention order was made) which any detained person may wish to make."[27] Copies of the remarks and recommendations of the Committee shall be sent to the Commission.[28] Finally, a detainee shall only be detained in a place authorised by the President.[29]

Provision is made for the appointment by the President of a Tribunal or such number of Tribunals as the President considers necessary or expedient and such Tribunal shall comprize a Chairman appoited by the Chief Justice and such other persons as the President may appoint.[30]

(B) JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL SAFEGUARDS

The question which arises is whether the aforementioned provisions, especially the constitutional safeguards, are mandatory or merely directory. What is the effect of non-compliance with them? Does non-compliance invalidate the detention or restriction order? Some of these provisions have been the subject of judicial interpretation.

(I) THE EFFECT OF NON-COMPLIANCE WITH ARTICLE 27(1)(a) AND (b) (i.e. SUPPLYING DETAILED GROUNDS IN A LANGUAGE UNDERSTOOD BY THE DETAINEE WITHIN 14 DAYS AND PUBLICATION IN THE GAZETTE WITHIN ONE MONTH RESPECTIVELY)

In Chipango v Attorney-General,[31] the applicant was detained under regulation 33(1), but he got the grounds of detention after 16 days and his name was not published in the gazette within the stipulated period of one month. Magnus, J. held that the provisions that were contravened are constitutional conditions subsequent to arrest and are mandatory. Failure to comply with them rendered the detention order invalid.[32] In a more recent case, Attorney-General v Musakanya[33] the respondent cross-appealed on the sole ground that article 27(1)(a) was not complied with in that the grounds for his detention were not furnished to him immediately, that is, at the time of his detention. He argued that the words in article 27(1)(a) "as soon as is reasonably practicable" mean immediately, unless the magnitude and intricate nature of the allegations, or the detention of a large number of persons, or both, make this impracticable, in which event, grounds must be served not later than 14 days after the detention or restriction.

Replying to this argument, Silungwe, C.J. delivering the judgement of the supreme court stated (after quoting article 27(1)(a)):

> "Taking the above quotation as a whole, it is clear that the fundamental object intended to be secured by paragraph (a) of clause (1) is to provide a machinery for enabling a detained or restricted person to know as soon as possible, but not later than 14 days, the reasons for his detention or restriction. I would regard the expression 'as soon as is reasonably practicable and in any case not more than 14 days...' as falling into two parts, namely, (a) 'as soon as is practicable';

> and (b) 'in any case not more than 14 days.' As to (a), my understanding of it is that it does not constitute a mandatory period; it serves as an injunction to urgency. With regard to (b) it clearly represents the maximum, that is, the mandatory period within which a detainee or restrictee must be furnished with grounds for his detention or restriction, as the case may be."

(i) The meaning of 'specifying in detail'

The meaning of this expression has been the subject of much litigation in Zambia as it has been in India. In fact Zambian courts have followed Indian decisions on this point. Most cases that have been brought before the courts have contained allegations that the grounds of detention are vague, imprecise, roving and so forth. Two major Indian decisions on this point have often been cited with approval by the Zambian courts. In one case Bombay v Atma Ram Vaidya,[34] Kania, C.J. stated:

> "What is mean t by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of circumstances of each case. If on reading the ground it is capable of being intelligently understood and is sufficiently definite to furnish material to enable the detained person to make a representation against the order of detention it cannot be called vague."

However, it is apparent that the amount of detail and what constitutes vagueness will always depend upon the circumstances of each case. In Naresh Chandra v State of West Bengal[35] the Indian Supreme Court stated:

> "Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. What may be said to be vague in one case may not be so in another and it could not be asserted as a general rule that a ground is necessarily vague if the only answer of the detained person can be to deny it. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague"

The West Indian case of Herbert v Phillips and Sealey[36] dealt with the vagueness of grounds. In that case Lewis, C.J. stated:

> "But it must (the statement), in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear on it."

In Zambia the most instructive construction of the expression 'specifying in detail' was that given in Kapwepwe and Kaenga v Attorney-General.[37] The two applicants appealed against the refusal of the High Court to grant habeas corpus. They contended that the grounds that were supplied to them were not in detail, and consequently they could not make representations to the appropriate authorities against their detention. The Court of Appeal observed that the statement which the detaining authority is required to give need not contain all the evidence which has come to his knowledge because it might be against the public interest to disclose such evidence. Both Doyle, C.J and Baron, J.P cited with approval the passages in the two Indian and one West Indian cases, quoted above. Baron, J.P. said:

> "Such grounds must enable the detainee to make representations not only on the basis of mistaken identity, alibi, and the like, but also on the

> merits; the detainee must be put in a position where he can dispute the truth of the allegations against him. This is not, however, to say that the allegations must be particularised in the same way as criminal charges; the procedure of preventive detention is, a fortiori, different from criminal procedure, and there is no warrant for the proposition that the allegations must be made in similar manner. Grounds are not charges; they are the reasons for the detention."[38]

Thus, the test to be applied whenever an allegation of vagueness in a ground for detention is made is whether a detainee has been furnished with sufficient information to enable him to know what is alleged against him so that he can bring his mind to bear upon it and so enable him to make a meaningful representation to the detaining authority or the Detainee's Tribunal.

In Attorney-General v Musakanya[39] the Supreme Court held that failure to give a specific date in a ground for detention cannot, per se, render the grounds vague, just as in the case of a criminal charge. Obviously, where the detaining authority is aware of a specific date on which a detainee is alleged to have participated in activities prejudicial to public security, it is duty bound to specify the date.

In Munalula and Gors v Attorney-General,[40] it was held that it was important for the detainee to know what has been alleged against him, but as to how much detail must be given and what constituted vagueness would depend on the circumstances of each case. Where facts were notorious or the detainee must himself know them, it could not be said that a failure to refer in the ground to those facts caused the ground to

fail to be in detail.

An example of grounds which were held to be insufficient is provided by the case of Mutale v Attorney-General[41] where the applicant sought a declaration that his detention made under regulation 33(1) was unlawful by reason of the fact that the detaining authority had not complied with article 27(1)(a) which required the applicant to be furnished with a statement in writing specifying in detail the grounds of detention. The statement of grounds read:

> "That between 1st January 1971 and 11th December, 1973, you conspired with other persons in Zambia to commit crimes and that you organized and managed the commission of serious crimes in Zambia, which acts are prejudicial to the security of Zambia."

The applicant impugned the sufficiency of the grounds. Bweupe, J. held that the grounds were so vague, exploratory and roving that the detainee could not make meaningful representations to the detaining authority or tribunal and, therefore, his detention was unlawful.

(ii) The meaning of 'a statement in writing in a language he understands'

The meaning of the phrase "a statement in writing in a language he understands" first came up for interpretation in the case of Chakota and 30rs v Attorney-General.[42] In that case all the applications were based on the ground that each of the applicants was an illiterate person, in that he could speak and understand a vernacular language but

could not write or read any languages. Commissioner Kakad (as he then was) observed that the objects of serving a detainee a written statement specifying grounds of his detention in a language that he understands are: (a) that the detainee should within the stipulated period be informed of the reasons for his detention; and (b) that the detainee could at the earliest opportunity make a meaningful representation to a detaining authority or to the Tribunal.Commissioner Kakad then stated:

> "... where a detained person is illiterate, the detaining authority should, at the time of serving a written statement of grounds under article 27(1)(a), make certain that the grounds are fully explained and translated in a language that the detainee understands; and a certificate of such explanation stating the language in which it was explained should be attested by the officer who explained the grounds to the detainee. Where a detainee is illiterate in English, the detaining authority following the above procedure would in my view be considered as having strictly complied with the provision 'a statement in writing in a a language that he understands'..... The interpretation and explanation of the grounds to a detainee illiterate in English, in a vernacular language that he understands... affords a constitutional protection and places him in a position to be able to make representation as provided under article 27(1)(d)...(The) wording 'in a statement in writing in a language that he understands' under article 27(1)(a) being mandatory, may have significant implications where the detainee is literate in a vernacular language and who is served with grounds of detention in English."

On the facts of the case the court held that the detaining authority had not breached the provision in question and dismissed the applications for habeas corpus.

(iii) Does article 27(1)(a) apply to Police detentions?

In King v The Attorney-General[43] the court examined the provisions of article 27(1) of the constitution and compared them with regulation 33(6). The court observed that publication in the gazette within one month and review by a Tribunal cannot apply to a police detention. The Judge drew attention to the fact that the regulations define a detention order as an order under regulation 33(1), and he attached particular significance to the words in article 27 "specifying in detail the grounds," which he said the police could not comply with in the case of a police detention because this was merely based on reasonable suspicion or belief before any enquiry was conducted. He held that article 27(1)(a) does not apply to police detention if the grounds are not known, but that it comes into play when the grounds are known before the expiration of 28 days. He held further that if the grounds were established within 14 days then they must be furnished in terms of article 27(1) (a), but if they were established after the 14 days the only course open to the police would be to recommend to the President that a detention order be made.

However, the Supreme Court in Sharma v Attorney-General[44] over-ruled King. The Supreme Court held that it is incorrect to say that in the case of a police detention the police act only on suspicion and do not have any grounds as envisaged by article 27 and which therefore applies only when grounds are established. As a matter of construction of the language used, there must be grounds for the police detention itself;

and if that were not the proper construction regulation 33(6) would be ultra-vires. The Court emphasized the fact that the liberty of a person is a very precious right and therefore whenever a person is deprived of his liberty there is a common law obligation which cannot/is not affected by statutory inroads and that obligation is that the deprivation of liberty must be justified, i.e. the grounds of detention must exist at the time of the deprivation of liberty,

The Supreme Court in Joyce Banda v Attorney-General[45] followed the decision in Sharma. In that case, the appellant was detained under regulation 33(6) by an Assistant Superitendent of Police but she was released after nine days, no grounds having been furnished to her on release. It was held that article 27(1) (a) equally applied to police detentions. It was held further that the detaining authority was obliged by the law to justify the detention and this entailed that grounds for detention must exist ab initio. Failure to justify the deprivation of the appellant's liberty rendered the detention unlawful ab initio and she was entitled to compensation.

(iv) Is the detaining authority under any obligation to give grounds of detention for the detention which has been revoked before the expiry of 14 days?

The courts have held that the detaining authority is under no constitutional obligation to furnish grounds in respect of a detention which has been revoked within 14 days. In Re Cain[46] Doyle C.J. said:

> "It is not necessary to furnish the grounds for an order which has been revoked before the expiry *of 14 days period, but it is necessary that* grounds should exist at the time the order is made."

This observation was confirmed by the Supreme Court in the Joyce Banda case.[47]

II. THE EFFECT OF NON-COMPLIANCE WITH ARTICLE 27(1) (c), (d) (e) (i.e. review of case by a Tribunal, access to a legal representative and to appear in person or by a legal representative before a Tribunal, respectively)

It is not clear from case law, hitherto, whether failure to comply with the aforementioned paragraphs renders the detention or restriction unlawful. In Chipango, Magnus, J. speaking obiter said:

> "It may well be that, if for example, under paragraph (c), a detainee requests a review after he has been in detention for a year, and that review is not carried out, or is not carried out in accordance with that paragraph, then he is entitled to be released. It may even be that breaches of the other two paragraphs (d) and (e) will have the same effect. I do not have to decide that in this case, and therefore, the point must be left open for the future."[48]

Doyle, C.J. delivering the judgement of the Court of Appeal in the same case observed:

> "... I would not agree with the contention of the Attorney-General that each of the conditions laid down in paragraphs (a) to (e) of section 26A (2) are in the same position and that failure to comply has the same result in each case. The courts have in the past held that where a provision lays down a number of requirements, some might be held to be mandatory while others might merely be directory. The conditions appear to be in some order of descending importance."[49]

However, two cases, albeit not conclusive, have been decided involving, inter alia, the aforementioned paragraphs.

In Re Alice Lenshina Mulenga,[50] the petitioner impugned her detention on, among other grounds, that:

(1) Whereas she made a request for the review of her case, the same had not been reviewed for over three months;

(2) She had been denied the constitutional right of review of her case after one year's detention by "a Tribunal established by law" insofar as though the Chairman had been appointed the Tribunal was not properly constituted as the other members of the Tribunal had not been named. It was held by the High Court that:

(1) it is a detainee's constitutional right to apply for a review of the case at any time after one year's detention and it is the duty of the executive to put the case immediately before the Review Tribunal;

(2) a detainee has a constitutional right to a review of the case by a "Tribunal established by law" and when the Chairman is appointed the Tribunal is so established but it is not properly constituted and the review cannot take place until some other members have been appointed.

