"THE POWERS OF THE PRESIDENT IN ZAMBIA TO DECLARE A STATE OF EMERGENCY: ARE THERE ENOUGH SAFEGUARDS?"

BY

PENGELE, EVARISTO

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THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that this Obligatory Essay prepared under my supervision by:

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"THE POWERS OF THE PRESIDENT IN ZAMBIA TO DECLARE A STATE OF EMERGENCY: ARE THERE ENOUGH SAFEGUARDS?"

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22/12/05
Date

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THE POWERS OF THE PRESIDENT IN ZAMBIA TO DECLARE A STATE OF EMERGENCY: ARE THERE ENOUGH SAFEGUARDS?

AN ESSAY
SUBMITTED TO
THE FACULTY OF LAW
OF
THE UNIVERSITY OF ZAMBIA

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF
THE BACHELOR OF LAWS DEGREE (LL.B)

BY

PENGELE, EVARISTO

2005.
ACKNOWLEDGEMENTS

My prime gratitude to the almighty God for granting me wisdom and good health. Without God, my work would have been unsuccessful.

I am also extremely indebted to my supervisor, Professor A. W Chanda, whose pieces of advice, directions and constructive criticisms put me on the right tract in this work.

I would also like to thank my elder brother, Maurice, who has always been there for me since I enrolled to this University. Brother, your encouragements have not been fruitless; here is part of the evidence that I used to take heed to your unending encouragements.

Lastly, my stay at the University of Zambia would not have been as interesting as it has been without my classmates. To them all, I say you have been a blessing in my life. I would seen to be less appreciative if I did not specially refer to the help that I always received from Chipasha Mulenga. Chipasha, you always allowed me to use your computer to type this work even at the expense of your study time. I cannot reward you; but my God will definitely do. Thanks also to Mataliro James with whom I always discussed the topic for this thesis. James, your criticisms of some of my ideas and your helpful suggestions constitute a big part of this work. Last, I would like to give special appreciation to Major Makanta, Mupenda Benaiah, Katongo Waluzimba, Frank Sikazwe, Chola Mwewa, Exonobert Zulu, Gift Mileji, Namuchana Mushabati, Mayamba Mwanawasa, Mando Mwitumwa, Gamaliel Zimba, Makebi Zulu and Mwenda Etambuyu. These friends have made my stay on campus extremely memorable.
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4.0 Conclusion

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ORGANISATION OF CHAPTERS.

This dissertation will examine the effectiveness of the safeguards on the powers of the President to declare a state of emergency in Zambia. It will establish that although there are numerous safeguards on the exercise of emergency powers, these safeguards are more theoretical than practical. It will demonstrate that the absence of proper separation of powers between the three arms of government renders the safeguards less feasible. The thesis will also show that the executive, and in particular the President, wields a lot of powers and influence at the expense of the independence of the legislature and the judiciary.

In chapter one, I will discuss the concept of state of emergency. A number of definitions will be analyzed. We will see that it is practically important to circumscribe circumstances that should actuate the President to resort to emergency powers. Chapter one will further explore the international requirements for the declaration of a valid state of emergency. It will become clear that under international law, a state could only resort to extraordinarily powers when the crisis or public danger is so serious that the normal measures of restriction are simply inadequate. The last segment of chapter one traces the origins of the concept of state of emergency in Zambia. We will see in that segment that the contemporary conception of the idea of state of emergency is traceable to the colonial period.

In chapter two, focus will be shifted to the law governing the declaration of state of emergency in Zambia. The Zambian emergency laws will be compared and contrasted with those of Kenya, Malawi, South Africa, Nigeria, Sudan, Iraqi, United States of America and India. We will see that unlike the emergency laws of other countries, the Zambian emergency laws are couched in a way that leaves a lot of room for abuse.
Chapter three discusses the legislative and judicial safeguards on the powers of the President to declare a state of emergency. We will see that the constitutional safeguards on the rights of detainees are not only inadequate, but also poorly framed. Chapter three will also focus on the importance of an independent judiciary in safeguarding the rights of detainees in a state of emergency. It will be discovered that although Judges have at times tried to interpret the law *in favorem libertatis*, such efforts have been frustrated by the law which allows the authorities to re-detain a person under a Presidential detention order once the police detention order has been held to be illegal.

In chapter four, we will see that the constitutional provision requiring the President to declare a state of emergency only after consulting Cabinet is a facile and ineffective safeguard. We will discover that since the members of Cabinet are appointed by, and serve at the pleasure of the President, they usually lack independence of will. Chapter four will further reveal that even the National Assembly cannot be trusted to provide objective safeguards. We will see that since independence, the ruling party has had the necessary majority required to secure ratification of a Presidential declaration of a state of emergency. The chapter will show that MPs from the ruling party invariably ratify Presidential declarations without any critical debate.

In the last chapter, I will present a general conclusion of the thesis. In this chapter, a summary of the important points of this thesis will be given. The last component of chapter five will give some recommendations that may help to reduce the powers of the President and ultimately facilitate a reduction in the violation of the rights of detainees.
DECLARATION

I PENGELE EVARISTO (20026986) hereby declare that this paper is a product of my research, of course with reference to other useful materials on the topic. I therefore take full responsibility for any errors, omissions and mistakes appearing in it.

Signature: __________________________    Date: 22/12/05

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CHAPTER ONE.

1.0 INTRODUCTION.

The declaration of a state of emergency or threatened emergency is essential in every country when there is the existence of exceptionally grave emergencies that threaten the life of the nation such as war, extreme civil strife and economic disorder. It is now accepted even in the most constitutional of constitutional regimes that human rights can only be properly realized when there is an organized political society. However, what is usually a crucial issue in a democratic state is how to ensure that this inevitable and unavoidably necessary desire to preserve the life of the nation is not achieved at the expense of the human rights of the citizens.

In this chapter, I will begin by discussing the concept of state of emergency. I will then analyze the international law requirements for the declaration of a valid state of emergency. In the last component of this chapter, focus will be shifted to a brief discussion of the origin of the concept of state of emergency in Zambia.

1.1 Discussion of the concept of State of Emergency.

Emergency laws are important in every country because a state must put in place laws that can enable it to preserve itself. However, although states of emergency are necessary for the preservation of the life of the nation, they pose a comparatively higher threat to the enjoyment of human rights. The state should strive to overcome the emergency and restore order in the country while at the same time respecting the fundamental human rights of individuals. It is for this reason that it is important for a state to provide clear circumstances that should actuate the declaration of a state of emergency. Constitutions of most countries, however, do not provide the meaning of the concept of state of emergency. The prima facie justification for this may be that it is not practically possible to provide an all-embracing definition that would be applicable to
different factual situations at different times. Indeed, there is a semblance of truth in the argument that in certain instances a situation may only be known to be a severe threat to the life of the nation by interpreting it or considering it in relation to other surrounding circumstances at that given time. It must be appreciated, however, that in the absence of constitutional guidance on when emergency powers may be resorted to, there may be a very high risk of abuse of the powers. In my view, when circumstances constituting an emergency are clearly enumerated the courts would have something to refer to when questioning the validity of an emergency declaration or measures taken pursuant thereto. This is why the Mwanakatwe Constitutional Review Commission recommended that the grounds for declaring a state of emergency should be specifically stated in the constitution.¹

The definition of a state of public emergency that was arrived at by the International Law Association (ILA), which approved a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, quite reflects a better picture of when a state should resort to emergency powers. The ILA defined a state of emergency as:

An exceptional situation of crisis or public danger, actual or imminent, which affects the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.²

According to the ILA’s definition, the threat must be actual or at least imminent. This means that a threatened emergency may be very objectionable under international law because it involves an anticipation that if a given situation is allowed to continue it may lead to a state of public emergency; there is really no actual threat but just a situation, which may arguably be

verted by using the ordinary state powers. In other words, it is unlawful for states to derogate
from human rights in order to face possible exceptional situations, which have not yet arisen.\footnote{Jaime Orava, Human Rights in state of Emergency in International Law (Oxford: Clarendon Press, 1992), at page 27.}

Professor Nwabueze, who defines emergency as an event, usually of a violent nature, endangering or threatening public order or public safety, offers the other definition. The learned professor emphasizes that the danger or threat must be an imminent one, and the event giving rise to it must involve a considerable section of the public, since only so can public order or public safety be said to be in jeopardy.\footnote{B.O Nwabueze, Constitutionalism in the Emergent States (London: C. Hurst & Company, 1972), at page 175.}

The major elements that one can readily discern from the various conceptions of a state of emergency are the following:

\begin{itemize}
  \item[a)] The emergency must be actual or imminent;
  \item[b)] The emergency must be of exceptional magnitude;
  \item[c)] The life of the nation must be threatened;
  \item[d)] A state of emergency must be a last resort; and
  \item[e)] A state of emergency must be a temporary measure.
\end{itemize}

It can be concluded, therefore, that the executive must endeavour to deal even with serious crises using the ordinary law of the land. A state of emergency must be perceived as a drastic measure only to be instituted as a last resort. Above all, a state of emergency must be of a temporary nature and intended to restore peace and order expeditiously, after which the ordinary law of the land must be reinstated. In short, therefore, permanent states of emergency are illegal under international law. Permanent states of emergency are those which are perpetuated, with or without proclamation, either as a result of \textit{de facto} systematic extension or because the constitution has not provided any time limit \textit{a priori}.$^5$
1.2 The International Law Requirements for the Declaration of a valid State of Emergency.

The importance of a discussion of international law requirements for the declaration of a valid state of emergency rests on the fact that Zambia belongs to the international community and is therefore legally bound by several important human rights treaties to which it is a party by ratification. For this reason, it is only rational that one should judge the Zambian emergency laws against the international law standards.

From the outset, it must be noted that the African Charter on Human and Peoples’ Rights does not allow derogations from the rights enshrined in that treaty, even during a state of emergency.\(^6\) Thus, limited reference will be made to the African Charter in this discussion. Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), on the other hand, permits states parties to take measures derogating from their obligations under the covenant in times of emergency. However, the ICCPR provides certain fundamental safeguards on the state’s liberty. In the first place, the public emergency must be one which threatens the life of the nation and the existence of which is officially proclaimed.\(^7\) Second, any measures taken by the state should not be inconsistent with the state’s other obligations under international law.\(^8\) Third, the measures taken should not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin.\(^9\) Fourth, the state must notify other states parties of the

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\(^8\) Ibid.