Cullinan, J. stated:

> *"I have no doubt that while the Legislature did* not specify any period within which a review must take place it obviously intended that no more than reasonable delay should take place.. I consider .. that as a constitutional right of review, arises upon the making of a request upon one year's detention, that it would then be incumbent upon the executive to show good cause as to why delay had taken place or a further delay was likely to occur in placing the matter before a Tribunal. If good cause is not shown then it seems to me that the bona fides of continued detention is immediately called in question"[51]

He continued:

> "..Although I consider that an unreasonable delay has occurred it seems to me that the proper remedy does not lie in a writ of habeas corpus. If other remedies fail meanwhile, to secure the constitution of a Tribunal and the review of the applicant's detention requested by her then the writ may be the eventual remedy. I would be prepared therefore to adjourn this application upon that ground."[52]

In Mundia v Attorney-General[53] the applicant sought a declaration against the Attorney-General that his detention was illegal and unjustified on various grounds. One of the grounds was that he was not afforded reasonable facilities to consult a lawyer as provided for in Article 27 (1) (d). It was held that where the petitioner whilst in detention was visited on a number of occasions by two lawyers it could not be said that he was not afforded facilities for legal consultation. The court did not, however, say what would have been the result if the applicant had been denied facilities for legal consultation.

Thus at the moment it is not certain whether failure to comply with article 27 (1) (d) (c) and (e) renders the detention illegal. It is submitted that all the requirements laid down by article 27 (1) are mandatory. We can do no

better than quote Professor Nwabueze who cogently argues that all the constitutional safeguards are mandatory:

> "..All the safeguards have the same object in view, namely to enable the detained person to obtain his release. The furnishing of grounds is to enable him to make representation with a view to his release, and the purpose of a review is to enable the Tribunal to make recommendations concerning the necessity or expediency of continuing the detention or restriction. Can the Tribunal's recommendations be said to be less important for this purpose? Prima facie it can be said that the Tribunal's recommendations would carry a much greater authority than the detainee's representation. Although the detaining authority is not bound by the tribunal's recommendation yet it would be reasonable to expect that the former would not lightly disregard a strong recommendation by the Tribunal for the detainee's release. While the detainee's representation may be regarded with scepticism as being biased in his own interest, the report of an independent and impartial Tribunal cannot but be treated with great consideration. And the services of a lawyer may enable the case of the detainee to be put more cogently and forcefully before the Tribunal, and so persuade it to come to a decision favourable to the detainee. One is inclined to say, therefore, that all the safeguards are mandatory, and that violation of any of them would make further detention unlawful."[54]

It is submitted that in order to enhance the detainee's position the recommendation of the Tribunal should have been made binding on the detaining authority. As the law stands presently the detaining authority may as well decide to ignore recommendations that are favourable to the detainee, with impunity. This has in fact happened on a number of occasions. For example, in 1978 a Tribunal recommended that twelve people who were allegedly connected with the Mushala Terrorist Gang should be freed from detention because the state had no direct

evidence against the twelve linking them with Mushala. But they were not freed.[55]

Perhaps the position in India, where under its Preventive Detention Act the report of an Advisory Board in favour of a detainee's release is binding and conclusive on the detaining authority should be adopted here in Zambia.

In the final analysis it is fair to conclude that the Judiciary in Zambia has been vigilant in ensuring that the safeguards guaranteed to detainees under the constitution are upheld. In this they have followed Indian decisions which have upheld the individual's liberty. Although it would appear from the observations of Doyle, C.J. in the Chipango case that the safeguards embodied in article 27 do not rank in pari passu, the courts nevertheless construe them very strictly in favour of detainees. As Doyle, C.J. remarked in the same case:

> "S.26A appears in a part of the constitution which has formally and deliberately set out to enshrine the rights and freedoms of the people of Zambia. It is a section introduced to provide for the protection of those rights and freedoms and where possible it should be interpreted effectively to protect the rights and freedoms. That the protection given is a limited protection is no reason for cutting down what is given."[56]

And Silungwe, J. (as he then was) in the same case said:

> "The individual's right to personal liberty is one of the pillars of the fundamental rights and freedoms under the constitution of the land and is so clear in the minds of the Zambian people that it ought not to be allowed to pass through their fingers like quick silver; it should be jealously guarded against any encroachment from any source no matter how great or powerful."[57]

3. THE POSITION OF DETAINEES AND RESTRICTEES UNDER OTHER COMMONWEALTH AFRICAN CONSTITUTIONS

(A) BOTSWANA

The High Court is empowered to review executive or legislative acts which infringe any of the rights enshrined in the Bill of Rights.[58]

Section 16 provides safeguards for persons detained during a period when an emergency declaration is in force. A detained person must be furnished with grounds of detention within five days and the fact of his detention must be published in the Gazette within fourteen days after the commencement of his detention.[59] Moreover, his case must be reviewed by an independent Tribunal not more than one month after the commencement of his detention and thereafter during his detention at six months intervals.[60] Further, he must be afforded reasonable facilities to consult and instruct a legal representative and any such legal representative must be permitted to make written or oral representations or both to the Review Tribunal.[61] Like in Zambia, the Review Tribunal can only make recommendations, which are not binding on the detaining authority.[62]

Unlike in Zambia, restrictees do not enjoy the same rights as detainees' in Botswana. The only safeguard provided for restrictees in the constitution is the requirement that a restrictee, if he so requests, must have his case reviewed by an independent and impartial tribunal not earlier than six months after the restriction began and thereafter at intervals

of six months.[63] The recommendations of the Review Tribunal, however, are not binding on the restricting authority.[64]

These safeguards have not been subject to judicial review because Botswana has never had a state of emergency since independence in 1966.

(B) MALAWI

Malawi, as has been stated in chapter three, does not embody a justiciable Bill of Rights in its Constitution (1966). Therefore, there are no constitutional safeguards for detainees and restrictees. The judiciary has therefore little, if any control, over the executive's power to detain or restrict.

The only safeguard conferred on the detainee is the requirement under the Preservation of Public Security Act that the Minister must review each detention order at the end of a period of six months from the commencement of the detention and thereafter at intervals of six months.[65]

But the efficacy of this safeguard is questionable. This is because there is no independent tribunal set up to consider the detainee's case. It would be too sanquine to think that the same authority who signed the detention order would consider the case from a different perspective or in an impartial manner.

(C) KENYA

The constitutional safeguards for detainees in Kenya

are similar to those in the Botswana Constitution.[66]

Unlike in Zambia, there has not been much judicial activity in Kenya with respect to cases arising from detention law. The first and only notable case in which a Kenya national has moved for a judicial solution of the conflict between his personal freedom, on the one hand and the executive's powers of derogation, on the other is Ooko v The Republic.[67]

The applicant was detained on 4th August, 1966 under a detention order with his surname but different first names made by the Minister for Home Affairs. On 27th September he challenged the validity of his detention before the High Court on the grounds that: he was not furnished with the reasons for his detention within the prescribed period; the reasons were not sufficiently detailed as required by section 27 (now S.83) of the Constitution; he was detained under the wrong name; and outsiders were present when his detention order was being reviewed by the Tribunal. It was held that the detention was not unlawful. The wrong name in the order did not invalidate the order as he was in fact the person that the detention order was intended to apply to. The court also dismissed the ground that a state counsel and a senior police officer were present at the Review Tribunal, holding that there was no reason why they should not be present and that as a matter of fact their presence was desirable and necessary. There was no evidence that these persons participated in the recommendations of the Tribunal, and in any case its recommendations were not binding on the Minister.

The court found that the reasons were given within the prescribed time, but agreed with the plaintiff that they were not sufficiently detailed. However, it did not think that this was sufficient cause for his release; it might well have been otherwise if no written statement at all of the grounds for the detention had been given. In the circumstances the applicant's remedy was to apply to the court for an order to obtain further and better particulars of the reasons for detention.

Although the court's primary concern appeared to be to ensure compliance with the procedural rights under section 83 it did not address itself to the consequences of non-compliance. It merely intimated that it was prepared to consider the release of a detainee if no reasons at all for detention were given. However, it appears from this decision, that the court will not order the release of a detainee as long as grounds of detention are furnished to him notwithstanding that such grounds are vague and general.

The case also raises the point as to how far the courts will concern themselves with the adequacy or the truth of the grounds. After being given new particulars (as ordered by the court) the applicant had attacked the new particulars as being still vague and general and based on his activities as a trade unionist before Independence. The court held that the new particulars satisfied the requirement of section 83. If further particulars were required, a request could be made to the Tribunal, but as far as the court's limited jurisdiction was concerned, the particulars given were adequate:

> "The grounds if true could justify his detention. The truth of those grounds and the question of the necessity or otherwise of his continued detention are matters for the Tribunal and ultimately for the Minister rather than the court."

Thus this decision leaves the question open whether the safeguards provided under section 83 are mandatory or directory.[68] As Ojwang and Kuria observe, the Ooko case is evidence of some reluctance on the part of the court to consi der matters which raise issues as to the imperativeness and sanctity of safeguards for the individual provided under the constitution.[69]

(D) GHANA

Ghana's constitutions till 1966 did not embody any Bill of Rights. Therefore, detainees did not enjoy any constitutional safeguards. The only safeguard available was the requirement under the Preventive Detention Act that the detainee must be informed, not later than five days from the beginning of his detention, of the grounds of detention and that he must also be afforded an opportunity to make representations in writing to the President with respect to the detention order.[70] Was this an adequate safeguard against the use of unfettered power by the government? Examination of the Act reveals that there was no provision for the detainee to be heard in person nor could he face his accusers. Needless to say where the President is exercising quasi-judicial powers, the rules of natural justice must apply. One such rule is audi alteram partem, that is, no person should have his case decided

without being given an opportunity of presenting his side of the story and also of hearing what his accusers are saying against him.

Further, the absence of an Independent Tribunal, which in many countries provides an important safeguard against the indiscriminate use of detention orders by the Executive, accentuated the detainee's precarious position. Moreover, it is arguable whether the power to deprive an individual of his liberty for possibly as long a period as five years should be vested in only one member of the Executive, who under the constitution,[71] appeared answerable neither to Parliament nor to any identifiable body for his executive acts.[72]

In spite of the paucity of constitutional or legislative safeguards, the legality of the Governor-General's order for detention, and from July 1, 1960, the President's order for detention, was repeatedly and fearlessly contested by counsel in the courts for writs of habeas corpus.

In re Okine and 36 ors,[73] the applicants impugned the legality of their detention. In rejecting the application Mr. Justice Smith, inter alia, said:

> "The Preventive Detention Order sets out that the Governor-General is satisfied that it is necessary to make the detention order in question. It is signed... by the Minister of Defence: there is nothing against his signing this order either in law or in the circumstances of this case. The question of the necessity of making the order at all is not for the court to consider. (Progressive Supply Company v Dalton (1943) 1 Ch. 54). It also appears well established that where a statute requires only that a Minister shall be 'satisfied' that certain action is necessary the effect is 'virtually to exclude all judicial review on the ground that Ministerial action taken under (such) authority is purely

administrative.' (Laws and Orders - Sir Carleton Kemp Allen."74

In yet another case, In re Dumoga and 12 ors,[75] the 13 applicants argued that the court must enquire into the truth or otherwise of the allegations contained in the grounds of detention served on the applicants, and if the court found the allegations false, as indeed the applicants contended they were, the order for habeas corpus must issue. It was held that where a statute conferred a discretion upon an executive officer to arrest and detain persons, the court could not inquire into the exercise of that discretion, provided the officer acted in good faith. Moreover, the court could not enquire into the truth or otherwise of the allegations contained in the grounds of detention served on a detainee. Speaking obiter, Mr. Justice Adumua-Bossman observed, inter alia:

"We are not at war, it is true; but a fully sovereign parliament composed of representatives of the people duly elected by universal adult suffrage, of which learned counsel of the applicants in his his political activities was one of the staunchest sponsors, has after due deliberation decided that conditions exist as to make it necessary for this rather drastic power to be conferred on the Chief Executive Officer of the state to be by him exercised in his discretion, and has accordingly made provision for it. In these circumstances there can surely be little or no point in resorting to the courts; and surely the course open to men of realistic outlook is to adopt and pursue a policy of constant approach and appeal to influential humanitarian parliamentarians to use their influence and good offices to procure possibly a reduction in the period of detention in some cases, or perhaps reconsideration from

time to time of the question of the termination of the operation of the enabling Act..."76

The most important case was decided by the Supreme Court on August 28, 1961. In re Akoto and 7 ors,[77] the eight appellants had been detained on 10th and 11th November, 1959 for five years for "acting in a manner prejudicial to the security of the state." The applicants challenged the legality of their detention on very wide grounds, inter alia,

(1) that by virtue of the Habeas Corpus Act of 1816 the court was required to inquire into the truth of the facts contained in "the grounds" upon which the Governor-General was satisfied that the order was necessary to prevent the appellants from acting in a manner prejudicial to the security of the state;

(2) that the grounds upon which the appellants were detained did not fall within the ambit of the expression "Acts Prejudicial to the Security of the State;"

(3) that the Preventive Detention Act 1958, was in excess of the powers conferred on Parliament by the constitution with respect to article 13 (1) of the constitution, or was contrary to the solemn declaration of fundamental principles made by the President on assumption of office; and

(4) the Preventive Detention Act not having been passed upon a declaration of emergency was in violation of the constitution.

The court held that albeit the Habeas Corpus Act 1816 was a statute of General Application, it did not apply because the Preventive Detention Act under which the appellants were detained vested plenary discretion in the President if satisfied that such order was necessary; the court could not therefore inquire into the truth of the facts set forth in the grounds of detention. The court relied on the legal principles enunciated in Liversidge v Anderson,[78] R v Home Secretary, ex parte Green,[79] R v Home Secretary, ex parte Budd,[80] which were all decided in war time conditions in England. The court also dismissed the appellants' contention that the grounds of detention did not disclose that they were suspected of preparing acts prejudicial to the security of the state, holding that a wide interpretation should be given to the purpose of the Act; that the Act covered even offences which had nothing to do with defence of Ghana or with foreign countries, but in respect of which the President could, if satisfied that the order was necessary, make an order under the Preventive Detention Act 1958. As regards the last two grounds based on Article 13 of the constitution, the court held that Parliament was competent to enact the said Act and that the Presidential declaration did not impose any legal obligation on the President. Korsah, C.J delivering the judgement of the court, inter alia, stated:

"The contention that the legislative power of Parliament is limited by Article 13 (1) of the Constitution, is therefore in direct conflict with the express provisions of Article 20. We hold that the Preventive Detention Act does not constitute a violation of the constitution consequently it is neither invalid nor void. It will be observed that Article 13 (1) is in the form of a personal declaration by the President and is no way part of the general law of Ghana. In the other parts of the constitution where a duty is imposed the word "shall" is used, but throughout the declaration the word used is "should." In our view the declaration merely represents the goal to which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.

On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of article 13 (1) do not create legal obligations enforceable by a court of law. The declarations, however, impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

We do not accept the view that Parliament is competent to pass Preventive Detention Act in war time only and not in time of peace. The authority of Parliament to pass laws is derived from the same source, the Constitution, and if by it, Parliament can pass laws to detain persons in war time there is no reason why the same parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the state in peace time. It is not only in Ghana that Detention Acts have been passed in peace time. Finally the contention that the Preventive Detention Act 1958 is contrary to the constitution... is untenable..."[81]

It is relevant to state here that none of the applications for habeas corpus ever succeeded before the Ghana courts.[82] Thus it is reasonable to conclude that under the Nkhrumah

regime the liberty of the individual was virtually at the mercy of the President. The courts, who traditionally are regarded as 'sentinels of liberty', could not afford the citizen the required protection. Because of the narrow subjective interpretation of the words "if satisfied", the courts did preclude themselves from investigating the grounds of the President's atisfaction.

The 1979 constitution[83] does provide some useful safeguards for persons detained under emergency legislation. Like in Zambia, restrictees and detainees are granted the same safeguards under the constitution. The safeguards are that:

(1) detailed grounds of detention in writing must be supplied within twenty-four hours of the commencement of the detention[84] (all references to detention shall hereinafter include restriction).

(2) the spouse, parent, child or other available next of kin must be informed of the detention within twenty-four hours and be permitted access to the person within seventy two hours of the commencement of the detention;[85]

(3) a notification of the detention giving particulars of the relevant provision of law and the grounds of his detention must be published in the Gazette within ten days;[86]

(4) his case shall be reviewed not more than ten days after the commencement of his restriction/detention

and thereafter at intervals of three months by a Tribunal composed of at least three Supreme Court Judges appointed by the Chief Justice and presided over by the Chief Justice or a Supreme court justice (provided that the same Tribunal shall not review more than once, the case of a person detained);[87]

(5) he must be afforded every possible facility to consult counsel of his own free choice who must be permitted to make representations to the Review Tribunal;[88] and

(6) at the hearing of his case he must be permitted to appear in person or by counsel of his own choice.[89]

Unlike in the other countries seen so far, the Review Tribunal has power to order the release of the person restricted or detained and the payment to him of adequate compensation or uphold the grounds of his restriction or detention and the detaining/restricting authority must act accordingly.[90]

The Constitution also provides extra-judicial controls over the executive's power to detain or restrict. A Minister of State must in every month when Parliament is sitting make a report to Parliament of the number of persons restricted or detained and the number of cases in which the detaining/restricting authority has acted in accordance with the decision of the Review Tribunal.[91]

Furthermore, the aforementioned Minister must publish every month in the Gazette:

(a) the number and names and addresses of persons restricted or detained;

(b) the number of cases reviewed by the Tribunal; and

(c) the number of cases in which the detaining/ restricting authority has complied with the decisions of the Tribunal.[92]

It is apparent that the aforementioned provisions go a long way to make the executive accountable for its exercise of the powers to detain and restrict. It is very difficult for the executive to use those powers indiscriminately. The courts in post 1979 Ghana up to the military coup of 31 December, 1982 did not have the opportunity to interpret the constitutional safeguards because the executive never once did invoke emergency powers.

(E) UGANDA

The Independence Constitution (1962) as well as the 1966 Constitution of Uganda embodied safeguards for people detained. Those safeguards were similar to those embodied in the Botswana, Zambia (before 1969), and Kenya Constitutions.[93] However, there was one additional safeguard, which required the Prime Minister or his assignee to make a report to Parliament in every month when Parliament was sitting, of the

number of persons detained and the number of cases in which the detaining authority had ignored the recommendations of the Review Tribunal.[94]

The most important case that attempted to interpret the safeguards was that of Uganda v Commissioner of Prisons, Ex parte Matovu.[95] The applicant in that case was arrested and detained under the Emergency Powers (Detention) Regulations 1966.[96] In challenging the validity of his detention the applicant, inter alia, contended that the safeguards provided under article 31 (1) (a), (b) and (c) of the constitution had not been complied with because respectively:

(1) the applicant was not furnished within five days of his detention with a statement in writing specifying in detail the grounds for his detention;

(2) the detention of the applicant was not published within fourteen days after the commencement of his detention; and

(3) the review of the applicant's case was done by a Tribunal not established by law; and that the composition of the tribunal, apart from the Chairman appointed by the Chief Justice, were not independent in that two members were District Commissioners and the presumption was that they were not free from the influence of the executive.

The court held that article 31 (1) (a) and (b) had been adhered to insofar as grounds of detention had been supplied,

and the fact of detention had been published in the gazette, within the stipulated time. Even though the court accepted that the grounds of detention were vague and not in detail as required by the constitution it was of the view that the deficiency was a matter of procedure, not substance, which could be cured by a direction of the High Court under article 32 (2) that a proper statement be supplied. Further, the court held that it was not a "condition precedent, but a condition subsequent." Consequently the Minister's order was valid; it was necessary, however, for him to furnish reasons.

One finds it hard to appreciate what the court mean t by saying that the said deficiency was a procedural one, and being a condition subsequent could not be fatal. Needless to say that it is generally accepted that non-compliance with procedural **requirements** can invalidate an order; nor does it matter that the requirement takes the form of a "condition subsequent." It is instructive here to note that the Indian[97] and Zambian[98] courts have held that breach of procedural safeguards renders the detention order invalid.

The court dismissed the argument that the Review Tribunal was not independent holding that the same had been established by law. It

> "regarded with disfavour the imputation that the other two members of the Tribunal were not independent of executive influence. There was not a shred of evidence before us in support of such a serious allegation. One would have thought that the two men concerned, who undoubtedly must have done well in the public service of Uganda to have risen to the Senior posts of

> the District Commissioner, and who owed their appointment to the Public Service Commission, ought to be regarded as men of integrity and high reputation with independent minds. It would be wrong and unjustified to assume otherwise."[99]

It is arguable that, on the contrary, the presumption might be drawn that they were not independent; they were executive officers, and as District Commissioners, very much concerned with the maintenance of law and order. It is trite that courts have always put stress on the oft-quoted maxim that justice should not only be done, but seen to be done. However, the court in the Matovu case, recommended that the government employees should be replaced as members of the Tribunal.

"Such a change, we believe, would be all to the good and might serve to place the Tribunal, like Caesar's wife, above suspicion."[100]

The decision in the Matovu case has been criticised by academic writers as an abdication by the court of its responsibility of protecting the individual's liberty.[101]

In another case, In re Ibrahim,[102] 78 applicants challenged the validity of the detention orders on the grounds that:

(a) the detainees should have been named on the order itself and not in an unsigned list attached to it; and

(b) the order had not been served on the applicants for it had merely been read out to all 78 detainees mentioned in the list attached to the detention order through interpreters. The High Court, in

dismissing the applicants' application, held that although a detention order must be supported by a written order served on the person in whose custody the detainee was to be as his authority to detain the detainee, such an order need not be in any particular form, nor need it be served on the detainee. It was held further that the court could not look behind a valid detention order, as it must be assumed that a Minister had acted in good faith.

From the two cases cited above it is apparent that the courts in Uganda, as in Kenya, were not strong protectors of individual liberty notwithstanding the incorporation of safeguards for detainees in the constitution.

4. SUMMARY AND CONCLUSION

It is evident from the foregoing discussion that safeguards for detainees and restrictees are only found in those constitutions which contain justiciable Bills of Rights. The independence constitutions of the various countries surveyed exhibit many similarities. It appears that they were drawn from a single source most especially the British Emergency Powers Act 1920 and the Emergency Powers (Defence) Act 1939.

It is only the post-independence constitutions which exhibit differences. In many cases, as exemplified by Zambia, the changes made to the Independence Constitutions had the effect of enhancing the power of the executive and proportionately attenuating the constitutional safeguards

provided to detainees and restrictees.

The competence of the court to control the executive's discretion to detain or restrict depends on whether or not the constitution embodies a Justiciable Bill of Rights. Thus in Malawi, Tanzania and Ghana (up to 1966) the scope of judicial review is limited. Although other constitutions expressly confer the power of review on the courts, the courts have themselves construed the power narrowly. They have merely restricted themselves to determining whether or not the procedural safeguards have been complied with; they have been reluctant to probe the substantive validity of detention or restriction orders and in this they have in the majority of cases relied on the case of Liversidge v Anderson,[103] in which the House of Lords interpreted Regulation 18B made under the Emergency Powers Act as giving an absolute discretion to the Home Secretary to detain any person he thought was a threat to public security.

The failure of the courts to impugn the bona fides of a detention order is most unfortunate. It is submitted that courts in Africa should follow the example of Burmese Courts[104] which go beyond the order and examine its merits. Such an approach would greatly curtail the unfettered power granted to the executive.

Of all the countries surveyed it would seem that Zambian courts have acquitted themselves well vis-a-vis interpreting the procedural safeguards in favour of detainees and restrictees. They have followed closely the Indian approach rather than the British approach. This is to be

commended for as was stated by the Indian Supreme Court:

> "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the constitution has provided against the improper exercise of the power must be jealously watched and enforced by the courts."[105]

In contradistinction the approach taken by the Ghana (1966), Uganda and Kenya courts in construing the safeguards in favour of the executive is to be deprecated. It is tantamount to an abdication of responsibility to protect individual rights, by the courts.

It is submitted that the safeguards provided to detainees and restrictees in the Ghana Constitution 1979 are the best so far and go a long way in curbing the power of the executive to issue detention/restriction orders. It is an approach to be emulated by the other countries.

REFERENCES

1. (1881) 6 QBD 376 at 463.

2. Article 29 of the constitution provides

"(1) Subject to the provisions of clause (6), if any person alleges that any of the provisions of Articles 13 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -
(a) to hear and determine any application made by any person in pursuance of clause (1);
(b) to determine any questions arising in the case of any person which is referred to it in pursuance of clause (3), and may, subject to the provision of clause (8), give such directives as it may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of Articles 13 to 27 (inclusive)."