\(^9\) Ibid.
circumstances actuating the declaration.\textsuperscript{10} Fifth, the measures taken by the state must be proportional to the magnitude of the threat.\textsuperscript{11}

Lastly, according, to article 4(2), a state may not derogate from the following rights and freedoms: the right to life (article 6); freedom from torture or cruel, inhuman or degrading treatment or punishment (article 7); freedom from slavery or servitude (article 8); freedom from being imprisoned merely on the ground of inability to fulfill a contractual obligation (article 11); the right to recognition everywhere as a person before the law (article 17); freedom of thought, conscience and religion (article 18); and the right not to be tried on any criminal offence which did not constitute a criminal offence under national or international law, at the time when it was committed (article 15).\textsuperscript{12}

Apart from the provisions of the ICCPR, the Paris Minimum Standards of Human Rights Norms in a State of Emergency\textsuperscript{13} provide guidance on the international standards for the declaration of a valid state of emergency. The major purpose for these standards is to help ensure that even in situations where a bona fide declaration of a state of emergency exists, the state concerned will refrain from suspending non-derogable rights under article 4 of the ICCPR. The Paris Minimum Standards require, \textit{inter alia}, that the duration of the emergency should not exceed the period strictly required to restore normal conditions and that every extension of the initial period of emergency should be supported by a new declaration made before the expiration of each term.

A proper scrutiny of international law instruments reveals that International law permits states to resort to emergency powers only when the crisis or public danger is so serious that the

\textsuperscript{10} Ibid.
\textsuperscript{11} Ibid.
\textsuperscript{12} P.R. Ghandhi (ed), supra note 7.
\textsuperscript{13} These minimum standards were compiled by the International Law Association at its 61\textsuperscript{st} conference held in Paris from August 26 to September 1, 1984.
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normal measures of restrictions are simply inadequate. The danger must be one, which any reasonable person can objectively conceive or perceive as exceptional, and not one, which only the President subjectively perceives or apprehends as extremely serious. Thus, the ICCPR\textsuperscript{14} refers to 'a public emergency, which threatens the life of the nation'. Furthermore, the ICCPR\textsuperscript{15} makes an official proclamation of the state of emergency indispensable to the declaration of an internationally valid state of emergency. This requirement is probably premised on the fact that ideally states will only reach the extent of proclaiming a state of emergency when there is the existence of an objectively authentic danger to the life of the nation. In addition to the requirement for proclamation, the ICCPR\textsuperscript{16} obliges any state party availing itself of the right of derogation to immediately inform the other states parties to the convention of the provisions from which it has derogated and of the reasons by which it was actuated. This requirement has been breached with impunity in Zambia. For instance, Amnesty International revealed that Zambia did not notify other states when it declared the 1993 state of emergency.\textsuperscript{17}

Apart from the above standards, states are not at liberty to use emergency powers in a manner described by Mbambala Anock as "the use of a gun to destroy a mosquito."\textsuperscript{18} Measures taken by a state must be commensurate to the magnitude of the threat. The ICCPR\textsuperscript{19} and the European Convention\textsuperscript{20} permit derogations only to the 'extent required by the exigencies of the situation'. The American Convention\textsuperscript{21} adds to this that 'such measures must be to the extent and for the period of time strictly required.' Above all, once a state of emergency is declared, the

\textsuperscript{14} Article 4(1).
\textsuperscript{15} Article 4(1).
\textsuperscript{16} Article 4(3).
\textsuperscript{18} Mbambala Anock. The State of Emergency and its Practical Application in Zambia, 4\textsuperscript{th} year Obligatory Essay, 1995, UNZA Library, Special Collection, at page 20.
\textsuperscript{19} Article 4(1).
\textsuperscript{20} Article 15(1).
\textsuperscript{21} Article 27(1).
derogation from rights and any other measures taken by the state must be applied fairly without discrimination on the basis of race, colour, sex, language, religion, or social origin.\textsuperscript{22} Furthermore, the ICCPR, the American Convention and the European Convention all require that states parties must not take measures, which are inconsistent with their other obligations under international law.\textsuperscript{23} These provisions obviously allow for the examination of the acts of derogation in the context of the totality of the state’s international obligations.

Above all, international law requires that the courts should be empowered to question the authenticity of a declaration of state of emergency. In the celebrated \textit{Lawless} \textsuperscript{24} case, the court pointed out that in considering whether a particular restriction or derogation is necessary or strictly required, the judgment of the respondent government is not accepted as conclusive. In the \textit{Cyprus} \textsuperscript{25} case, the European Commission declared that it was competent to examine the existence of a public danger, which would justify derogation. Zambian courts should emulate international courts and rely on international instruments binding upon the state to question the declaration of state of emergency. Dr. Chaloka Beyani once advised that, “...the courts are not prevented from obtaining guidance from pertinent international standards binding upon the state.”\textsuperscript{26}

\subsection*{1.3 Brief Historical Background to the Concept of State of Emergency in Zambia.}

The contemporary conception of the idea of state of emergency in Zambia is traceable to the colonial era. The pre-independence government was always apprehensive of the likelihood of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{22}] Ibid, note 22, 23 and 24.
\item[\textsuperscript{23}] Ibid.
\item[\textsuperscript{24}] ECHR 15-41.
\item[\textsuperscript{25}] 176/56: 2 Yearbook. 177.
\end{itemize}
\end{footnotesize}
uprisings by the local population. Thus, in order to maintain sovereignty over the colony, the colonial government was ready to do anything to suppress the freedom fighters and would-be freedom fighters. Professor Nwabueze observes that “a principal preoccupation of the colonial government was with public order and security…. it was always apprehensive of any kind of challenge to its authority and was therefore disposed to subordinate the rights of the individual to public security where both should happen to be in conflict.”

During the colonial era, Northern Rhodesia was subject to three pieces of security legislation, which were intended to deal with full political emergency situations. These statutes were: The Emergency Powers Order-in-Council 1939-61, The Emergency Powers Ordinance (Cap 29 of the Laws of Northern Rhodesia) and the Preservation of Public Security Ordinance 1960 (Ordinance No.5 of 1960). Of the three pieces of legislation, the principal emergency legislation was the Emergency Powers Order-in-Council 1939-61. This statute applied to all the British colonies in Africa and Asia. The Orders-in-Council authorized the Governor, if he was satisfied that a public emergency existed, to declare by formal proclamation that the provisions of the Order-in-Council should come into operation in the whole or part only of the country concerned. The use of the word satisfied shows that the governor’s discretion was unfettered since it was based solely on his subjective determination. Having by proclamation brought the order into operation, he could then order any kind of regulation appearing to him necessary or expedient for securing public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community. In particular, the regulations might authorize the

28 Mbambala Anock, supra note 18 at page 14.
29 Section 3, as amended in 1956.
30 B.O Nwabueze, Presidentialism in Commonwealth Africa, supra note 27 at page 311.
detention of persons without trial, the acquisition or taking of possession of property, and the apprehension, trial and punishment of persons offending against the regulations. The trial of persons by military courts was, however, expressly forbidden and excluded from the governor’s regulation-making power. Once brought into force these extraordinary powers were not limited in duration; they continued until the governor, by another proclamation, directed that they should cease to have effect.

In July 1964, four months before Zambia gained independence, large-scale violence occurred between Lumpa cult followers of a prophetess called Alice Lenshina and members of UNIP in Northern Province. The uprising of Lenshina followers was very serious and there was widespread destruction of homes, schools and roads, which caused fear and insecurity among villagers. The government of Northern Rhodesia acted swiftly to contain the situation without success. Many lives were lost during the uprising. Consequently, the government declared a state of emergency, which gave the governor and his executive increased power to use all necessary means to quell the rebellion. In my view, this declaration was justified because the disturbances were so exceptional that the life of the nation was threatened. In fact, normal state powers had failed to contain the situation; the Governor deployed the army but little was achieved to restore law and order and the situation continued to deteriorate. Above all, the state of emergency was restricted to Northern Province and Lundazi district in the Eastern Province. It is this state of emergency which was continued even after Zambia attained independence. However, the continuation of the state of emergency required renewal every six months upon adoption of an affirmative resolution in the National Assembly. In 1965, the state of emergency was extended to the rest of the country. The state of emergency continued until November 1991 when it expired.

31 Ibid.
32 Ibid.
in accordance with the constitutional requirements under article 30(5). The continuation of the state of emergency was criticized in that even after the threat had long dissipated President Kaunda used emergency powers to suppress the opposition. Professor Mvunga noted that, "Past experience has shown that whether by design or coincidence, the victims of the state of emergency are invariably political opponents."34 The validity of Professor Mvunga’s conclusion can be supported by the politically motivated detention of Nalumino Mundia. Mr. Mundia resigned from UNIP and formed his own political party, which was called the United Party (UP). In October 1968, Kaunda banned the UP. Its leaders were arrested and restricted to remote parts of the country (Mporokoso). Mundia was released from restriction in January 1969. He was never charged with any offence.35 His restriction was purely on political grounds. The Kaunda administration had been alarmed by the increasing popularity of the UP in some parts of the country.

Under the Independence Constitution,36 section 29 empowered the President to declare, by proclamation published in the gazette, either that a full state of emergency was in existence or that a threatened state of emergency was imminent. After 1969, a new section was introduced and it became article 30 of the One-Party Constitution of 1973.37 There were two prominent differences in the provisions relating to the declaration of an emergency before and after 1969. First, whereas before 1969 a declaration, if not sooner revoked, ceased to have effect within five days if Parliament was sitting and within 21 days in any other case if it was not approved by the Assembly,38 the position after 1969 was that such a declaration only ceased to have effect on the

34 Ibid, at page 143.
35 John M. Mwanakatwe, supra note 33 at page 142.
36 Zambia Independence Order, Schedule II.
37 Chapter 1.
38 Independence Constitution, section 29(3).
expiry of 28 days unless it had been approved by the National Assembly in the meantime.\textsuperscript{39} Second, under the pre-1969 position the Assembly was required to renew a declaration at intervals of six months.\textsuperscript{40} The position after 1969 was that once a declaration had been approved by a resolution of the Assembly, it continued in force indefinitely.\textsuperscript{41}

1.4 **SUMMARY.**

As this chapter has shown, there is nothing objectionable about a state resorting to extraordinary powers to preserve the life of the nation. What raises concern, however, is the extent to which emergency powers are abused. In most instances states of emergency are declared when the circumstances prevailing on the ground do not warrant such a declaration. This is the more reason why international law instrument have stipulated that emergency powers should be resorted to only when the threat to the life of the nation is authentically exceptional.

This chapter has demonstrated that the emergency laws of Zambia date from the colonial era. Despite the fact that these laws were intended to suppress nationalist movements, it is very surprising that the emergency laws have been continued with very insignificant changes.

\textsuperscript{39} One-party Constitution, article 30(2).
\textsuperscript{40} Independence Constitution, section 29(3).
\textsuperscript{41} One-party Constitution, article 30(4).
CHAPTER TWO.

2.0 THE LAW GOVERNING THE DECLARATION OF STATE OF EMERGENCY IN ZAMBIA.

2.1 INTRODUCTION.

In this chapter, I will focus on the pieces of legislation that are currently governing the declaration of states of emergency in Zambia. To make this analysis more comprehensive, I will critically compare and contrast the Zambian emergency laws with those of some selected countries. This chapter will also scrutinize the extensiveness of the powers of the President to declare a state of emergency. I will finally discuss the presidential and police powers of detention during a declared state of emergency.