3. S. 26(3), Independence Constitution 1964.

4. Constitution (Amendment) (No.5) Act, No. 33 of 1969.

5. Ibid, S.7.

6. Ibid, S.7.

7. Zambia, National Assembly, Hansard 19 (7th October-17th October 1969), Col. 242
The then Vice-President, Mr Kapwepwe echoed Mr Chuula thus:

"We have been helpless in some cases when we have been arresting some of the spies from across the Zambezi who have been here because we had no power to arrest them and put them in the cells and question them all. Because sometimes it takes about one year before you can investigate where they get information, their contacts in the country. Therefore, this will enable the government to put these chaps in cells and question them hard until they tell us all the fellows who make contact with them." Ibid, col. 353.

8. Constitution (Amendment) Act, No. 18 of 1974.

9. Addresses to and Resolutions of the National Council of the United National Independence Party at the Mulungushi Hall, Lusaka 14th to 17th December 1974,

Government Printer, Resol.11, p.24.

10. s.4 (b), Constitution (Amendment) Act 1974, supra.

11. Zambia National Assembly, Debates 36 (23rd July - 2nd August 1974), Col. 473-75.

12. s.4 (b), Constitution (Amendment) Act 1974, supra.

13. L.S. Zimba, The Zambian Bill of Rights: An Historical and Comperative stuay of Fundamental Rights and Freedoms in Commonwealth Africa, chapter 6, p. 121 Forthcoming book to be published by East African Publishing House.

14. National Commission on the One Party State Report, 1972, Government Printer, Lusaka, para. 32.

15. Ibid.

16. Government white paper on "Summary of Recommendations Accepted by the Government" No. 1 of 1972, Government Printer, Lusaka, 1972, p.3.

17. See The Emergency Powers (Detained Persons) Regulations 1956, GN. No. 277 of 1956.

18. The Preservation of Public Security (Detained Persons) Regulations, Reg. 18 (4).

19. Ibid, reg. 18 (3).

20. Ibid, reg. 14 (1).

21. Ibid, reg. 17.

22. Ibid, reg. 19.

23. Ibid, reg. 15.

24. Ibid, reg. 16.

25. Ibid, reg. 26.

26. Ibid, reg. 21 (1), (2).

27. Ibid, reg. 21 (4), (5).

28. Ibid, reg. 21 (6).

29. Preservation of Public Security Regulations, reg. 33(5).

30. Ibid, reg. 33(7).

31. (1970) S.J.Z. 179. See also Mundia v Attorney-General HP/902/70 (Unreported). The case concerned grounds of restriction served after the stipulated period.

32. Magnus J., relied on the rule in Dale's case, (supra) and also the following comments by Basu on the meaning of the words "as soon as may be" which constitute a constitutional safeguard under the Indian constitution for detainees:

> "..it will be possible for the court, in a proceeding for habeas corpus, to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a reasonable time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the court would order his immediate release. The reason is that the two conditions of arrest embodied in this clause are constitutional conditions subsequent to arrest, and there is no reason to construe these conditions as other than mandatory, being valuable fundamental rights of the individual. So, even though the arrest has been valid, the failure to supply the grounds within a reasonable time may render further detention unconstitutional or illegal." Basu cited in support of this statement: State of Bombay v Atmaran (1951) SCR 167.

See D. Basu, Commentary on the Constitution of India, Vol.II 5th ed. (Sarka Calcuta, 1965), p.104.

33. SCZ Judg. No. 17 of 1981 (unreported). See also In re Puta 1981/HN/774 (unreported).

34. AIR (1951) S.C. 157.

35. AIR (46) (1959) S.C. 1335.

36. (1967) 10W.I.R. 435

37. (1972) Z.R. 248.

38. Ibid, at p.261.

39. S.C.Z. Judg. No. 17 of 1981. This case was followed in Godfrey Miyanda v Attorney-General 1981/HP/1062 and In Re Nkaka Puta, supra.

40. (1979) ZR 154.

41. (1976) ZR 139. See also: (1) Tembo v Attorney-General 1976/HP/95 (Unreported); (2) Mhango v Attorney-General (1976) ZR 297; (3) Sithole v Attorney-General (1977) ZR 55; and (4) Mudenda v Attorney-General (1979) ZR 245.

42. 1979/HP/D/1482 (Unreported).

43. 1977/HP/1247 (Unreported).

44. (1978) ZR 144.

45. (1978) ZR 233.

46. (1974) ZR 71 at p.77.

47. See also: (1) In Re Puta (1973) ZR 133; (2) Shamwana v Attorney-General 1980/HP/1426 (Unreported).

48. (1970) SJZ 179 at 186.

49. SJZ No. 12/1971 at p.64.

50. (1973) Z.R. 243.

51. Ibid, at p. 249.

52. Ibid, at p. 251.

53. (1974) ZR 166.

54. B.O. Nwabueze, Presidentialism in Commonwealth Africa, supra, p.233.

55. Times of Zambia, 16 October, 1979.

56. Chipango, supra.

57. Ibid.

58. Constitution of Botswana 1966, s.18.

59. Ibid, s.16 (2), paragraphs (a) and (b) respectively.

60. Ibid, s.16 (2) (c).

61. Ibid, s.16 (2) (d).

62. Ibid, s.16 (3).

63. Ibid, s.14 (4).

64. Ibid, s.14 (5).

65. Regulation 7, Preservation of Public Security Regulations (MALAWI)

66. Constitution of Kenya 1967 (as amended), s.83 (2) (previously s.27).

The safeguards are: grounds of detention must be supplied within five days; notification of the detention in the gazette within 14 days; automatic review of the detention by an independent and impartial tribunal within one month of detention and thereafter at intervals of six months; facilities to consult a lawyer; and to appear in person or by a lawyer of his own choice before the Review Tribunal.

67. High Court of Kenya, Civ. Cas. No. 1159 of 1966 (Unreported), as reported in Y.P. Ghai and Y.P.W.B. McAuslan, Public Law and Political change in Kenya - A Study of the Legal Framework of Government from colonial times to the present (Nairobi, Oxford University Press, 1970), pp.437 et. seq.

68. Ibid, p.439.

69. J.B. Ojwang and Kamau Kuria, "The Rule of Law in General and Kenya perspectives." ZLJ Vol.7-9 (1975-77), p.126.

70. s.2 (2), Preventive Detention Act, No. 17 of 1958.

71. Article 8 (2) and (4), Ghana Constitution 1960.

72. See ICJ, "Ghana's Preventive Detention Act," III Journal of the International Commission of Jurists (spring, 1961), pp.76-77.

73. (1959) G.L.R.1.

74. Ibid, p.3.

75. (1961) G.L.R. 44.

76. Ibid, p.55.

77. (1961) G.L.R. 523.

78. (1942) AC 206.

79. (1941) 3 A11 ER 104.

80. (1942) 1 A11 ER 373.

81. In Re Akoto, supra, at p. 534.

82. ICJ, supra, p.69.

83. The 1979 constitution was suspended in the wake of the military coup of 31st December, 1982.

84. Constitution 1979, art. 34 (1) (a).

85. Ibid, art. 34(1) (b).

86. Ibid, art. 34(1) (c).

87. Ibid, art. 34(1) (d).

88. Ibid, art. 34(1) (e).

89. Ibid, art. 34(1) (f).

90. Ibid, art. 34(2).

91. Ibid, art. 34(3).

92. Ibid, art. 34(4).

93. Constitution of Uganda, (1962, 1966), art. 31(1).

94. Ibid, art. 31(3).

95. (1966) E.A. 514.

96. Reg. 1(1).

97. Refer to cases such as State of Bombay v Atmaran (1951) S.C. 157, where it was held that failure to communicate grounds within the stipulated time makes the detention illegal.

98. See cases such as Chipango v Attorney-General, supra and others discussed elsewhere in this chapter.

99. Ex parte Matovu, supra, p.545.

100. Ibid.

101. Professor Ghai, for instance has written of the decision:

> "It is indeed a dangerous precedent. By it the government is sanctioned extensive powers, without any checkeven if they are arbitrarily exercised; and deviations by the executive from the prescribed procedure are held not to be serious. It is of course true, as the court clearly pointed out, the decision had to be made in a time of stress, when one's pre-occupation is necessarily with the maintenance of law, order and stability. While the rights of the individual must be subordinated to the greater good of society, there is no reason why courts should not make an attempt to examine whether there has been abuse of powers. What is more disturbing about the judgement is not necessarily the actual decision, but its general tenor, which is, to quote Lord Atkin,

'more executive minded than the executive'" Y.P. Ghai, "Matovu's case - Another Comment" (1968) 1 EALR 68. at p. 75.

102. Supra.

103. Supra.

104. See for e.g. Tinsa Maw Naing v The Commissioner of Rangoon and Another (1950) B.L.R. (sct) 17. Also: Maung Hla Gyaw v The Commissioner of Police (1948) B.L.R. 764.

105. Ram Krishma v State of Delhi (1953) S.C. 318 at p.329.

CHAPTER SIX

ADMINISTRATION OF EMERGENCY LAWS IN ZAMBIA

I: INTRODUCTION

The first part of this chapter will consider the extent to which and the manner by which security powers have been put into use by the executive in Zambia.

This will entail the examination of some of the circumstances in which security powers have been invoked. Have the security powers been used for the purpose of eliminating political rivals or covering up police inefficiency or simply in personal vendetta?

Have all situations justified the use of the security powers?

The last part of the chapter will briefly consider the way security powers have been used in a few other African Commonwealth countries in an attempt to see whether there are any parallels in the use of the powers in the various countries.

2. AN APPRAISAL OF THE USE OF EMERGENCY LAWS IN ZAMBIA

The Preservation of Public Security Act (then called the Preservation of Public Security Ordinance) was brought into operation on July 27th 1964 by the proclamation of a semi-state of emergency by the Governor of Northern Rhodesia.[1] This was precipitated by an uprising of the Lumpa Church of Alice Lenshina. Lumpa church followers were armed and lived in stockaded villages. They did not recognise the authority

of the government. Not only did they attack and kill members of the security forces and civilians but they also attacked and burned down police stations and villages.

The rebellion was concentrated predominantly in the Northern and Eastern Province. The army moved in to crush the rebellion and during the fighting that ensued over 600 people died[2] and some 19,000 Lumpa members fled into the Congo (now called Zaire).[3]

Pursuant to regulations made under the Preservation of Public Security Ordinance the government banned meetings and assemblies within the affected areas, movement generally was controlled and a curfew was imposed and the Lumpa Church was proscribed throughout the country. Detention orders were issued is respect of Lenshina and other leaders of the church. On 11th August 1964, after protracted negotiations, Lenshina surrendered and the next day publicly appealed to her followers to cease aggressive action and return to their villages.[4]

The question that arises is whether the government was justified in taking the measures that it took. The fundamental objection that government leaders had was to Lumpa endeavours to opt out of the political system that they were so desperately trying to create on the eve of independence. The need for national unity at such a crucial stage in the country's political development was self-evident. Colin Morris aptly expressed this by writing that the Lumpa:

> "were fighting for the right to remain above the law; the right to establish a private state within the state, and the right to offer violence with impunity to the representatives of law and order. No government could ignore a challenge of this kind without forfeiting the right to rule."[5]

It goes without saying that the UNIP government was not ready to tolerate an alternative authority and loyalty at a time of mobilisation and nation-building.

One is inclined to believe that the situation that was created by the Lumpa rebellion was so serious that national security was seriously jeopardized. The measures that were adopted by the government could be said to have been necessary and, therefore, justified in order to cope with the insurrection to prevent further loss of life and property.