2.2 Legislation Governing the Declaration of State of Emergency in Zambia: A Comparative Analysis with Emergency Laws in other Countries.

The primary source of emergency powers of the President in Zambia is the Constitution.\textsuperscript{42} The Constitution empowers the President, in consultation with Cabinet, at any time, by proclamation published in the Gazette, to declare that a state of public emergency exists.\textsuperscript{43} This declaration should cease to have effect on the expiration of a period of seven days commencing with the day on which the declaration is made unless, before the expiration of such period, it has been approved by a resolution of the National Assembly supported by a majority of all the members thereof not counting the Speaker.\textsuperscript{44} The requirement that the approval should be by the majority of the members of Parliament is quite unsatisfactory because it means that the proclamation passes when just a simple majority of the members of Parliament vote in favour of

\textsuperscript{42} Chapter 1 of the Laws of Zambia, 1991 as amended in 1996.

\textsuperscript{43} Ibid, article 30(1).

\textsuperscript{44} Ibid, article 30(2).
it. Important matters, like the declaration of a state of emergency, should be allowed to pass only when at least two-thirds of the members of the House vote in favour. This idea is recognized in India. In that country, the President may proclaim a state of emergency or repeal an existing state only under the written advice of the Cabinet of Ministers. The proclamation would automatically cease to operate after the lapse of a month's period unless passed by both Houses of Parliament (Lok Sabha and Rajya Sabha) with a two-thirds majority, within that period.\textsuperscript{45}

In counting the period of seven days, the Zambian Constitution excludes any time during which the Parliament is dissolved.\textsuperscript{46} After declaring a state of emergency the President may revoke such a declaration at any time, before it is approved by a resolution of the Nation Assembly, by a proclamation published in the Gazette.\textsuperscript{47} Once the National Assembly approves the declaration, the resolution of the National Assembly will continue in force until the expiration of a period of three months commencing with the date of its being approved or until revoked at such earlier date of its being so approved or until such earlier date as may be specified in the resolution.\textsuperscript{48} Under the Indian Constitution, there is no need to wait for the whole Parliament to convene and consider revoking the declaration. Instead, the proclamation may be challenged at all other times, by a written notice from a group of members of Parliament, numbering not less than a tenth of the total of the strength, in which case the proclamation can be referred to the Parliament for an interim vote.\textsuperscript{49}

After the expiration of the period of three months following the initial approval, the Constitution of Zambia empowers the National Assembly, by the majority of all the members thereof, not counting the Speaker, to extend the approval for periods of not more than three

\textsuperscript{45} www.answers.com
\textsuperscript{46} Chapter 1 of the Laws of Zambia, 1991 as amended in 1996, article 30(3).
\textsuperscript{47} Ibid, article 30(4).
\textsuperscript{48} Ibid, article 30(5).
\textsuperscript{49} www.answers.com
months at a time.\textsuperscript{50} Extensions of emergency declarations in Zambia have usually been made even when the circumstances constituting the emergency have long dissipated and ceased to be a threat. It was for this reason that some of the petitioners that made submissions to the Mung’omba constitutional Review Commission expressed the view that the President should only have power to declare a state of emergency for only seven days and any extension should require a three-quarters majority vote in the National Assembly.\textsuperscript{51} With the possibility of unjustified extensions, one would even argue that the period for which the state of emergency can be extended at any given time should be as short as possible. The current three months period is rather too long. In the case of Ghana, for instance, a resolution of Parliament approving a declaration of a state of emergency ceases to be in force after three months unless renewed for periods of not more than one month at a time.\textsuperscript{52}

Apart from the above, the Constitution also allows the National Assembly to revoke the emergency declaration at any time.\textsuperscript{53} The declaration may also come to an end whenever an election to the office of President results in a change of the holder of that office. In this case, the declaration must cease to have force on the expiration of a period of seven days commencing with the day when the President assumes office.\textsuperscript{54} When a declaration or resolution (as the case may be) expires or is revoked, such expiration or revocation does not affect the validity of anything previously done in reliance of the declaration.\textsuperscript{55}

\textsuperscript{50} Proviso to article 30(5) of the Constitution of Zambia, Chapter 1 of the Laws, 1991 as amended in 1996.
\textsuperscript{51} Chapter 4.2.2 of the Mung’omba Constitution Review Interim Report, obtained from www.zamlii.ac.zm
\textsuperscript{52} Mung’omba Constitution Review Interim Report, ibid in Chapter 4.1.
\textsuperscript{53} Chapter 1 of the Laws of Zambia, 1991 as amended in 1996, article 30(6).
\textsuperscript{54} Ibid, article 30(7).
\textsuperscript{55} Ibid, article 30(8).
In addition to the powers under article 30\textsuperscript{56}, the President has further powers to declare a threatened emergency under article 31 of the Constitution. In the case of a threatened emergency, the President is not required to consult the Cabinet.

Unlike the Constitution of Zambia, in my opinion, the Constitution of Malawi\textsuperscript{57} contains some of the most commendable emergency provisions. The President of Malawi cannot declare a state of emergency except with the approval of the Defence and Security Committee of the National Assembly.\textsuperscript{58} This is a more reasonable and effective safeguard than consultation with the Cabinet since the Cabinet consists of ministers, all of whom are appointed by the President and serve at the latter's pleasure. Hence, the ability of the Cabinet ministers to provide real safeguards on the powers of the President may be compromised by the fear of being fired if perceived to be too critical of the views of the appointing authority. Conversely, the Defence and Security Committee of the National Assembly may comprise, \textit{inter alia}, of opposition Members of Parliament who owe no personal obligation to sing the chorus of the President or to automatically endorse the perceptions of the President. Such a committee may, therefore, be in a better position to provide objective and constructive safeguards on the President's powers.

The safeguard in the Constitution of Malawi is quite similar to that in the Constitution of the Federal Republic of Nigeria.\textsuperscript{59} The President of Nigeria is obliged to lay the proclamation, including the details of the emergency, before both Houses of Parliament for approval.\textsuperscript{60} Thus, the chances of the President of Nigeria declaring a political state of emergency are extremely reduced.

\textsuperscript{56} Chapter 1 of the Laws of Zambia.
\textsuperscript{57} The Constitution of Malawi of 1994.
\textsuperscript{58} Ibid, article 45(2)(b).
\textsuperscript{60} Ibid, article 305(2).
The other feature that is objectionable in the Constitution of Zambia is the absence of a clear definition or enumeration of the circumstances, which should actuate the President to resort to emergency powers. The Mwanakatwe Constitutional Review Commission\textsuperscript{61} made a remarkable recommendation that the grounds for declaring a state of emergency should be specifically stated in the Constitution. The government, unfortunately, rejected this recommendation. The current Mung’omba Draft Constitution has also provided that “when the Republic is threatened with war, invasion, general insurrection, disorder, natural disaster or any other public emergency, the President may...declare a state of emergency....”\textsuperscript{62} It is just hoped that the Constitution should be adopted by a Constituent Assembly so that the President is denied latitude to reject such safeguards on his powers. In the United Kingdom, the Monarch or a senior minister may only make emergency regulations, under the Civil Contingencies Act of 2004, if there is a serious threat to human welfare or the environment or in the case of war or terrorism.\textsuperscript{63} Even some African countries circumscribe circumstances when the President may declare a state of emergency. In the case of Malawi, for instance, the President may declare a state of emergency ‘only in times of war, threat of war, civil war or widespread natural disaster.’\textsuperscript{64} As for South Africa, ‘a state of emergency... shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if the declaration of a state of emergency is necessary to restore peace or order.”\textsuperscript{65} The Constitution of the Republic of Sudan allows resort to emergency powers ‘whenever there is an event that poses a threat to the state or any part of it, whether by war, invasion, siege, catastrophe

\textsuperscript{61} Chapter 10.1(c). extracted from zamlii.ac.zm
\textsuperscript{62} The Constitution of Zambia Bill, 200-Mung’omba Draft Constitution, UNZA Library: Short Loan Collection
\textsuperscript{63} www.answers.com
\textsuperscript{64} The Constitution of Malawi 1994 article 45(2)(c).
or epidemic, or any other event threatening the public safety or the economy. The Constitution of the Federal Republic of Nigeria, just like the above Constitutions, also concisely enumerates the situations that should actuate resort to extraordinary powers.

When the Constitution provides guidance on circumstances constituting an exceptional threat to the life of the nation, the chances of abuse of emergency powers would be reduced. Above all, this would increase the latitude of the courts to question the authenticity and validity of the President’s declaration since the judges will have something to point to as the delimitation of the scope of the President’s powers.

The other flaw in the Zambian Constitution is that it does not provide for what I may call localized states of emergency, that is, states of emergency, which may be limited to the specific area affected by the threat. In this respect the Constitution of Zambia, falls short of the standards set by the International Covenant on Civil and Political Rights (ICCPR). Article 4(1) of the ICCPR provides in part: “In times of public emergency ...the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation....” The phrase ‘to the extent strictly required’ implies that, where the threat is confined to a particular part of the country, and there is no possibility of it spreading to other areas, there is no justification for a state to declare a nationwide state of emergency. An example of a localized state of emergency is one that was declared by the Governor of Northern Rhodesia, Sir Evelyn Hone, in July 1964. This state of emergency initially only affected the Northern Province and Lundazi district in the Eastern Province. It was only in 1965 that President Kaunda extended the declaration to the rest of the country. One of the findings of the 1991 Mvungu Commission was that it was the desire of the majority of the

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66 The Constitution of the Republic of Sudan (it entered into force on 1 July 1998), article 131(1).
67 Article 4(1)
petitioners that a state of emergency should be confined to such periods and troubled areas as may be necessary.\textsuperscript{69} However, the government rejected this recommendation.

Unlike the Constitution of Zambia, other Constitutions provide for limiting the measures taken pursuant to an emergency declaration to the area affected by the emergency. The Constitution of Malawi, for instance, allows the President to declare a state of emergency ‘only with regard to the specific location where the emergency exists’.\textsuperscript{70} The Constitutions of Kenya,\textsuperscript{71} Sudan,\textsuperscript{72} Nigeria,\textsuperscript{73} and South Africa\textsuperscript{74} are all expressed in similar terms. The importance of such provisions is to avoid situations where the President would have the latitude to rely on threats affecting, and confined to certain parts of the country, to declare a country-wide state of emergency. In my view, a localized threat should only justify a declaration of a nation-wide state of emergency when there is an objectively authentic possibility of the threat spreading to other parts of the country. Whether such possibility exists should be a matter for determination by the courts of law and not a subjective perception of the President.