The state of emergency was not lifted after the end of the Lumpa rebellion. On the contrary, it was continued into force after independence[6] and thereafter renewed after every six months by successive resolutions of the National Assembly[7] till 1969 when a constitution amendment dispensed with the need for six monthly renewals.[8] The existence of a state of emergency since independence was challenged in Shamwana v Attorney-General.[9] The appellant argued, first, that the Governor's declaration of the existence of a grave situation, under section 4 of the Preservation of Public Security Ordinance, made on July 27, 1964, lapsed on October 24, 1964, when Northern Rhodesia became the independent Republic of Zambia. At independence the regulations under the said ordinance, in particular, regulation 31A could only be invoked by complying with the entire provisions of section 29 of the constitution of Zambia. As section 29 had since not been complied with all detentions since independence, including the detention of the appellant, had been unlawful and unconstitutional. Thus the purported extension by the

National Assembly of the declaration under section 4 of the ordinance had been futile as the Assembly could not extend that which in law was non-existent. Secondly, the applicant argued, section 29 of the Constitution referred to a "declaration", and not to one that "shall be deemed to be in force", and so a declaration that "shall be deemed to be in force" under the provisions of section 7 of the Zambia Independence Order was not a declaration in terms of section 29 of the Constitution. The Supreme Court held, on the first ground, that section 2 of the Zambia Independence Act 1964, and sections 4(1) and 7 of the Zambia Independence Order 1964, contained the necessary saving provisions which kept alive, inter alia, the Governor's declaration under section 4 of the ordinance, and that it was not necessary for the President to make a fresh declaration for the reason that under section 7 of the Zambia Independence Order, the Governor's declaration had the effect of a declaration under section 29(1) (b) of the constitution. As regards the appellant's second ground, the Supreme Court held that the expression "shall be deemed" mean t, in the context in which it appeared, "shall have the effect of being in force." Because there was in existence the Governor's declaration under section 4 of the Ordinance, there was then in force, as from the date of independence, a declaration under Section 29 of the Constitution. Therefore, a declaration which was deemed to be in force under section 7 of the order had the effect of a declaration for the purposes of section 29(1) (b) of the constitution. And so,

it was unnecessary for the President to make a fresh declaration under the constitution.

Thus, there is now judicial authority to the effect that the existing semi-state of emergency is valid. What circumstances necessitated the perpetual renewal of the state of emergency? Many of the reasons adduced to justify the non-lifting of the state of emergency centre on Zambia's geo-political position in Southern Africa.

After independence Zambia was surrounded mostly by hostile minority regimes. To the South was Rhodesia, to the West was Portuguese ruled Angola, and South-African controlled Namibia and to the East was Portuguese ruled Mozambique.

In November 1965 the Smith Regime declared UDI in Rhodesia. As Zambia's economy was firmly shackled to the Rhodesian and South African economies, she became highly vulnerable to blackmail and destabilisation. She had the unenviable duty of giving assistance to Liberation Movements fighting for independence in Namibia, Angola, Mozambique and Rhodesia. She also provided sanctuary to refugees fleeing from those countries. The support rendered to Liberation Movements posed a danger to national security from two angles. First, refugees represented a danger because some of them might be spies working for foreign powers and others might be criminals. Secondly, the freedom fighters, who were allowed bases and other logistical facilities posed a threat both because of danger of retaliation by the minority regimes for Zambia's tolerance of their activities

and because they themselves might undermine Zambia's political stability. The situation was exacerbated by the presence of a large expatriate community especially on the Copperbelt which was believed to be sympathetic to the minority regimes and which could easily sabotage the country's economy.[10]

In the period between 1966 and 1974 Portuguese soldiers frequently made incursions into Zambia in search of freedom fighters. Portuguese military aircraft frequently bombed outlying border areas killing people and destroying property. The then Vice-President, Mr. S. Kapwepwe when announcing the extension of the semi-state of emergency summed up the various threats facing the country in the following terms:

> "...(this) House approves the continuation in force for a period of six months from the 24th October, 1969, of the declaration under Section 29 (1) (b) of the Constitution that a situation exists which, if it is allowed to continue, may lead to a state of public emergency... The government has maintained law and order under very trying circumstances and in the face of continuous and provoking threats and hostile propaganda from the minority regimes in the South. These unfriendly minority regimes have, since our Independence, resolved to harass and if possible to destroy our country by all the devious means at their disposal, including sabotage within our borders. In order, therefore, to ensure the protection and the security of our borders as well as our cherished liberties and all that we love and value, it is necessary that the government should have the powers to prevent and control hostile activities calculated to disturb our peace and endanger our security, whether they be from outside or within the country. The question of security and territorial integrity should be a matter of grave concern, not only to the government, but to all citizens and peace loving people. As far as the Republic of Zambia is concerned, it is quite clear that as long as the illegal regime in Rhodesia continues to wield political power, and as long as the so-called Portuguese colonies of Angola and Mozambique remain unliberated, it will be the height of folly for anyone to feel secure in

> Zambia. Indeed, the inhuman policies of apartheid by South Africa pose a great danger to Southern Africa in general and to Zambia in particular, where our philosophy of Humanism and our policy of multi-racialism greatly embarass the racialists in the South."[11]

From 1978 to November 1979 Zambia was subjected to frequent raids and bombings by Rhodesian and South African military forces. Rebel Rhodesian commandos raided Patriotic Front Camps at Siavonga,[12] on the outskirts of Livingstone, at Nampundwe Mine, Mulungushi,[13] Chikumbi, Old Mkushi,[14] Kalomo,[15] and so forth. Hundreds of people were killed in these raids and property worth thousands of Kwacha was destroyed. In addition to raiding camps the Rebels also engaged in a wanton destruction of bridges and other economic installations in an endeavour to destroy the Zambian economy. For instance, on November 19, 1979 Rebels blew up the Mkushi bridge, one of the major bridges leading to Northern Province.[16] On October 12, 1979 the Rebels blew up the road and rail bridges on the Chambeshi River.[17] This mean t that the Tazara railway, one of Zambia's vital outlets to the sea for her imports and exports was out of use for some months. Again the Rebels blew up two bridges near Rufunsa along the Great East Road, and a road and railway bridge at Kaleya near Mazabuka.[18] The Lunsemfwa and Chongwe bridges on the Great East Road were also blown up.[19] As a result of this sabotage traffic between Lusaka and Eastern Province was disrupted. Rebel attempts to blow up the Luangwa bridge proved abortive after two days of heavy fighting with the Zambian Security forces.[20]

On November 20, 1979 President Kaunda at a Press Conference disclosed that more than 1000 South African soldiers had invaded Western Province and at the same time a similar number of Rebel soldiers had attacked Southern Province. These forces were torturing and murdering hundreds of innocent villagers and raping women. He announced that as a result of the enemy bombings of bridges and roads, the country would not send all her copper to the markets and bring in food imports such as maize. He said some of the destruction to Zambia's property was being perpetrated with the collaboration of Rebel sympathisers within the country. As a result of all these factors the President put the country under a full war alert. He cancelled all leave in the security forces and recalled those on vacation. He further recalled all officers and other ranks in the army, air force and Zambia National Service (ZNS) who had resigned or retired as regular personnel. Form V ZNS graduates with the exception of girls would be mobilised while the Party and its government would mobilise other resources in the country for war.[21]

During the 1978-79 period some areas of the country notably those along the line of rail were put under a dusk to dawn curfew.

Under the circumstances that have been outlined above one is inclined to say that national security was seriously imperilled. Therefore, it was imperative for the executive to assume emergency powers in order to preserve the nation. On the basis of this can it be sincerely said that the

semi-state of emergency has been justified, throughout the years since it was first declared in July 1964?

It is important to distinguish periods when the situation justified the existence of an emergency from those periods when the existence of an emergency was not justified. Mozambique and Angola were liberated in 1975 and 1976 respectively. This mean't that the threat from the Portuguese ceized to exist. Tension between Zambia and Rhodesia was high just after UDI but it eased considerably subsequently till 1978, when it again reached its height. It is submitted that the use of emergency powers was justified during the first few months after UDI and at the height of the freedom war in Mozambique and Angola till 1974. Again the use of emergency powers was clearly justified during the 1978-79 period. It is, however, difficult to see how the use of emergency powers could have been justified on the other occasions (e.g. between 1974 and 1978, and between 1980 and 1983). At present there are only occasional forays into Zambia by South African troops since the Independence of Zimbabwe in 1980 but these could easily be dealt with without the need to invoke emergency powers. The justification of the emergency on the ground of Zambia's geo-political position, therefore, no longer holds good ground and has lost all its justification.

Apart from the aforementioned justification, other reasons are given to justify the continued existence of the emergency. Some of the subnational threats to Zambia's

unity and security are seen to lie not only in tribalism, regionalism and other sectional interests, but also in group loyalties like those of the Lumpa and the Watch Tower Sects.[22]

The Watch Tower Sect followers were seen as posing a threat to national security because of their refusal to sing the national anthem, to salute the national flag and to participate in Party activities. This was considered as one way of destroying national unity, which the UNIP Government was trying to forge.[23] The Lumpa followers had not completely been subdued, either.[24]

The detention and restriction power under the Preservation of Public Security Regulations has been used extensively, not only to counter threats from the minority regimes, but invariably against political opponents for political reasons.

Between March 16, 1971 and February, 1972, alone, about 338 people had been detained and about 15 restricted.[25] In the ten-year period between 15 March 1971 and 21 September 1981 about 901 detention orders and restriction orders had been issued.[26] The breakdown over the years was as follows: 1971 - 250; 1972 - 148; 1973 - 166; 1976 - 83; 1977 - 62; 1979 - 71, and 1981 - 43.

In 1970 most of those detained were opposition members of Parliament, members of the Lumpa and Watch Tower Sects, leaders of the Mine Union of Zambia and the Teachers Union (ZNUT).

In 1968, a UNIP government Minister, Nalumino Mundia who had been sacked by President Kaunda because of some

financial indiscretions in 1967 formed his own party, the United Party (UP). During mid-1968 violent clashes between supporters of UNIP and UP occurred on the Copperbelt. On the 11th August, 1968 in a UP strong hold in Chililabombwe, a UNIP Regional Youth Secretary was killed and a Minister was badly wounded. The next day, August 12, 1968, President Kaunda banned the UP as a "threat to public security and peace" under the Societies Act.[27] Mundia and five of his aides were arrested and detained in Mumbwa Prison and later restricted under the Preservation of Public Security Regulations.[28] By this act Kaunda eliminated one of his most serious political opponents, who enjoyed a large measure of support in Western Province.

In 1971 Simon Kapwepwe, one of Kaunda's principal aides and a former Vice-President, broke away from UNIP and formed his own political party, the United Progressive Party (UPP). Many UNIP stalwarts like Chimba, Chisata, Musonda, Chambeshi and others quit UNIP and joined UPP. The new party enjoyed popular support in some parts of the country like the Copperbelt and Northern Provinces and, therefore, constituted a grave threat to UNIP's hegemony. Following a series of clashes between supporters of UNIP and UPP Kaunda in 1972 proscribed the UPP under the Societies Act[29] in the interests of public security. He also detained nearly 400[30] leaders and supporters of UPP including Kapwepwe, Puta, Chimba, Chisata, Chambeshi, and Kaenga. Once again Kaunda eliminated the only effective opposition to his government. Although Nkumbula's ANC was not banned it was so weak that it did not pose any

threat to the government and with the intimidation of the remaining weak opposition the stage was set for the introduction of the one-party state in December 1972.,

Other groups of people who have fallen victim to the detention laws have included students, Trade Union leaders, foreigners and members of the Mushala Terrorist Gang.[31] In 1976, for instance, students at the University of Zambia demonstrated against the government's support of an imperialist backed group, Savimbi's UNITA in the Angolan Civil War. They exhorted the government to recognise the government (i.e. the Peoples Republic of Angola) that was set up by the MPLA. Kaunda acted ruthlessly and swiftly. He sent para-military police to crush the student demonstration and then closed the University. Two lecturers and 18 students were detained under the Preservation of Public Security Regulations.[32] The lecturers were later deported.

It is submitted that in this case national security was in no way endangered. The government's extreme reaction exemplifies the sensitivity of Presidential Regimes to national security. Professor Nwabueze has remarked that in such Regimes there is a tendency to view any threat to the security of the ruling party and to the President's tenure of office as a threat to the security of the nation.[33]

The power of detention has also been used against people suspected of involvement in crimes of violence,[34] the illegal and illicit trafficking in emeralds,[35] and embezzlement and misappropriation of funds.[36]

It is submitted that the use of detention power to

combat purely criminal offences which have little or no connection with public security, is improper.

Following the October 1980 abortive coup plot a number of prominent figures were detained under the Preservation of Public Security Regulations, notably Mundia Sikatana, Edward Shamwana (both prominent lawyers), former Brigadier-General Miyanda, General Kabwe (the suspended Air Force Commander), V. Musakanya (a former Minister of State), Major Mporokoso and many others.[37] Other people like Haamaundu, N. Puta (lawyers), Pretorious, Kapotwe, and Chawinga[38] were subsequently detained for allegedly participating in an abortive plan to rescue the coup plotters.