Another disappointing and in fact shameful element of the Constitution of Zambia is that it allows derogation from some of the rights that the ICCPR\textsuperscript{75} has recognized as non-derogable even in times of emergency. Article 25 of the Constitution of Zambia allows derogation from the freedom of thought, conscience and religion, which the ICCPR\textsuperscript{76} recognizes under article 18 as non-derogable even in times of public emergency. Article 18(1) of the ICCPR provides:

\textit{18(1). Every one shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and

\textsuperscript{69} Extracted from the Mung’omba Constitutional Review interim Report, supra note 51, in Chapter 4.
\textsuperscript{70} The Constitution of Malawi of 1994, article 45(2)(d).
\textsuperscript{71} The Constitution of Kenya. Chapter 1, article 85(1).
\textsuperscript{72} The Constitution of Sudan of 1998, article 131(1).
\textsuperscript{73} The Constitution of the Federal Republic of Nigeria, 1999, article 305(1).
\textsuperscript{74} The State of Emergency Act, 1997(section 1) made pursuant to the Constitution of the Republic of South Africa, article 34.
\textsuperscript{75} Article 4(2).
\textsuperscript{76} Article 4(1).}
freedom, either individually or in community with others and in public or in private, to 
manifest his religion or belief in worship, observance, practice and teaching.

In contravention of article 18 of the ICCPR, article 25 of the Zambian Constitution allows 
derogation from article 19 of the Constitution (which provides for freedom of conscience), when the Republic is at war or when a declaration under article 30 is in force. Commenting on 
article 25 of the Zambian Constitution, Amnesty International Report on Zambia notes that:

The Constitution of Zambia, however, allows the derogation from guarantees of rights 
that the ICCPR has indicated are non-derogable.... Amnesty International believes that 
article 25 of the Constitution is not in conformity with Zambia's obligations under the 
ICCPR and views this as a serious flaw in the protection of human rights in the country.

Moreover, the Constitution of Zambia lacks a provision of the extent to which human rights 
may be derogated from during a state of emergency. This violates international law standards. 
The United Nations Human Rights Committee, for instance, emphasized that:

Measures taken under article 4 [of the ICCPR-relating to the declaration of a state of 
emergency] are of an exceptional and temporary nature and may only last for as long as 
the life of the nation concerned is threatened and that, in time of emergency, the 
protection of human rights become all the more important particularly those rights from 
which no derogation can be made.

Indeed, article 25 of the Constitution of Zambia permits derogation from all the rights 
except the following, when there is a full state of emergency or the country is at war: freedom 
from torture, inhuman and degrading treatment (article 15); right to life (article 12); protection 
from slavery and forced labour (article 14), and protection of the law (article 18). In all other 
cases, derogations are permissible to the extent that the measures taken are, having due regard to

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77 Freedom of Conscience has been defined under article 19 of the Zambian Constitution in similar terms as the 
definition under article 18 of the ICCPR. It includes freedom of thought and religion, freedom to change one's 
religion or belief, and freedom, either alone or in community with others, and both in public and in private, to 
manifest and propagate his religion or belief in worship, teaching, practice and observance.

Extracted from: www.amnesty.org

79 See Amnesty Report, ibid.

the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation.

Unlike the Zambian Constitution, the Constitution of Malawi concisely enumerates the rights from which derogation may be possible during a state of emergency. In addition, the Malawian Constitution limits the scope of such derogation ‘to the extent that such derogation is not inconsistent with the obligations of Malawi under International Law.’ The derogation provisions under the Constitution of Sudan are even more remarkable and enviable. It expressly prescribes derogation from: the prohibition of torture, the prohibition of slavery, the prohibition of discrimination... freedom of thought, the right to access to a court, the presumption of innocence, or the right to defence.

A further flaw in the Constitution of Zambia is that it does not give express authority to the courts to question the validity of a declaration or that of measures taken pursuant thereto. The courts in Zambia have persistently claimed that they do not have jurisdiction to inquire into the declaration of a state of emergency. Let us look at two cases where the court observed that it had no power to impugn a declaration of a state of emergency where all the constitutional requirements have been satisfied. The first is Re Kapwepwe and Kaenga. In that case, the appellant had put forward an argument that there was no need to continue with the emergency because there were no circumstances justifying its continuation. The court held that the justification was subjective to the satisfaction of the President and not for the court. It was further observed that the court could not question the President’s decision even on a subjective test.

82 Ibid, article 45(3) (a).
84 (1972) ZR 248.
The second case is the case of *Dean Namulya Mung’omba v. Attorney-General*. In that case, the applicant, then President of the Zambia Democratic Congress (ZDC), an opposition political party, was arrested and detained under emergency regulations following the abortive coup of October 28, 1997. He applied for a *writ of habeas corpus ad subjiciendum*. He argued, *inter alia*, that the President had abused his powers to declare an emergency, as the facts on the ground did not justify the declaration of an emergency. The High Court (Justice Kabalata) defined a state of emergency as:

*Where the situation is so grave that it is necessary for the President by Statutory Instrument to make regulations to provide for the detention and for requiring persons to do work and render service. It is a situation in which the security of the nation and public safety are in danger. It is a situation characterized by disruption of public order, mutiny, rebellion and riot. The maintenance of supplies and services essential to the lives of the community are also endangered.*

The court was of the view that to topple a democratically elected government by mutiny, force or other undemocratic means is a very grave situation, which calls for the declaration of an emergency in the country. The court held that it had no jurisdiction to inquire into the reasons for the declaration of a state of emergency. Judge Kabalata J, stated, *inter alia*,

*I find that the President is not obliged to furnish any reason for making a declaration and such inquiry would in my view be ultra vires the powers of this court because the only condition that the President is required to fulfill is to meet and consult his Cabinet before declaring that a state of emergency exists.*

The court held that jurisdiction to ensure that constitutional provisions have relating to an emergency declaration have been complied with lies with the National Assembly. Once the National Assembly has, by the majority of all the members, approved the declaration of a state of emergency, the issue is laid to rest.

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85 1997/HP/2617 (unreported).
Ideally, "... it is within the realm of judicial propriety to determine whether the facts alleged to constitute an emergency satisfy legal standards."\textsuperscript{87} Unfortunately for Zambia, apart from the sweeping competence conferred by article 94(1)\textsuperscript{88} of the Constitution on the High Court, there is no specific provision in the Constitution expressly conferring competence on the courts to inquire into the validity of a declaration of a state of emergency, or an extension of the declaration or indeed any measures taken pursuant to the declaration. In my view, conferring competence on the courts in an express manner would increase the liberty and dispel fear amongst individual judges to decide on such sensitive political issues as the declaration of a state of emergency. One of the rejected recommendations of the Mwanakatwe Constitutional Review Commission was that "the President’s powers to declare a state of emergency be checked by obliging the President to give reasons for the state of emergency, and that the courts be competent to inquire into the validity of the declaration of the state of emergency."\textsuperscript{89} Even the Mung’omba Constitutional Review Commission has observed that "the courts should have explicit jurisdiction to inquire into the validity of circumstances necessitating the declaration of a state of emergency or threatened state of emergency or measures taken thereunder."\textsuperscript{90} Consequently, the Mung’omba Constitutional Review Commission has recommended that "the Constitutional court shall have jurisdiction to decide the validity of a declaration of a state of emergency or threatened emergency, including the reasonableness thereof; and any extension of


\textsuperscript{88} Article 94(1) gives to the High Court unlimited and original jurisdiction to hear and determine any civil or criminal proceeding under any law and such jurisdiction and powers as may be conferred by the Constitution or any other law.

\textsuperscript{89} Report of the Mwanakatwe Constitutional Review Commission, supra note 61 in Chapter 10.1(c).

\textsuperscript{90} Interim Report of the Mung'omba Constitutional Review Commission, supra note 51 in Chapter 4.
a declaration of state of emergency and any legislation enacted or other measures taken in consequence of such declaration.” 91

Unlike the Constitution of Zambia, the Constitution of the Republic of South Africa provides that “any superior court shall be competent to inquire into the validity of a declaration of a state of emergency, any extension thereof, any action taken, including any regulation enacted, under such declaration.” 92 The Malawian Constitution also gives competence to the High Court in exactly the same manner. 93

2.3 Analysis of the extensiveness of the powers of the President to declare a state of emergency.

Once the President has declared a state of emergency under the Constitution, such a declaration would activate either of two Acts: the Emergency Powers Act (Cap 108) or the Preservation of Public Security Act (PPS Act, Cap 112). The Supreme Court clarified in Zinka v. The Attorney General 94 that the Emergency Powers Act and regulations made thereunder can be invoked only when there is a declaration of an actual state of emergency. Similarly, the Preservation of Public Security Act and Regulations made thereunder can be invoked only when a threatened emergency exists. Both statutes empower the President to make regulations for the preservation of public security. 95

As the two statutes deal with different situations, there are prominent differences in the scopes of the powers conferred by each statute on the President. Indeed by virtual of the fact that

91 Ibid.
92 Constitution of the Republic of South Africa- 1996, article 37(3).
93 The Constitution of Malawi-1994, article 45(5).
94 (1990-1992) Z.R 73
95 A. W. Chanda. A Case Study in Human Rights in Commonwealth Africa. A Thesis submitted to the Yale Law Faculty in conformity with the requirements for the J.S.D Degree, at page 252
the Emergency Powers Act deals with a more serious situation, the powers conferred by that Act on the President are wider.96

It has been noted that, first, under the Emergency Powers Act, not only can the President make regulations for the detention or restriction of persons, but he can also make regulations to provide for the deportation and exclusion of persons who are not Zambians.97

Second, the scope of the property, which the President may acquire on behalf of the Republic under the Emergency Powers Act, is wider. He can acquire 'any property or undertaking' other than land under the Emergency Powers Act98 but only 'immovable property' under the PPS Act.99 Third, under the Emergency Powers Act the President may make regulations to provide for the amendment of any enactment, and for the modifying of the operation of any enactment.100 However, under the PPS Act the President may only make regulations to provide for the suspension of the operation of any written law other than the constitution.101 Finally, as regards the validity of regulations, the Emergency Powers Act provides that only emergency regulations that have been affirmed by a resolution of the National Assembly shall take effect during an emergency.102 Conversely, regulations made under the PPS Act are valid even if they have not been tabled before the National Assembly until the expiration of a period of three months.103 It must be noted, however, that neither the Emergency Power Act104 nor the PPS Act105 authorizes the making of any regulations providing for the trial of persons by military courts.

96 Ibid.
97 Emergency Powers Act, Section 3(2)(a).
98 Ibid, section 3(2)(b)(i) and (ii).
99 A. W Chanda, supra note 95 at 252.
100 Emergency Powers Act, section 3(d).
101 PPS Act, section 4(c).
103 PPS Act, section 5(3).
104 Emergency Powers Act, proviso to section 3.
Furthermore, the state cannot derogate from fundamental human rights when what is in force is a semi-emergency declared under article 31 of the Constitution. Article 25 of the Constitution allows derogations only when the Republic is at war or when a declaration under article 30 is in force. Article 30 of the Constitution deals with the declaration of a full state of emergency. Thus, if the State purported to derogate from fundamental rights pursuant to a declaration made under article 31, such derogations would be unconstitutional.

Under the Constitution of Iraq, the powers of the Prime Minister in a state of emergency are quite reasonable. For instance when the Iraq government declared a state of emergency in November 2004 in response to the escalation of violence by the militants, Official spokesman, Thaer Naqib, revealed that the Prime Minister has powers under the National Safety Law passed in July, to impose curfews, restrict freedom of movement, assembly and use of weapons, cordon off and search suspect areas, freeze assets of suspected insurgents and conduct military and security operations in suspect areas with the aid of US-led multinational forces.\(^{106}\)

### 2.4 Presidential and Police Powers of Detention during a State of Emergency.

To begin with, the powers of the President to detain a person under the laws of Zambia have been challenged as unjustified in a democratic country, which professes support for human rights.\(^{107}\) Indeed, since a President is a politician and not a professional police officer, in a democracy, he is not supposed to exercise detention powers. Being a politician, the President might use detention powers to lock up opposition leaders whom he perceives to be threats to his stay in office. Political detentions during the Kaunda era authenticate this argument. For instance, when Kapwepwe resigned from UNIP to lead United Progressive Party (UPP), UNIP

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\(^{105}\) PPS Act, proviso to section 4.

\(^{106}\) News.bbc.co.uk

genuinely feared loss of members in large numbers in some parts of the country especially the Copperbelt, Luapula and Northern Provinces. For this reason, in February 1972, only six weeks after Kapwepwe’s re-election to National Assembly, Kaunda banned the UPP and detained Kapwepwe and other leading members of his party.  

Both the Emergency Powers Act and the PPS Act allow for the detention of persons without trial. The regulations promulgated under the PPS Act, inter alia, empower the President to detain or restrict people without trial for an indefinite period. Regulation 33(6) authorizes any Police Officer of or above the rank of superintendent to arrest, without warrant, any person in respect of whom he has reason to believe that there are grounds which would justify his detention under the regulation and may order that such person be detained for a period not exceeding seven days pending a decision whether a presidential detention order should be made against him. The proviso provides that such a person shall be released where, before a decision is reached as to whether or not a detention order should be made against him, the Police Officer who arrested him finds on further inquiry, that there are no grounds which would justify his detention under the regulation.

What has worsened the situation further is the fact that the detention by the police under section 33(6) has been held to be separate and distinct from the presidential detention under section 33 (1). The implication of this is that the subsequent presidential detention order cannot be impugned on the basis of the illegality of the initial police detention order. The separateness was in fact affirmed in the case of Sharma v. Attorney-General. In this case, the applicant was first detained under regulation 33(6) and later under regulation 33(1). The court held that

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108 Ibid.
109 Section 3(2) (a).
110 Section 3(a) and Regulation 33(1) and (6).
111 Regulation 16.
grounds for detention under the two regulations are different. The court further stated that as a result of this separateness, the detention under regulation 33(1) could not be assailed on the basis of any unlawfulness in the detention under regulation 33(6).

The practical implication of the distinctiveness of the two types of detention can be seen in the case of Major Kangwa Musonda,\textsuperscript{113} where the judge found the police detention order to be illegal because the grounds were not published within the stipulated 14 days. Although the judge allowed the application for habeas corpus, he would not order the release of Major Musonda because the police detention order had been superseded by a presidential detention order.\textsuperscript{114}

Moreover, even when habeas corpus in respect of a presidential detention order is successful, the authorities have been known to order further detentions under criminal charges. This was the case with former President of Zambia, Kenneth Kaunda. After more than three months of court hearing in the habeas corpus application, the police informed Kaunda that he was to be further charged with the crime of misprision of treason.\textsuperscript{115} Regardless of the outcome of the legal challenges to his presidential detention order, Kaunda was to remain in detention as a ‘restricted person’. In effect therefore, presidential detentions have worked at best to defeat the practical importance of the writ of habeas corpus. In the United States, habeas corpus is extremely treasured. In fact the US Constitution expressly provides that, “the privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety may require it.”\textsuperscript{116} Courts in the US have usually construed this provision \textit{in favorem libertatis}. For instance on April 27, 1861, during the American civil war, Abraham Lincoln

\textsuperscript{113} Amnesty International Report, supra note 78, Major Musonda was detained on 2 November 1997 following the 1997 failed coup attempt.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
\textsuperscript{116} www.answers.com
suspended the writ of habeas corpus. The court decided in *Ex Parte Milligan*\textsuperscript{117} that the suspension was unconstitutional because civilian courts were still operating, and the Constitution (according to the court) only provided for suspension of habeas corpus if the courts are actually unable to function.

In some cases even Zambian judges have been bold enough especially in respect of questioning the authenticity of the grounds of detention. This is so, notwithstanding the fact that the powers of detention are expressed in very broad terms that require only the satisfaction\textsuperscript{118} of the President or the reasonable belief\textsuperscript{119} of the police officer. Professor A.W Chanda notes that decided cases have established that the law requires the detaining authority to act bona fide by fulfilling two conditions. First, he must apply his mind to the necessity alleged for the detention. Second, there must be some grounds or basis of fact precipitating the necessity.\textsuperscript{120} Thus, in *Joyce Banda v. Attorney-General*\textsuperscript{121} Baron D.C.J stated:

> But it is not any ground, which justifies the deprivation of liberty.... The police officer must have reason to believe that the person concerned, if left at liberty is likely to engage in activities prejudicial to public security.

The phraseology of article 25 of the Constitution further compounds the contention that an objective test should be applied when examining the ‘satisfaction’ of the detaining authorities. Article 25 provides in part:

> 25...and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were ...reasonably required for the purpose of dealing with the situation in question.

\textsuperscript{117} 71 US 2 1866.
\textsuperscript{118} PPS Act, section 33(1).
\textsuperscript{119} Ibid, section 33(6).
\textsuperscript{120} A.W Chanda, supra note 95 at page 269.
\textsuperscript{121} (1978) Z.R 233 at page 239.
Some judges have affirmed that the test envisaged by article 25 is an objective one. For instance, in *Chiluba v. Attorney General*,\(^{122}\) the court applied the test of reasonableness and held that “this court upon inquiry finds that there are in fact no reasonable grounds for the detaining authority to suspect the applicant of alleged activities and there was in fact no reasonable basis for any such suspicion.”

It is unfortunate, nevertheless, that very few judges have been so liberal as to subject the detaining authority’s satisfaction to the test of reasonableness. Some judges have been reluctant to do so. For instance in *Re Puta*,\(^{123}\) the court stated:

> It is not for this court to determine whether the detention was reasonably justifiable because the test is one of the subjective satisfaction of the President only.... Whether a detention is reasonably justified is a matter for the detaining authority.

The other unfortunate reality is the fact that the courts have given latitude to the detaining authorities to detain a person even where the offence falls clearly under criminal law or where the accused has been acquitted of criminal charges. For instance, in *Re Kapwepwe and Kaenga*,\(^{124}\) it was submitted by the petitioner that the discretion to detain was exercised in bad faith because the grounds for detention constituted criminal offences for which a criminal prosecution could have been instituted. Dismissing this submission, the court emphasised that the machinery of detention without trial is, by definition, intended for circumstances where the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation.

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\(^{122}\) 1981/HN/713 (unreported).

\(^{123}\) 1981/HN/774 (unreported).

\(^{124}\) (1972) Z.R 248.
2.5 SUMMARY.

As this chapter has shown, the emergency provisions in the Constitution of Zambia are below international standards. The manner in which the emergency and detention powers are framed in the Constitution clearly reveals that the law-givers had very little regard to the possibility of abuse. In my view, emergency powers should be framed in a way that clearly undercuts the importance of human rights. This may only be possible where safeguards in the Constitution are not only sufficient but also framed in clear and unambiguous terms. I think the Constitution of Malawi is a model Constitution as far as emergency provisions are concerned. In the first place, the President of Malawi cannot declare a state of emergency unless he secures approval of the declaration from the Defence and Security Committee of the National Assembly. Second, the Constitution of Malawi clearly enumerates the circumstances that should actuate the President to resort to emergency powers. Third, any derogation from human rights should not be inconsistent with the obligations of Malawi under international law. Last, the High Court is expressly vested with powers to inquire into the validity of a declaration of a state of emergency and measures taken pursuant thereto.

Furthermore, in my view, human rights violations would be eliminated, or at least reduced, if the Presidential Detention Orders and the Police Detention Orders were treated as one continuous detention so that any invalidity in the latter would automatically nullify the former. Lastly, police should not be allowed to detain a person on the same set of facts after the court rules the initial detention illegal.
CHAPTER THREE.

3.0 Legislative and Judicial Safeguards on the Powers of the President to Declare a State of Emergency.

3.1 Introduction.

The importance of providing clear and effective safeguards on the powers of the President to declare a state of emergency and to make detentions during a declared state of emergency cannot be overstressed. Indeed it would be dangerous to confide in, or trust the authorities as reasonable people who would exercise their powers in a manner that underscores the fundamental character of human rights. Some authorities may not even appreciate the real importance of human rights. For instance, following the 28th October 1997 abortive coup, the then Republican President, F.T.J Chiluba was quoted as having said, “Zambian citizens should observe the rule of law if they wanted to enjoy their fundamental rights, because human rights could not be enjoyed in a vacuum.”125 By necessary implication the President meant that human rights had to be bought at a price called ‘observance of the law’. This is inconsistent with the fundamental principle of human rights, which principle holds that human rights are inherent, inborn and not conferred by the government. A fortiori, rights that are non-derogable should not be suspended or violated even when a suspect has flouted the law. In short, the enjoyment of non-derogable rights cannot be made subject to being a good citizen or a strict observer of the law. Even the person considered to be the worst criminal is, nevertheless, entitled to the enjoyment of fundamental human rights, which the law considers as non-derogable even in times of war or state of emergency.126

125 Times of Zambia, 1st November 1997.
126 These rights are enumerated in article 25 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia and article 4(1) of the ICCPR.
In view of the fact that most of the authorities entrusted with the enforcement of the law do not really appreciate the fundamental character of human rights, I would argue that rather than putting all our trust and confidence in these authorities, it would be a safer way of protecting human rights to have effective safeguards in the laws. However, good laws alone, admittedly, cannot guarantee the liberties of the people; good laws should be coupled with an effective and independent Judiciary.

In this chapter, I will discuss the safeguards available under the Constitution,\textsuperscript{127} and the Preservation of Public Security (Detained Persons) Regulations and the Preservation of Public Security ( Restricted Persons) Regulations. I will then analyze the independence of the Judiciary and the impact of such independence on the role of the courts to provide safeguards. The extent of the powers of the Zambian courts to question the legality of a declaration of a state of emergency will also be explored. The last component of this chapter will critically discuss the effectiveness of the courts’ role in safeguarding human rights during a state of emergency.