The Zambia Congress of Trade Unions (ZCTU) leaders, Chiluba (Chairman-General), N.Zimba (General-Secretary), Chitalu Sampa and Timothy Walamba (the then MUZ Vice-Chairman, now Chairman), and a business man, Chakomboka were detained in the last quarter of 1981.[39] They were accused of stirring up industrial unrest with a view to eventually inciting the masses to turn against the government.[40] But all the labour leaders were later freed by the courts because the allegations against them were found to be without substance and plainly unreasonable. Kaunda has always viewed Chiluba as a threat to his Presidency and the detention was mean t to eliminate Chiluba from the political scene.

It is submitted that the detention of the labour leaders was clearly an abuse of the power of detention as they did not in any way prejudice national security. Their only crime was to have publicly disagreed with the policies of the political leadership (as the courts later ruled).

President Kaunda has given multifarious reasons for detaining people. As one observer has commented on this issue:

> "For the opposition he has said they are violent, destructive, tribalistic, agents of imperialism and racist minority regimes, subversive and engaged in anti-Zambian and other forms of treasonable crimes. To the Mining Union Workers and other Trade Union leaders he has given as his reasons for detaining them: attempts at industrial sabotage through strikes, leadership feuds, anti-party and anti-government policies and wage and other untenable demands for their Unions. For most foreigners, they have been detained for spying, economic sabotage, bribery and corruption to obtain citizenship, currency smuggling and counterfeiting money, attempts to confuse and subvert the integrity of the nation."[42]

The Police, too, have used the emergency powers very frequently and widely. Mr. Edward Shamwana then Chairman of the Law Association of Zambia at the time, noted:

> "Notably it has been used to detain persons in the Mechanical Services Branch thefts, army officers suspected of theft, suspected or breaches of Exchange Control regulations, common conspiracies, espionage, murders, robberies, no offence, 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 an offence until after such a suspect is detained."[43]

It is this frightful and oppressive misuse of emergency powers that prompted Baron, D.C.J. (as he then was) in Joyce Banda v Attorney-General[44] to remark as follows:

> "The way in which regulation 33(6) continues to be used becomes increasingly disturbing... alarming is a more appropriate word. In Mulwanda a Senior Superintendent of Police quite deliberately used the regulation in a manner which he knew was unlawful. The express words of the regulation are being consistently ignored. The regulation was never intended for purposes of investigation of crimes unrelated to public security."

The other powers granted to the executive under the Preservation of Public Security Act and Regulations have not been much used. But assemblies, meetings and processions are restricted unless police permission is granted.

3. THE POSITION IN OTHER COMMONWEALTH COUNTRIES

(A) MALAWI

The powers under the Preservation of Public Security Regulations have been used very extensively and indiscriminately. They have been used essentially against opponents of Dr. H. Banda, the despotic life-President of Malawi. Dr. Banda has accumulated into his hands vast power. As David Williams writes:

> "Dr Banda was to prove... an apt student of techniques of political manipulation. Subtle, ruthless, and determined, he was to establish effective control over party organisation before independence was achieved, and within a few months after it had been achieved he came into head on conflict with the same youngmen who had engineered his return to the country and who were, by this time, the only potential leaders, apart from himself, to have any real base of political support in the country. They were outmaneuvered and outfought; rooted, they fled the country. Dr. Banda was left in unrivaled command of Parliament and Party, with virtually no one holding any position of seniority anywhere in the country which was not owed directly to his patronage; it was soon clear that there were few, if any, limits to his voracious appetite for power. His object was to exercise precise and comprehensive control over the entire political, judicial, and economic life of the nation and its people; in their scale and scope, the legislative measures directed to this end have so matched the President's ambition that the only limits to his power appear to be those imposed by the increasingly feeble state of his physical Constitution."[49]

In this respect Parliament is a mere rubber-stamp, as members are well-aware that questioning the wisdom of Dr. Banda's policies is taking a great risk for the unwary have found themselves detained or have disappeared.[46] As one member put it:

> "The coming of members to the Parliament to pass laws is just a formality, otherwise Ngwazi, himself is enough for us. We happen to be here, Mr. Speaker, just to fulfill the procedure of making laws."[46]

In February 1966, the Attorney-General when questioned put the number of those detained at not less than 500, while other lawyers estimated the total at between 1000 and 1500.[48]

Amnesty International in 1968/69 reported that many hundreds of individuals had been detained without trial since independence. Some of those detained had been implicated in violent attempts to overthrow the government, but the majority were simply opponents of Dr. Banda's policies.[49]

Between 1972 and 1973 reliable reports stated that the number of persons detained, which was estimated at close to 300 in May 1972, had risen to over 1,000 during the ensuing year. Among these were 21 leaders of the Jehovah's Witnesses Sect who were detained in December, 1972. The Sect, which had suffered persecution for its beliefs in Malawi for a number of years, experienced severe repression in the autumn of 1972 when the Young Pioneers (the Youth Wing of the Ruling Malawi Congress Party, and Banda's storm-troopers) began to harass its members. The ensuing campaign of intimidation not only cost a number of lives but also drove 15,000 to 20,000 members of the Sect out of the country into Zambia.[50]

Between 1973 and 1974 more people were detained and placed in a newly opened detention centre at Mukuyu, near Zomba. Amongst the detainees were members of the Jehovah's Witness Sect, lawyers, former civil servants, teachers, trade unions and journalists.[51]

More people were detained between 1974 and 1975 adding to the more than 1000 persons who were held without trial at various prisons and detention centres especially at Mukuyu Detention Centre, Zomba and Lilongwe prisons and Chichiri Remand Prison, Blantyre. Prison conditions were reportedly bad in the detention centres, with inadequate diet, medical attention and facilities for exercise. Unconfirmed reports stated that ten prisoners had died in detention.[52]

However, the use of detention without trial was not extensive between 1977 and 1980, when more than 2,000 long-term political detainees were released. At that time, Albert Ngumayo, a former Minister of State in the President's office, was blamed for the widespread use of detention. But Ngumayo was executed for treason in September, 1977. Signs of renewed tension appeared in early 1980 when it was announced that several prominent political figures had been dismissed from office and expelled from the MCP. One of those sacked, Gwanda Chakuamba Phiri, was widely regarded as a close confidant of President Banda. Phiri had before his dismissal held two ministerial portfolios, with responsibility for both the Southern Region and for Youth and Culture. He was also responsible for the notorious Young Pioneers,

Dr. Banda's private army. After his dismissal Gwanda Phiri was detained. Among other senior figures removed from office in early 1980 and subsequently detained was Aleke Banda, a former Secretary-General of the MCP and Managing Director of the Press Holdings Company and other national institutions. He was dismissed from all his posts in January, for allegedly "gross breaches of Party discipline." The same allegation was made against David Kaunda, another former Cabinet Minister on his expulsion from the MCP on 13th February, six weeks after his dismissal as Minister of Local Government. He, too, was detained. Others in detention in 1980 were believed to include several former associates of Albert Ngumayo, at least one former government Minister and two chiefs arrested in 1973.[53]

The result of these massive detentions has been the elimination of virtually every political opponent of Dr. Banda. Africa Now states that Banda maintains his hold on Malawi through a totally ruthless, extensive and sophiscated apparatus of repression which hunts down actual or imagined opponents, not only within but even far beyond the country's frontiers. Those who are not detained are killed or brutally beaten up.[54] The people, as a consequence, live in total fear as any act which may displease the President may be construed as a threat to public security or treason and therefore attract detention or death. As a matter of fact, treason is defined very loosely. Talking to Parliament about the penalties for attempts to overthrow the government, Dr. Banda stated:

> "If he even just thinks about it and speaks aloud and somebody hears it, that is treason. He doesn't have to march at all, if he thinks about, talks to others about it.. no one should be left in doubt now about what treason is."[55]

And the next speaker, N. Mwambungu of Karonga North put it bluntly when he said:

> "A whisper which would lead to the breakdown of the Malawi government will be treated as treason."[56]

(B) UGANDA

The first three years of independence (October 1962 to February 1966) saw no emergencies and no preventive detentions. However, on February 22, 1966 following the defeat of the government on a critical motion in the National Assembly calling for a commission of enquiry into charges of corruption involving Prime Minister Obote, the defence Minister and the Deputy Army Commander-in-Chief (General Idi Amin), Obote dismissed five Ministers, stripped the Kabaka of his presidential powers and suspended the constitution. The five Ministers were arrested and detained pending their deportation under the Deportation Ordinance.[57]

On April 15, the government promulgated a new constitution under which Obote became Executive President. The Lukiko, (the Parliament of the Kingdom of Buganda) regarding Obote's action as sufficient provocation, issued an ultimatum to the government demanding that it should quit Bagandan soil by the end of May. Obote reacted by ordering his army under

General Amin to match into the Kabaka's palace and, albeit the Kabaka himself escaped, this put an end to the Lukiko's demand for autonomy.[58]

The government on May 23 declared a state of emergency over the whole of Buganda and issued emergency regulations. This was precipitated by the need to subdue the Baganda who were in a rebellious mood following the overthrow of the Kabaka. The state of emergency was extended throughout the country in 1969,[59] and continued in force until March 1971 when it was revoked by the Military Regime of Idi Amin which had overthrown Obote.[60]

The Obote government used the emergency powers very extensively and oppressively, mostly against its political opponents. Although the exact number of detainees was not known because detentions were not always announced in the gazette, Amnesty International estimated the number to be over 100 in 1969 and also to be the largest number of political prisoners in East Africa.[61] All political organisations other than the ruling party - the Democratic Party, Uganda National Union, Uganda Farmers Voice, Uganda Conservative Party, Uganda National Socialist Party and Uganda Vietnam Socialist Party - were proscribed under the Penal Code Act[62] as being dangerous to peace and order.[63] Among the hundreds of detainees was the leader of the main opposition Party (the Democratic Party) and 78 non-Uganda citizens detained on allegation of smuggling.[64]

Most of those detained came from the Southern part of the country and particularly from Buganda. Journalists

of (the editor- and two contributions) "Transition", one of the most distinguished intellectual monthlies published in Africa were also detained; this led to the demise of the magazine.[65]

The powers under the Preventive Detention Act 1967 were never used owing to the extension of the emergency throughout the country.

(C) KENYA

Barely a month after both the constitution and the Preservation of Public Security Act had been amended to enable the President, without prior parliamentary approval, to bring the Act into operation whenever he saw fit, notwithstanding whether the situation was grave or not, the Act was brought into operation in July 1966.[66] Regulations authorising the detention and restriction of persons were then made by the President.[67] This legislation was used to intimidate the Kenya Peoples Union, a newly formed opposition Party led by Oginga-Odinga, the former Vice-President of Kenya. Eight leaders of the party were detained and with five more detentions the total reached 13 in March 1968, albeit five had been released up to that date.[68]

Amnesty International reported that between 1968 and 1969 over 30 members of the K.P.U were in detention. Many of the detainees were found with Maoist literature. Other detainees included members of proscribed societies

(some associated with the Mau Mau) and eccentric religious sects.[69] Oginga Odinga was detained in 1969 and was only released in March 1971.[70] 1969 also saw the banning of the K.P.U as a threat to public security.

Kenya in the sixties faced a rebellion in the North Eastern Region by Somali - speaking people, abetted by Somali. As a result of the intensification of the rebellion the whole North Eastern Region was virtually in a state of war. The government not only passed savage emergency legislation in the area but also used brutal army measures to combat the Somali guerillas. The nomadic Somali population was confined to "concentration camps" and all known Somali leaders who were not prepared to support the government line were detained and the number was believed to be in thousands.[71]

(D) GHANA

The government made extensive use of the Preventive Detention Act 1958. This Act came into force on July 18, 1958 and on November 6, 1963 it was extended for a further five years. The government used it as the principal instrument for stifling opposition to it. On November 10, 1958, 43 persons, many of them members of the United Party were arrested and detained under the Act. On 23 December, 1960, 118 were detained following acts of "violence, gangsterism and brigandry" in Ashanti and other regions of the country. Many of these persons were members of the

United Party.[72] On October 3, 1961, among 50 persons who were detained were Mr. J.E. Appiah, Deputy Leader of the Opposition and Dr. J.B. Danquah, one of the most prominent political leaders in the country, a leading member of the opposition and a Presidential candidate who stood against Nkrumah for the Presidency. Another leading figure arrested was P.K.K. Quaido, a former Cabinet Minister. Dr. Danquah was released after 10 months, then was rearrested and detained until his death in prison after 13 months, on February 4, 1965.

The arrests and detentions under the Act continued unabated till the military coup of 1966, which toppled Nkrumah. The exact number of those in detention was not known because the government had discontinued the publication of the list of detainees in the gazette. From unofficial sources, the number was believed to have stood above 1000 since 1961.[75]

A letter dated February 20, 1965, smuggled out of a Ghanaian prison and vouched for as authentic by Dr. Busia, leader of the Ghana United Party, claimed that there were nearly 600 detainees in the prison in which the writer was detained.[76]

The letter stated that among the detainees at the detention centre were: (1) MPs and other leading figures and supporters of the opposition United Party; (2) a number of the ruling CCP members and supporters used by government and party leaders for shady activities, frauds, and extortions whose detentions had been arranged by their principals to prevent the leakage of those activities as the persons became

disgruntled; (3) personal ene mies of government and party leaders, regional and district commissioners; (4) a group of party workers in the 'Propaganda Unit' of the CCP headquarters detained in 1962 because they were suspected of being supporters or sympathisers of their fallen party leaders Tawiah Adamafio, Ako Adjei and Kofi Crabbe; (5) a number of very highly-placed police officers dismissed and later detained following an attempt to assassinate Nkrumah by a junior officer in January 1964; and other persons detained upon spiteful but false reports made against them by personal ene mies who happened to know what to say to get a person detained, including persons detained so that their wives might become available for interested suitors, or their properties misappropriated by false claimants or their businesses destroyed.[77]

4. SUMMARY

The obvious conclusion that can be drawn from the discussion above is that emergency powers, especially those relating to detentions and restrictions have been used indiscriminately in the countries surveyed. Although emergency powers are mean t to be used in exceptional circumstances when the normal powers of government prove inadequate it is the rather extensive and oppressive use made of them that has given them a fearful reality.

In this regard parallels in the extent and manner of

use of emergency powers in the various countries are manifest.

First, the powers of detention and restriction have been used essentially for the purpose of stifling political opposition thereby consolidating the position of the ruling party.

Secondly, there has been an inexorable move towards the concentration of power in the Head of State, who is in all cases an Executive President.

Thirdly, the detention of leaders and supporters of opposition parties has been followed in all cases by the proscription of opposition parties and the establishment of de jure or de facto one party Regimes.

Finally, emergency powers have been used for purposes of combating common crime, which in most cases has no bearing on public security.

Needless to say that the record of independent governments in the use of emergency powers is in many ways no better than that of their colonial predecessors, if not worse in some instances.[78] Haamaundu aptly sums up this by saying that:

> "The achievement of independence was merely a simplification and consolidation of the then existing colonial power structure rather than a change in the nature of that power. This mean't of course the use of the law of detention and restriction to suppress political opponents who threatened the status quo. The nationalists saw the use under which they would apply the detention and restriction laws to achieve their goals. It is one of the ironies of the struggle for liberty, freedom and human dignity that those who fought and won them use the very methods used against them to perpetuate themselves in power by throwing their opponents in either detention or restriction."[79]

We may conclude by submitting that emergency powers in Zambia and other African commonwealth countries have on countless occasions been used for the purpose of covering up police inefficiency or as a threat against political rivals, or simply in personal vendetta.

REFERENCES

1. See Government Notice No. 374 of 1964; See also Proclamation No. 5 of 1964, GN No. 376 of 1964.
2. Republic of Zambia, Provincial and District Government Annual Report, 1961; Annexture A, p.10.
3. J. Pettman, Zambia: Security and Conflict (1974), p.55.
4. Zambia Police Annual Report, IX, 1964, p.3.
5. Quoted in L. Charlton, Spark in the Stuble, (1969), p.140.
6. Zambia Independence Order, s.7.
7. See Zambia National Assembly, Debates from April 1965 to 1969.
8. Constitution (Amendment) (No. 5) Act, No. 33 of 1969, S.8.
9. S.C.Z. Judgement No. 35 of 1980, Appeal No. 16 of 1980, (Unreported). See also Chaila, J's Judgement on the same issues in Edward Shamwana v Attorney-General 1980/HP/1426 (Unreported).
10. Pettman, supra, p.94.
11. Zambia National Assembly, Debates, 19 (1969), Col. 446.
12. Times of Zambia, 7 March 1979.
13. Ibid, 23 August 1979.
14. Ibid, 24 November 1979.
15. Ibid, 5 November 1979.
16. Ibid, 20 November 1979.
17. Ibid, 13 October 1979
18. Ibid, 19 November 1979.
19. Ibid, 21 November 1979.
20. Ibid, 24 November 1979.
21. Ibid, 21 November 1979.
22. Pettman, supra, p.95.

23. See arguments adduced by the Attorney-General in the case of Kachasu v Attorney-General (1967) ZR 145, a case involving a member of the Watch Tower Sect who had been suspended from school for refusing to sing the National Anthem and to salute the National Flag. These arguments are reproduced in the introduction.

24. Zambia National Assembly, Debates 19 (1969), Cols 444-446.

25. B.O. Nwabueze, Presidentialism in Commonwealth Africa (London: C. Hurst & Co., 1974), p.341.

26. See Government Gazette Notices between 1971 and 1981.

27. S.I. 30/1972.

28. Gazette Notice No. 1501 of 1968.

29. S.I. 30/1972.

30. See Gazette Notices of 1971 and 1972. Also Amnesty International Annual Report, 1972-73, p.43.

31. See for example: Munalula and Six ors v Attorney-General (1979) ZR 154, where the applicants were detained for allegedly being connected with Adamson Mushala.

32. Gazette Notices No. 291 and No. 292 of 1976.

33. Nwabueze, supra, p.298.
Expressing the same sentiments Graham Mytton has noted: "Men like Kapwepwe, and others who have incurred official displeasure for political opposition, have often been locked up. It is then said that they were "lunatics" and hardly a voice is heard in support of the Constitution and human rights Kaunda and his colleagues fought so hard and so long for. But if he makes high moral statements he must expect to be judged by them. He once wrote: 'it would seem to be the Christian's duty in whatever circumstances, to press for ultimate truth and fearlessly seek and promote such decisions as are dictated by truth alone, not motivated by selfish motives.' But critics have been imprisoned without trial. People have been forced to join the ruling party, UNIP. Kaunda has even given his tacit approval to the expression of near-fascist political statements by Party and government associates. When the students had the temerity to criticize the extravagance of the 10th Independence anniversary Celebrations, or gave vocal support to the MPLA during the Angolan Civil War they were dealt with severely. Not only are few

voices raised in protest, the President himself seems to ignore both the spirit and the content of the constitution he is committed to upholding."

G. Mytton, Review of F. MacPherson's Kaunda of Zambia (Lusaka: Oxford University Press, 1974), in 77 African Affairs, the Journal of the Royal African Society, No. 307 (1978), pp.266-67.

34. In Mhango v The Attorney-General (1976) ZR 297, the applicant and 3 others were acquitted of murder by the Supreme Court but were immediately detained on the same charges.

See also: Sithole v The Attorney-General (1977) ZR 55.

35. In Mudenda v The Attorney-General (1979) ZR 245, the applicant was detained on the ground that she had in collusion with others indulged in the illegal and illicit trafficking in emeralds.

36. Maseka v Attorney-General (1979) ZR 136. In this case the applicant was arrested by the police and charged with several counts of obtaining money by false pretences. He was subsequently discharged, and immediately detained by order of the President.

37. See Gazette Notices Nos. 1520, 1120, 1560, 1747 of 1980 and Nos. 754, 1366, 916 of 1981.

Shamwana's grounds of detention were:

"1. That on dates unknown but between the 1st day of March, 1980 and 6th day of October, 1980, you together with Messrs: Goodwin Mumba, Deogratius Syimba, Pierce Annfield, Albert Chilambe and other persons unknown attended unlawful meetings at the office of Mr. Goodwin situated along Cha Cha Cha Road and your offices along Cairo Road, Lusaka where it was resolved to overthrow the lawfully constituted government of.. Zambia by force.

2. That on a date unknown but between 1st day of March, 1980 and 23rd October, 1980 at Lusaka you offered money to Albert Chilambe for the purchase of a Landrover registration number AAD 5842 which was used for the transportation of recruits and Firearms from North-Western Province of .. Zambia to Lusaka for the purpose of over-throwing the lawfully constituted government of the Republic of Zambia by force....."
(See Shamwana v Attorney-General 1980/HP/1656 (Unreported).

Musakanya's grounds of detention were substantially similar to those of Shamwana - see Musakanya v Attorney-General S.C.Z. Judgement No. 18 of 1981 (Unreported).

38. Gazette Notices Nos. 1060 and 1004 of 1981. Puta's grounds of detention give an indication of how the rescue plan was to be arranged. They were:

"1. That on a date unknown, but during the month of April, 1981, while at Geoffrey Haamaundu's office, situated at Chuundu House, Lusaka you were informed by him that there were ex-residents of Zambia abroad who were willing to give financial help to Messrs E. Shamwana and V. Musakanya but that they were unable to transfer their money to Zambia. Subsequently, you were informed by Geoffrey Haamaundu that he (G. Haamaundu) was looking for somebody in Zambia who had a lot of Kwacha and who would be willing to exchange it with the U.S.A. dollars abroad. Mr. Haamaundu further informed you that the money was intended for use to rescue the people involve in the abortive coup attempt of October, 1981;

2. That subsequently on or about the 22nd May, 1981 you informed Willem Johannes Pretorious of Chingola about the aforesaid proposal namely, exchange of U.S.A. dollars with Kwacha as you were aware that Pretorious was looking for foreign currency, and that soon after informing him, you instructed Pretorious to travel to Lusaka to meet Haamaundu through a third man namely George Kapotwe, with a view that Hamaundu and Pretorious may discuss the exchange rate of the U.S.A. dollars and the Zambian Kwacha. You further informed the said Pretorious that the money was intended for use to rescue the detainees involved in the abortive coup attempt of October, 1981;..."

(See Nkaka Puta v Attorney-General 1981/HN/774 (Unreported)

39. Gazette Notice No. 1111 of 1981.

40. For example some of the grounds of detention,in respect of Chiluba were that:

1. He addressed a meeting at a named place on 11th August 1980 at which, while commenting on the then crime rate in the country, he said that President Kaunda would be lucky if he was not toppled during the next five years and that the crime rate was because people were fed up with the government and once the government was toppled, everything would return to normal.

2. That at another meeting on 27th September he said that since Independence the government had been running the country on experimental basis and had achieved nothing. Further,he said people

could not have confidence in a government which trotted from one country to another begging for loans. He urged the delegates to advocate to the workers for countrywide industrial unrest so that the party and its government would be forced to meet whatever the workers demanded.

3. That on 3rd April, 1981 he told people unknown that his ultimate objective and that of his fellow leaders was to take over the Zambia leadership.

4. That on 1st May, 1981 while addressing a Labour Day Rally, he said that the Labour leaders and workers had lost confidence in the Party and its government thereby inciting the workers to hate the party and its government.

5. That as a result of the aforementioned actions the Miners on the Copperbelt went on illegal strikes and resorted to violence and intimidation which resulted in the loss of human life and damage to public property as well as disruption of Law and Order.

(See F.J.T. Chiluba v The Attorney-General 1981/HN/713) (Unreported)

41. See for e.g. Chiluba v Attorney-General, Ibid.

42. Geoffrey Haamaundu, The Development of the Law of Detention and Restriction during peace times in Colonial and post-colonial Zambia from 1911-1974 (1975) (Obligatory Essay, UNZA Special Collections).

43. E.J. Shamwana, "Police Have Too Much Power of Detention" Law Association of Zambia Journal 7 (1980), p.2

44. (1978) ZR 233 at p.240.

45. T.D. Williams, Malawi: The Politics of Despair (London, Cornell University Press, 1978), p.16.

46. "Who Props Up Banda's 'Murder Inc.'?", Africa Now, June 1983, pp 36-39.

47. G.E. Ndema, the member for Zomba South Malawi Hansard, 12 April 1965, p.642.

48. ICJ, "Malawi since Independence", Bulletin of the ICJ, No. 27 (September, 1966)

49. Amnesty International, Annual Report 1968/69, p.9.

50. Ibid, 1972/73, p.32.

51. Ibid, 1973/74, p.29.

52. Ibid, 1974/75, p.47.

54. Ibid, 1980, p.58.

54. Africa Now, supra, p.36 et seq.

55. Legislative Assembly, Debates (12 April 1965), p.641.

56. Ibid.

57. See Grace Stuart Ibingira and ors v Uganda (1966) E.A. 306 The court of Appeal for East Africa subsequently (July 14) declared the detentions invalid on the ground that the Deportation Ordinance was ultra vires the Constitution and void.