3.2 Safeguards under the Constitution.

Article 26 of the Constitution\textsuperscript{128} provides certain safeguards on the powers of the detaining authorities vis-à-vis the detainees and restrictees. Clearly, these safeguards are intended to protect the detainees’ human rights from abuse by the authorities. However, as I will reveal in the following discussion, the existing safeguards are not only ineffective but also extremely insufficient. The available safeguards are:

\textsuperscript{127} Chapter 1 of the Laws of Zambia, 1991 as amended in 1996.
\textsuperscript{128} Constitution of Zambia, Chapter 1.
(i) Every detained or restricted person has to be furnished with grounds of detention within fourteen days in writing in a language that he understands specifying in detail those grounds;\(^\text{129}\)

(ii) A notification, stating that he has been restricted or detained and giving particulars of the place of detention and the provisions of the law under which his restriction or detention is authorized, must be published in the Gazette within fourteen days;\(^\text{130}\)

(iii) There must be a review by an independent and impartial tribunal every three months if the detainee so requests;\(^\text{131}\)

(iv) The detainee should be afforded reasonable facilities to consult a legal representative of his own choice;\(^\text{132}\)

(v) At the hearing of his case the detainee should be allowed to appear either in person or by a legal representative of his own choice.\(^\text{133}\)

The courts have tried to foster the rights of detainees but the poor framing of the constitutional safeguards has hampered such efforts. The safeguards in the Constitution are couched in a manner that leaves a lot of room for the President and the Police to manipulate them and in effect evade the court’s checking role. For instance, in the case of Moyce Kaulung’ombe,\(^\text{134}\) police detained UNIP’s head of physical security, Moyce Kaulung’ombe, on 23\(^{\text{rd}}\) December 1997 for questioning about the failed coup attempt. Notification of his detention was not published in the gazette until 27\(^{\text{th}}\) January 1998, 12 days beyond the 14-day period

\(^{29}\) Ibid, article 26(1) (a).

\(^{30}\) Ibid, article 26(1) (b).

\(^{31}\) Ibid, article 26(1) (c).

\(^{32}\) Ibid, article 26(1) (d).

\(^{33}\) Ibid, article 26(1) (e).

stipulated in article 26(1)(a) of the Constitution. On 12th February, the High Court Judge, Irene Mambilima, found his detention to be illegal and ordered him released after 51 days of detention without charge or trial. However, Kaulung’ombe had only minutes of freedom before being re-detained that same day on criminal charges of misprision of treason.

In this case it can be seen that the safeguards under article 26 (1)(a) usually serve no real purpose. In my view, it would have been better if there were a provision in the Constitution proscribing further detention on the same set of facts once the initial detention has been held to be illegal. This would be forcing the police to detain suspects only when they have reasonable grounds for suspicion. Even in the Second Republic, it was not uncommon for a detainee just released by order of the court to be arrested once outside court, and served with the same grounds, which the court had found invalid.\(^{135}\) Article 26 (1)(a) would be strengthened further if there were a constitutional requirement for a detainee to be entitled to claim damages from the state once his detention has been held to be illegal or malicious or baseless. The Mwanakatwe Constitutional Review Commission, in fact, recommended that a person should have a right to challenge the lawfulness of a detention and seek damages if the detention is found to be unlawful.\(^{136}\)

Just as is the case with article 26(1)(a), the interpretation of article 26(1)(b) by the courts has also been in favorem libertatis (in favour of the liberties of the people). In Chipango v. Attorney General,\(^{137}\) for example, the respondent was detained by an order of the President made under regulation 31(A) of the Preservation of Public Security Regulations. The grounds for his detention, which should have been furnished not more than fourteen days after the commencement of detention, were furnished sixteen days after such commencement. Publication


\(^{136}\) Ibid, in Chapter 10.9.

\(^{137}\) (1971) ZR 1.

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of the detention order in the Gazette was required to be made not more than one month after the commencement of the detention. The grounds were only published seven weeks after such commencement. On the respondent’s petition to the High Court, the court ordered his release holding that the detention had become illegal after the non-compliance with the mandatory conditions subsequent to the detention. The Attorney-General appealed to the Supreme Court on the ground that the non-compliance with the conditions subsequent to the detention order could not affect its validity, though failure to obey would open the way to other remedies, such as mandamus. The Supreme Court, rejecting the Attorney-General’s argument, held that the conditions prescribed in paragraph (b) of section 26A (1) of the Constitution are not mere procedural steps in the furtherance of the consideration of a detainee’s case but they go vitally to the fact of detention; the provisions must be adhered to strictly and failure to do so causes further imprisonment under the detention order to be invalid and that non-compliance with the condition in section 26A (1) (a) to publish in the Gazette had the same effect.

The courts have also been liberal when interpreting article 26(1)(c)\textsuperscript{138} of the Constitution. For instance, in \textit{Re Alice Lenshina Mulenga}\textsuperscript{139}, the petitioner requested a review of her case but her request was ignored for over three months. Cullinan, J held that the detainee had a constitutional right to apply for a review of her case at any time after one year’s detention\textsuperscript{140} and it was the duty of the executive to put the case immediately before the Review Tribunal. The current Constitution has reduced the period for requesting for review to three months.\textsuperscript{141} In my view, even the period of three months is too much unless the Constitution had proper safeguards to ensure that in these three months the rights of a detainee are not subjected to abuse, a practice

\textsuperscript{138} This article requires review of the detention every three months on request by the detainee.
\textsuperscript{139} (1973) ZR 243.
\textsuperscript{140} In the 1991 Constitution, as amended in 1996, the period after which the detainee can request for review of his or her detention, has been reduced to three months.
\textsuperscript{141} Ibid, article 26(1)(c).
which has almost become a norm for the police officers in Zambia. As at now there is little possibility that the forthcoming Mung’omba Constitution will reduce the period required to apply for review. The Mung’omba Draft Constitution has retained the three months period. In contradistinction, the Mwanakatwe Constitutional Review Commission had recommended that the current three months period, in which a detainee is entitled to review of his detention, be reduced to one month and automatic periodical reviews be held monthly thereafter.\(^{142}\)

Article 26(1)(d) seems to have been the most abused safeguard. This article requires the detainee to be afforded reasonable facilities to consult a legal representative of his own choice. The major flaw in this provision has been the failure to stipulate a specific time frame within which the detainee should be afforded the said chance to consult a legal representative. What the framers of the Constitution did not appreciate seems to be the fact that in most cases the rights of detainees are violated in the early hours of detention. The United Nations special rapporteur on torture, Nigel Rodley, for instance, has noted that:

\(\text{\textit{Torture often takes place within the first hours of detention, and often when the detainee is held incommunicado. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention embracing this short time frame as a way to protect detainees from torture and ill-treatment.}}^{143}\)

The absence of a period, in terms of hours, within which access to a legal representative should be afforded, has given the police wider room to defy the constitutional safeguard with impunity. The extent and effect of such defiance can be seen in the case of \textit{Dean Mung’omba},\(^ {144}\) where, following the failed coup attempt of 1997, police detained Mung’omba in incommunicado detention at police headquarters for four days, despite both his repeated requests

\(^{142}\) Mung’omba Constitutional Review Commission, extracted from \url{www.zamlii.ac.zm}, in Chapter 10.6.


\(^{144}\) Amnesty International Report on Zambia, supra note 134.
for legal representation and his lawyers’ attempts to discover his whereabouts. Mung’omba was tortured and denied food, drink and sleep. When he appeared in court he had marks of bruises and cigarette burns.\textsuperscript{145} It can be seen that in this case if the legal representatives had been permitted to see Dean within twenty-four hours of his detention, the police would not have had chance to torture and ill-treat him.

A further safeguard, which I think is essential for protecting the rights of the detainees, is the requirement to afford a relative or close friend of the detainee an opportunity to see the detainee within a short period of time after detention. This safeguard, unfortunately, is absent in the Constitution of Zambia. Nigel Rodley recommended that “in all circumstances a relative of the detainee should be informed of the arrest and detention within 18 hours.”\textsuperscript{146} This requirement is present in the Constitution of Malawi which enacts that: “An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible and in any case not later than forty-eight hours of detention.”\textsuperscript{147}

There have been several judicial decisions interpreting the above constitutional safeguards. In \textit{Attorney General v. Musakanya},\textsuperscript{148} the respondent cross-appealed on the grounds that the reasons for his detention were not furnished to him immediately, that is, at the time of his detention. He argued that the words ‘as soon as reasonably practicable’ meant immediately. The Supreme Court held that the words ‘as soon as reasonably practicable’ do not constitute a mandatory period; it serves as an injunction to urgency.\textsuperscript{149}

\textsuperscript{145} Affidavit by Dean Mung’omba to the High Court for Zambia, Principal Registry, Lusaka, 1997/HP/2617.
\textsuperscript{146} UN Doc. E/CN. 4/1995/35, supra note 143.
\textsuperscript{147} Article 45(6)(a) of the 1994 Constitution of Malawi.
\textsuperscript{148} SCZ judgment No. 17 of 1981 (unreported).
The meaning of ‘specifying in detail’ has also been a subject of much litigation. In the case of *Kapwepwe v. Kaenga*, the applicants appealed against the refusal of the High Court to grant habeas corpus. They contended that the grounds of detention were not detailed, and consequently they could not make representations to the detaining authority against their detentions. The Court of Appeal held that the statement, which the detaining authority was required to give, need not contain all the evidence, which had come to his knowledge because it might be against public interest to disclose such evidence. Therefore, the test to be applied whenever an allegation of vagueness in a ground for detention is made is whether the 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 Tribunal appointed to review his case.

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

The obligation by the detaining authority to furnish grounds of detention in a language that the detainee understands is merely directory. This means that failure to do so does not invalidate the detention. This High Court ruling exacerbates the possibility of abuse of detention powers by the detaining authorities.

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150 (1942) ZR 248 at page 263.
151 Chanda A. W, Supra note 149 at page 289.
152 (1979) ZR 154.
In *Shamwana v. Attorney-General*\(^{154}\), the court held that where an offence is disclosed in the grounds of detention, there is no obligation on the state to prosecute.

In terms of a revoked detention order, the Supreme Court, affirming the decision in *Re Cain*,\(^ {155}\) held that a detaining authority is under no constitutional obligation to furnish grounds for a detention, which has been revoked within fourteen days.\(^ {156}\)

In respect of the provision requiring review of the detention by a Tribunal, access to legal representation and to appear in person or by a legal representative, respectively, it is not clear from case law whether failure to comply with the aforementioned rendered the detention unlawful. However, in *Re Alice Mulenga Lenshina*,\(^ {157}\) the petitioner requested the review of her case but her request was ignored for over three months. She petitioned the court to invalidate the detention on that ground. The court held that the detainee had a constitutional right to apply for a review of her case at any time after one year’s detention and it was the duty of the executive to put the case immediately before the review tribunal.

In *Mundia v. Attorney-General*,\(^ {158}\) it was held that were the petitioner whilst in detention was visited on a number of occasions was visited by two lawyers, it could not be said that he was not afforded facilities to consult a lawyer.

### 3.3 Safeguards under the Preservation of Public Security (Detained Persons) Regulations and the Preservation of Public Security (Restricted Persons) Regulations.