58. Anirudha Gupta, Government and Politics in Africa: A Comperative Survey of Political Processes and Institutions (Delhi: Vikas Publishing House PVT Ltd., 1975 p.56.

59. The Constitution (state of Public Emergency) Proclamation 1969.

60. The Constitution (state of Public Emergency) Revocation Decree 1971.

61. Amnesty International Annual Reports: (1) 1966/67; (2) 1968/69, p.10.

62. S. 54 (2) (c).

63. The Penal (Unlawful Societies) (No.2) Order 1969.

64. Re Ibrahim and Ors, Miscellaneous Clause No. 26 of 1969 In this case the applicants were arrested on June 16, 1969, but were only served with an order of detention under emergency regulations on July 4, 1969.

65. Amnesty International Annual Report 1968/69, p.10.

66. Nwabueze, supra, p.339.

67. The Public Security (Detained and Restricted Persons) Regulations 1966, LN 212 of July 25, 1966.

68. Nwabueze, supra, p.339.

69. Amnesty International Annual Report 1968/69, p.9.

70. Ibid, 1970/71, p.35.

71. Ibid, 1966/67.

72. ICJ, "Ghana's Preventive Detention Act", 3 Journal of

the International Commission of Jurists (Spring 1961), p.66

See also K.A. Busia, Africa in Search of Democracy (London: Routledge and Kegan Paul, 1967), p.128.

73. Ibid.

74. ICJ, Ibid.

75. Busia, supra, p.129.

76. ICJ, "Recent Development in Ghana", Bulletin of the International Commission of Jurists, No. 24 (December, 1965), p.25.

77. The letter is reprinted in full in K.A. Busia, supra, pp. 129-132.

78. Nwabueze, supra, pp. 334-335.

79. Haamaundu, supra, p.51.

CHAPTER SEVEN

CONCLUSION

The picture that emerges from the discussion of emergency powers in Commonwealth Africa is that the executive is vested with very wide-ranging security powers. The power of detention has been the most widely used of all the emergency powers. Indeed, detention laws have a frightful reality and have invariably been used oppressively. The extent of the President's power in Zambia (and would apply with equal force to other countries as well) was aptly put by Baron, D.C.J. when he said:

> "These are far - reaching powers. In particular 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."[1]

It is evident that the exercise of emergency powers by the executive, particularly the power of preventive detention, derogates fundamentally from the Rule of Law.[2] President Nyerere aptly underscored this point when he observed:

> "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 is trying to do, or for what you believe he has done. Few things are more dangerous to the freedom of 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 injustice being perpetuated."[3]

It is conceded that every state must possess adequate power to preserve itself and that sometimes certain exigencies might necessitate the restriction of individual liberty. But, it is submitted that the executive's power for the preservation of national security should be subject to strict controls in order to prevent its abuse and its being used as an instrument for oppression and tyranny.

First, the Constitution should define what constitutes an emergency and the circumstances under which it can be declared. It is suggested that a state of emergency or a semi-state of emergency should only be declared during periods of war, rampant rioting, mutiny and insurrection. Moreover, a state of emergency, once declared, should only be ephemeral because it could all too easily degenerate into an instrument of tyranny and oppression if continued beyond the contigency that precipitated it ab initio. Professor Elias has observed that:

> "The damage arises however when the citizens whether by legislative or executive action or abuse of the judicial process are made to live as if in perpetual state of emergency."[4]

Furthermore, emergency powers should only be invoked when there is an emergency declaration in force.

Secondly, although the power to declare an emergency should reside in the executive it is submitted that such declaration should be approved within a short period (e.g. seven days) by Parliament and should also be subject to frequent review by Parliament after a period of say, three months. It should expire after three months unless it has been extended by Parliament.

Thirdly, detainees should be provided with reasonable constitutional safeguards. Those countries like Malawi and Tanzania whose Constitutions do not embody a Bill of Rights should adopt the same. It is submitted that all countries should adopt the safeguards contained in the Constitution of Ghana 1979 (suspended). They offer the best protection, hitherto, and go a long way in curbing executive power. Furthermore, the Independent Tribunal reviewing a detainee's case must have power, as in Ghana and India, to order the release of the detainee and payment to him of adequate compensation. Moreover, the scope for the award of damages for wrongful detention should be widened. In Zambia damages can only be awarded to detainees for claims arising from:

(i) physical or mental ill-treatment; and

(ii) any error in the identity of the person detained.[5]

Compensation should be awarded to any person who has been wrongfully detained or restricted. This will deter the executive from detaining people on flimsy and fabricated grounds. It is further submitted that both detainees and restrictees should enjoy the same safeguards, as is the case in Zambia and Ghana (1979).

Fourthly, the maximum period of detention should be fixed by the constitution or by statute. In India, as noted elsewhere in this work, a detainee cannot be detained for more than three months unless an Advisory Committee approves the detention but even in such a case a detainee must be released at the expiration of one year.[6] In Africa it is

not uncommon to find people who have been interned without trial for more than ten years. This is to be deprecated. It is difficult to appreciate how one can still constitute a threat to public security after being detained for such a *long period. It is submitted that the Indian approach is to* be preferred if only because it fosters democratic honesty.

Fifthly, the power to detain or restrict should be exercised only when there is clear and present danger to national security. There should be a sufficiently proximate and rational relationship between the detainee's activities and national security. It should not be used as an easy substitute for adequate criminal laws as is the case at present. In this respect the courts must, like the Burmese Supreme Court, not hesitate to invalidate such detentions.

Sixthly, in the face of executive and legislature encroachments on individual liberty the imperative need to have a strong impartial and independent judiciary cannot be overemphasized. It is incumbent upon the Judiciary to strike a balance between the competing claims of national security on the one hand and those of individual liberty, on the other. The position was expressed correctly by Justice Robert in the case of American Communications Association v Douds[7] when he said:

> "The task of this court to maintain a balance between liberty and authority is never done because new conditions today upset the equilibrium of yesterday. The see-saw between freedom and power makes up most of the history of government, which, as Bryce points out, on a long view consists of repeating a painful circle from anarchy to tyranny and back again.

> The court's day to day task is to reject as false claims in the name of civil liberty which, if granted, would paralyse or impair authority to defend the existence of our society and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression. These are the competing considerations involved in judging any measures which government may take to suppress or disadvantage its opponents and critics."

Liberty, doubtelessly, is so precious that everything possible should be done to protect it. Thus, where a man's personal freedom is involved the power of the executive should be strictly construed. In this respect an objective test must be applied to the power of the executive to detain, as is the case in Burma. Courts should examine the reasonableness of the grounds of detention. They should not shirk from their responsibility. The powerful dissenting opinion of Lord Atkin in Liversidge v Anderson is of incalculable importance in this regard:

> "I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in wartime leaning towards liberty, but following the distum of Pollock C.B. in Broditch v Balchin cited with approval by Lord Wright in Barnard v Gorman: 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.' In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war and in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting that the judges are not respecters 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. I protest, even if I do it alone, against a strained construction put on words

> with the effect of giving an uncontrolled power of imprisonment to the Minister..."[8]

In this connection Zambian courts must be commended for coming out strongly in favour of individual liberty. The approach of the courts in other African countries leaves much to be desired. It is submitted that the latter should emulate the Zambian, Indian and Burmese courts for it is just at times of grave exigency that liberty requires to be protected against the pretensions and abuses of unlimited power. As the court observed in ex parte Milligan[9], a nation preserved at "the sacrifice of the cardinal principles of liberty is not worth the cost of preservation."

Although a heavy burden is placed on the Judiciary to uphold individual liberty it is trite that the Judiciary is handicapped by the absence of an independent machinery to enforce its decisions. Professor Nwabueze has noted:

> "... judicial power underlines the ability to take action to enforce a decision as an indispensable attribute. Yet the machinery for this owes all its function to the organized coersive force of the state, the police, prison service and the army, all of which are an arm of the executive, by whom their administration and operational use are also controlled. The court has no independent force of its own... Thus, in the rare extremity of a showdown, the executive may order the police and prison authorities not to execute any decision of the court or direct its agencies not to obey a court order, as when during the American Civil War President Lincoln ordered the military authorities to defy a writ of habeas corpus issued by the Chief Justice of the U.S.A."[10]

It is important, therefore, that there should exist harmony between the judiciary and the executive. The latter should in all circumstances enforce the decisions of the

former in any society that claims to be democratic."[11]

Seventhly, it is submitted that lawyers should be in the fore-front in the protection of individual liberty. The crucial role of an Independent legal profession cannot be overemphasized. The task of lawyers was ably and corectly expounded by Sir Leslie Munroe in the following words:

> "Above all, lawyers must be courageous. They have of course, the duty to watch the interests of their clients. That duty, important as it is, is part of a larger obligation as officers of the court, always to uphold truth and to abjure falsehood; finally, as citizens blessed with the traditions of an ancient and honourable profession, to take their part in the advance of society in the orderly process of the Rule of Law and to act fearlessly against governments whether of the right or the left which ignore the dignity of man and infringe or seek to abolish his inalienable liberties. No man or woman is a true lawyer who stands mute where the executive restricts or abolishes freedom."[12]

Eighthly, the power of detention should be subject to the scrutiny and control of the people through their elected representatives in Parliament. Mr. Justice Holmes once admonished that ".. It must be remembered that legislatures are ultimate guardians of the Liberties and welfare of the people in quite as great a degree as the courts."[13]

It is submitted that the executive should be required to submit reports of the number of people detained and the reasons for their detention, every month to Parliament. As an alternative to a Review Tribunal, the executive could be required to submit detention orders to Parliament for ratification within the shortest possible time, by a select parliamentary committee to ensure that detainees are to a reasonable degree security risks.[14]

Finally, it is submitted that in the long run, the

crucial factor in the preservation of civil liberties during emergency "is the existence of a citizen body which is conscious that civil liberties matter, and is willing if need be, to fight for them."[15] Thus an active public opinion is indispensable for the protection of civil liberties.[16]

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1. In Re Kapwepwe and Kaenga (1972) ZR 248 at p. 261.

2. See para. 3 of the Law of Lagos which reads:

   "That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peace time be restricted without trial in a Court of Law."

   African Conference on the Rule of Law, January 3-7, 1961, Lagos, Nigeria, p.11. The Conference was held by the International Commission of Jurists.

3. 'Development and State Power,' speech inaugurating the University College, Dar-es-Salaam, Reprinted in Thomas Franck, Comperative Constitutional Process: Cases and Materials (London: Sweet & Maxwell, 1968), p.231.

4. From a speech delivered at the International Commission of Jurists Congress in Lagos, from January 3-7, 1961 as quoted in the Report of the Proceedings of the Congress, African Conference on the Rule of Law, Lagos, 1961, pp. 44-45.

5. Art. 29(8), Constitution of Zambia, 1972.

6. S.11A, Preventive Detention Act 1950. See also:
   (1) Ram Prasad Shaw v Government of West Bengal: A.I.R. 1955 Cal. 374 (376);
   (2) Parwatibai w/o Mahadeo Sukharam v The State: A.I.R. 1956 Bom. 127

   For other countries:

   Malaya: 2 years is the maximum period of detention: Security Act 1960, s.8.

   Singapore: 3 years is the maximum period - Preservation of Public Security Ordinance 1955, as amended.

7. (1950) 339 US 382, 445.

8. (1942) A.C. 206 at 244.

9. Justice Davies in Ex parte Milligan (1866) US 4 Wall 2, 126, 181 ed. 281, 297.

10. B.O. Nwabueze, Judicialism in Commonwealth Africa (1977), pp. 225-6

11. Ibid.

12. Address by Sir L. Munro, K.C., M.G., K.C., V.O., Secretary-General of the International Commission of Jurists, when opening the International Congress of Jurists; Rio De Janairo, Brazil. December 11-15, 1962. Report of the Proceedings at p. 63.

13. Missouri, Kansas & Texas Rhy. Co. v May, 194 U.S. 267 at 270 (1904).

14. Collins Parker, "Control of executive discretion under preventive detention law in Zambia" XIII CILSA 1980, p.176.

15. H. Laski, "Civil Liberties in Great Britain in War-time" (1942), 2 Bill of Rights Rev. 243.

16. See also Professor P. Telford Georges who has said that:

> "In the final analysis, the only safeguard is an alert public opinion, quick to show its resentment when restrictive measures are proposed which are not reasonably justifiable in a democratic society."

P.T. Georges, "The Rule of Law: Definition and Safeguards" in Law and its Administration in a One Party State: Selected Speeches of Telford Georges, (Mimeo, Faculty of Law, University of Dar-es-Salaam), p.39

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