When the President declares a state of emergency, he has powers to bring into force certain regulations. Some of these regulations may be aimed at providing safeguards on the rights of

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\(^{154}\) (1981) ZR 12.  
\(^{155}\) (1974) ZR 71 at page 77.  
\(^{156}\) Chanda A. W, Supra note 149 at page 294.  
\(^{157}\) (1973) ZR 243.  
\(^{158}\) (1974) ZR 166.
detainees. For instance, the Preservation of Public Security (Detained Persons) Regulations contain some provisions designed to protect the rights of detainees. Under these regulations, some of the most salient regulations relating to the welfare of detainees: allow for medical examination and weighing;\(^{159}\) that the detainee shall receive a normal daily diet;\(^{160}\) allow the detainee to wear his own clothing;\(^{161}\) permit visitors to visit him;\(^{162}\) permit a detainee to smoke tobacco and to receive newspapers, books and magazines;\(^{163}\) allow the detainee to receive and write letters;\(^{164}\) permit the attorney for the detainee to interview him;\(^{165}\) permit the detainee to exercise daily;\(^{166}\) no detainee may be compelled to perform any work\(^{167}\) nor may any prison officer use force unless its use is necessary.\(^{168}\) A detainee should not be placed in solitary confinement unless he has committed a scheduled offence.\(^{169}\) In addition, the President may appoint two or more persons to constitute a committee of inspectors for any place or places of detention, which, \textit{inter alia}, shall be responsible for ensuring compliance with the provisions of the regulations.\(^{170}\) The committee is empowered to visit any place of detention and may hear any complaint (not related to the validity or grounds of detention), which any detainee may wish to make.\(^{171}\) Finally, the regulations require that a person should only be detained in a place authorized by the President.\(^{172}\)

\(^{159}\) Regulation 12 of the Preservation of Public Security (Detained Persons) Regulations.
\(^{160}\) Ibid, regulation 13.
\(^{161}\) Ibid, regulation 14.
\(^{162}\) Ibid, regulation 18.
\(^{163}\) Ibid, regulation 15.
\(^{164}\) Ibid, regulation 19.
\(^{165}\) Ibid, regulation 18(4).
\(^{166}\) Ibid, regulation 17.
\(^{167}\) Ibid, regulation 16.
\(^{168}\) Ibid, regulation 26.
\(^{169}\) Ibid, regulation 20.
\(^{170}\) Ibid, regulation 21(1) and (2).
\(^{171}\) Ibid, regulation 21(4) and (5).
\(^{172}\) Ibid, regulation 33(5).
Admittedly, these safeguards are aimed at ensuring that the rights of the detainees are not violated by the police officers. However, in practice these safeguards have achieved very little. This may be attributed mostly to the ineffectiveness or complete absence of checks on the police. It seems that the requirement of regulations 21(4) and (5) that the President should appoint a committee that should ensure compliance with the provisions of the regulations has not been utilized effectively. This is evident, for instance, in cases such as the Dean Mung’omba\textsuperscript{173} case, where Dean Mung’omba testified that he had been suspended from a metal bar by his handcuffed hands and rope-tied and beaten. This method of torture is the most common in Zambia and it is popularly referred to as “the swing”.\textsuperscript{174} If the committee is appointed and it is able to visit prisons regularly, such incidences of primitive torture would be unheard of.

The other problem has been that, in the case of restricted persons, most of the safeguards under the Preservation of Public Security (Detained Persons) Regulations have been derogated from and rendered nearly useless by the Preservation of Public Security (Restricted Persons) Regulations.\textsuperscript{175} These regulations define the police powers of control on places of restriction and the safety and treatment of restricted persons. It creates offences, which prohibit loitering near places of restriction and delivery or removal of any articles or letters from a restricted place. These regulations also stipulate the circumstances in which a police officer or guard may use force and weapons on a restricted person. These regulations were seemingly intended for Kenneth Kaunda when he was declared a ‘restricted person’. They banned him from political activity, prohibited him from giving interviews to the press, and restricted his access to

\textsuperscript{173}Amnesty International Report, supra note 134.
\textsuperscript{174}Times of Zambia, 27 February 1998.
\textsuperscript{175}These regulations were adopted in 1997 by the then President F.T.J Chiluba and were seen to have been intended for Kenneth Kaunda who had been declared a ‘restricted person’ under section 3(3)(a) of the PPS Act and Regulations 16(1) of the Preservation of Public Security Regulations (S.I No. 151 of 1997).
It is clear here that at times the President may just target regulations at political opponents that he perceives to be a threat to his stay in office. Such practices are inconsistent with the values of the rule of law, which demand that a law should have general application.

There has been no case in which the courts have been faced with a question requiring the interpretation of the Preservation of Public Security (Restricted Persons) Regulations. It is just hoped that when an opportunity to interpret the provisions of these Regulations presents itself the court’s interpretation will be in favorem libertatis.

4.4 The Independence of the Judiciary and its Impact on the Role of the Courts to Provide safeguards on the Powers of the President.

In an atmosphere in which abuse of emergency and detention powers punctuate every declaration of a state of emergency, Judges are ultimately looked up to as the sentinel of the rights of the people. Only a Judiciary, which is independent from the heavy arm of the executive, can satisfactorily discharge this duty. Julius Nyerere once opined that “it is of paramount importance that the execution of the law should be without fear or favour. Our judiciary at every level must be independent of the executive arm of the state”\(^{177}\).

In Zambia, the executive’s influence on the liberty of the courts, to freely and impartially apply the law, has been regrettably great. In cases with political implications, very few Judges have been bold enough to pass objective and impartial decisions. For fear of harassment, criticism and transfer from the bench to lower offices, most Judges are ready to betray the people in favour of the executive. Zambian Judges need to be challenged to adopt the bold stance of one

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6 Amnesty International Report, supra note 134.
Nigerian Judge, Mr. Justice Oyemade, who, in the course of the trial of some opposition party supporters for the murder of a government party supporter, declared:

*I will not allow myself to be intimidated into sending innocent persons to jail. Even if this means losing my job, am still sure of leading a decent life. The only thing we have now in this country is the judiciary. We have seen politicians changing from one policy to another and one party to another, but the only protection the ordinary people have against all these inconsistencies is a fearless and upright judiciary.*\(^{178}\)

One important point to appreciate is that the executive will not be seen directly instructing Judges to rule in its favour. The executive usually uses covert ways that work to send a message to the Judges that there is a reward in being pro-government. It is for this reason that in a genuine democracy, where the importance of the independence of the Judiciary is appreciated, there should be laws aimed at ensuring that the atmosphere in which Judges operate does not make them feel they would lose something if they ruled against the executive. Professor Muna Ndulo advised that:

*Judicial independence flourishes in a society where conditions allow it to flourish. No government will be foolish enough to actually tell a judge what to do when it wants to interfere. What a government will do when it wants to interfere is to create conditions, which send clear massages that there are rewards for being inclined to the government. This is often done through appointments and promotions.*\(^{179}\)

The question now is: to what extent are the Zambian Judges and the Judiciary as a whole independent? In Zambia, the Constitution provides for the appointment of the Chief Justice, the Deputy Chief Justice and Supreme Court Judges, by the President, subject to ratification by the National Assembly.\(^{180}\) In the case of High Court Judges, the President must seek the guidance of

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\(^{178}\) B.O Nwabueze, *ibid.*
\(^{179}\) *Times of Zambia,* 22\(^{rd}\) December 1985.
\(^{180}\) Article 93(1) and (2) of the Constitution of 1991, as amended in 1996.
the Judicial Service Commission (JSC) in addition to obtaining ratification by the National Assembly.\textsuperscript{181}

The idea of Presidential appointments being ratified by the National Assembly is well intended and is aimed at ensuring that the President does not put on the bench people whom he would easily manipulate. However, in reality, this is a mere theoretical assumption that does not accurately reflect what happens in practice. In practice presidential appointments are ratified as a matter of course because in most cases the President has the required majority in Parliament to secure ratification. Dr. Julius Sakala observed that:

\textit{In practice, however, the suspected mischief does not appear to have been cured for the simple reason that the so-called multiparty Parliament... is a \textit{de facto} one-party National Assembly. The ruling... government has such an overwhelming majority that it can virtually legislate as it wishes.}\textsuperscript{182}

In my view, although the Constitution has provided some safeguards on the powers of the President to appoint judges, these safeguards are not only insufficient but also too theoretical. Since ratification by the National Assembly is secured as a matter of course, it would not be an exaggeration to argue that in practice Judges are \textit{de facto} appointees of the President. This undermines the independence of the Judiciary. Unless those appointed to the bench are appointed on merit and not on consideration of any ulterior factor, it would be an illusion to talk about an independent and impartial Judiciary. Professor Schwartz put this clearly when he wrote:

\textit{Unless those appointed to the bench are competent and upright and free to judge without fear or favour, a judicial system, however sound its structure may be on paper, is bound to function poorly in practice. That is why the problem of judicial selection and tenure is the pivotal one in all discussions of the proper administration of justice.}\textsuperscript{183}

\textsuperscript{181} Ibid, article 95(1).
\textsuperscript{182} Julius Bikiloni Sakala, The Role of the Judiciary in the Enforcement of Human Rights in Zambia, a Thesis submitted to the School of Law for the Degree of Doctor of Philosophy of the University of Zambia, June 1999, Library: Special Collection at page 303.
\textsuperscript{183} B. Schwartz, American Constitutional Law, (Cambridge: University Press, 1955), at page 130.
Furthermore, the liberty of Judges to question the declaration of state of emergency may be influenced by fear of compromising promotion prospects or alternatively the risk of being demoted to lower non-judicial offices. Justice Ernest Sakala reveals that “promotions in the judiciary are believed to be inconsistent with judicial independence, for the decision of a Judge may be influenced by the hope for promotion.” 184 Indeed if the executive has the power to promote and demote Judges this would send a massage to serving Judges, which massage may make Judges depart from their role as watch-dogs. Unlike the position in Zambia, Shetreet writes that:

*Judges in England are not influenced by the prospects for promotion because there, a person who accepts the office of a Judge must reckon that he will stay in that position always. He has taken it as his life work and must stand by it.* 185

Apart from the above, the independence of Judges can be further assured when the executive has no role in determining the salaries and other entitlements of judges. Conditions of service for judges in Zambia are regulated by an Act of Parliament, The Judges (Conditions of Service) Act. 186 The Act empowers the President to make regulations in respect of Judges’ salaries and general conditions of service. The possibility of the President giving Judges an increase in their salaries in order to secure some favours needs no emphasis. For instance, in 1997, salaries for Judges were more than doubled in less than one year and they were made in midstream of the Presidential and Parliamentary petition then before the Supreme Court. This raised suspicion that the increments were meant to influence the Supreme Court Judges who were adjudicating over the Presidential petition challenging the President’s nationality. 187

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186 Chapter 27 of the Laws of Zambia.
187 Julius Bikiloni Sakala, supra note 171 at page 309.
Direct criticism of court decisions may also jeopardize the independence of the Judges. Dr Roger Chongwe once observed that:

...each attack on a Judge for a decision given by him, not pointing out legal infirmity but by imputing an imputation of motive, is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions.\(^{188}\)

Professor A. W Chanda has also advised that:

...criticism of Judges is circumscribed in the sense that it must be bona fide and must not impute improper motives to the Judges. It must be genuine criticism and not malicious or calculated to subvert the administration of justice.\(^{189}\)

A classic demonstration of the effect of criticism of judicial decisions is the case of *The People v. Kambarage Mpundu Kaunda*.\(^{190}\) In this case, Kambarage was accused of murdering a woman, Tabeth Mwanza. In the High Court, Justice Cleaver Musumali found Kambarage guilty of murder and sentenced him to death. On appeal to the Supreme Court, a Coram consisting of Chief Justice Silungwe, *inter alia*, acquitted Kambarage citing several defects in the trial Judge’s judgment. The then minister of Legal Affairs, Roger Chongwe, swiftly condemned the Supreme Court’s judgment. Above all the Movement for Multiparty Democracy (MMD) made it virtually impossible for Chief Justice Silungwe to stay in office. He consequently resigned and went to work at the High Court of Namibia.

### 3.5 The Extent of the Court's Power to Question the Legality of the Declaration of a State of Emergency.

As already emphasized in chapter two, the absence of an express vesting of jurisdiction on the courts to determine matters relating to the declaration of a state of emergency has been very...
detrimental to the courts' watch-dog role. The courts have persistently averred that they have no jurisdiction to inquire into the declaration of a state of emergency. For example, in *Kapwepwe and Kaenga v. The Attorney General* 191 the court held that the power to declare an emergency was not for the court to decide but for the subjective satisfaction of the President. The court emphasized that the court could not question the President's decision even on a subjective test. Justice Baron specifically opined: "it is not open to the courts to debate whether it is reasonable for there to be in existence a declaration."

Some jurists have argued that although there is no express constitutional empowerment, the courts should derive competence from the provisions of article 94(1) 192 which confers on the High Court original and unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law. Other jurists have contended that the Zambian courts should seek guidance from pertinent international standards binding upon the state. 193 Some, still postulate that no exercise of discretionary power is immune from judicial review. These jurists claim that Article 30 of the Constitution requires that the factual situation motivating the President to declare a state of emergency should objectively exist. For this reason, they aver that the courts should have power to determine whether the factual situation that the President alleges to exist in fact does exist. And going by the principle that *he who alleges must prove*, it is argued that the executive should be obliged to prove before court that exceptional circumstances in fact exist. 194

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191 (1972) Z.R 248.
192 Constitutional (Amendment) Act No. 18 of 1996.
194 Administrative Law Lecture by Mr. John P. Sangwa, Friday, 09 September 2005 at 17:00-20:00 hours.
3.6 The Effectiveness of the Courts' Role in Safeguarding Human Rights during a State of Emergency.

The courts have usually adopted statutory interpretations aimed at ensuring that human rights are protected during states of emergency. However, these efforts have frequently been frustrated by the inadequacy of the powers given to the courts in the area of safeguarding human rights of detainees. For instance, the courts do not effectively check on the police. Even after discovering that a detainee had been subjected to torture or other ill treatment, the courts do not order transfer of the detainee to alternative detention camps.\textsuperscript{195} Detainees are sent back to the same police officers that tortured them.

In cases where constitutional safeguards have been flouted, the courts have ruled subsequent detentions illegal. In \textit{Attorney General v. William Chipango},\textsuperscript{196} the supreme court held that the constitutional provision requiring the publication of the detention in the Gazette and the furnishing of grounds for detention were substantive and not merely procedural provisions and that the state had to adhere to them strictly in order to validate the detention.

The other area in which the courts have been instrumental in safeguarding the rights of detainees is in respect of the writ of habeas corpus. Unfortunately, habeas corpus applications have been rendered nearly unnecessary by the fact that although the courts may order the detainee produced, they lack the power to supervise effectively the detention of prisoners or to call into question the activities of the security officers. For instance, the court did not have the mandate to take protective measures for Dean Mung’omba and other detainees once it was learned they had been tortured, such as ordering their release or transfer to other detention

\textsuperscript{195} Amnesty International Report, supra note 134.  
\textsuperscript{196} (1971) Z.R 1.
The situation is compounded by the fact that the President has power to order indefinite detention. Above all the police detention order and the presidential detention order are treated as separate and distinct. This usually renders habeas corpus applications of little practical importance because in many cases when the police are ordered to release a person detained under a police detention order, the detainee is almost immediately re-detained under a presidential detention order. For instance, in the case of *Musonda Kangwa*, High Court Judge Tamula Kakosa, allowed the application for habeas corpus because the police detention order was illegal since the grounds of detention were not published within the stipulated fourteen days. However, the Judge would not order his release because the police detention order had been superseded by a presidential detention order.

### 3.7 Summary

As I have shown in this chapter, the safeguards under the Constitution are not only inadequate but also very poorly framed. In the case of the requirement to afford a detainee access to his legal representative, the safeguard would have been more effective if there was a specific stipulation of the number of hours within which such access should be afforded to the detainee. Lawyers must be allowed to see their detained clients within a short period.

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197 Amnesty International Report, supra note 134.
198 Ibid.
CHAPTER FOUR.

4.0 THE EFFECTIVENESS OF SAFEGUARDS PROVIDED BY THE CABINET AND PARLIAMENT.

4.1 INTRODUCTION.

In this chapter, I will concentrate on the influence of the President on the freedom of the Cabinet to provide unbiased advice to the President. I will then analyse the doctrine of collective responsibility and its impact on the ability of Cabinet ministers to provide safeguards when they are in Parliament. This chapter will further focus on the impact of the absence of separation of powers between the executive and the legislature on the role of the legislature to check on the powers of the President. The effect of party patronage will also be explored. In the last segment, I will discuss the effect of the appointment of opposition members of parliament to ministerial positions on the independence of the legislature.

4.2 The Reality of Safeguards by Cabinet.

(a) The influence of the President on the freedom of the Cabinet to provide unbiased advice to the President.

The Zambian cabinet consists of the President, the Vice-President and Ministers.\textsuperscript{199} The President appoints the Vice-President and the ministers from amongst the members of the National Assembly.\textsuperscript{200} Both the Cabinet ministers and the Vice-President serve at the President’s pleasure. It is this insecurity in the tenure of office that makes the National Assembly an impotent institution in so far as providing safeguards on the powers of the President is concerned. In fact, the President is not obliged to give reasons for firing a minister. The absence of any safeguards on the powers of dismissal, gives the President wide latitude to eliminate those

\textsuperscript{199} Constitution of Zambia, Chapter 1 of the Laws of Zambia, article 49(1).

\textsuperscript{200} Ibid, article 45(2) and 46(2).
that are not willing to toe the President’s line of thinking. Cabinet ministers, thus, always conduct themselves in a manner that effectively nurtures their relationship with the President. Although the Mung’omba Draft Constitution has subjected the appointment of ministers from outside Parliament to ratification by the National Assembly, little would change if it were enacted because removal of a minister from office has still been left to the whims and caprices of the President. In the case of the Vice-President, the Mung’omba Draft Constitution has assured security of tenure since, apart from being a running mate to a person seeking election as a President; the Vice-President can only be removed from office in similar circumstances, and following a similar procedure as in the case of removal of the President.

Thus, it would not be an exaggeration to say that the requirement of consultation with cabinet before the President can declare a state of emergency is a facile and ineffective safeguard. It would have been more reasonable if the exercise of emergency powers were made subject to consultation with an independent body, for instance, a committee consisting of people over whom the President has no ‘hire-and-fire’ powers.

(b) The Doctrine of Collective Responsibility and its Impact on the ability of Cabinet Ministers to Provide Safeguards in Parliament.

The ineffectiveness of Cabinet members to provide meaningful safeguards on the President’s emergency powers extends even to the time when the ministers are in parliament. The doctrine of collective responsibility requires ministers to be loyal to government policy. This concept in short implies that all members should fully support Cabinet decisions; whoever disagrees must resign. In reality, therefore, the role of Cabinet ministers when in Parliament is not to use their brains and objectively do what they think is right; but to blindly endorse what they blindly supported (or refused to support, as the case may be) whilst in Cabinet. Even if a minister had a contrary view whilst in Cabinet, the doctrine of collective responsibility requires such a minister to ipso facto support the Cabinet resolution, failing which he should resign. Thus, since it would be expecting too much to think that any of our unprincipled Zambian ministers

202 Ibid, article 152(2).
203 Ibid, article 149(2).
204 Ibid, article 159.
would resign, the most rational conclusion is that the safeguarding role of the Cabinet ministers both in Cabinet as well as in the National Assembly is at best decorative.

4.3 Effectiveness of Safeguards by Parliament.

(a) Absence of Separation of Powers between the Executive and the Legislature: Its impact on the Role of the Legislature to Check on the Powers of the President.

In Zambia, there is virtually no separation between the executive and the legislative arms of government. The legislative power of the Republic is vested in Parliament, which consists of the President and the National Assembly.\(^{205}\) The National Assembly is made of, *inter alia*, one hundred and fifty elected members and not more than eight nominated members.\(^{206}\) The President, from amongst the members of the National Assembly, appoints the Vice-President and ministers.\(^{207}\) The President wields a lot of power and influence over Parliament. In addition to his power to nominate, at most eight members of Parliament, the President is not restricted from appointing opposition member to ministerial positions.\(^{208}\) The absence of separation between the executive and the legislature dangerously jeopardizes the independence of the legislature.

The importance of an independent legislature needs not be over stressed. For the National Assembly to provide meaningful and effective safeguards on the powers of the President it should be independent from interference by the executive; the National Assembly should not be a *de facto* component of the executive but a distinct and independent organ. It is only an independent legislature that can be trusted when it comes to checking on the powers of the President.

The extent to which the absence of separation of powers between the executive and the legislature jeopardizes the role of the National Assembly, to provide effective safeguards on the President, may be demonstrated in two ways. Both ways allow the President to strengthen his support in the House. First, the power of the President to nominate at least eight members of Parliament\(^{209}\) works at best to dilute the parliamentary composition. The more members the ruling party has, the greater are the chances of securing ratification of an emergency declaration

\(^{205}\) Constitution of Zambia, Chapter 1 of the Laws of Zambia, article 62.

\(^{206}\) Ibid, article 63(a) and (b).

\(^{207}\) Ibid, article 45(2) and 46(2).

\(^{208}\) Ibid, article 46(2).

with little, or no objective debate at all. The power of nominating MPs is usually defended as being “necessary in order that the House might be given the benefit of the services of persons of experience and proven ability who might not wish to subject themselves to the ordeal of an election.” However, Professor Nwabueze notes that “… the argument is somewhat disingenuous, and looks like a disguise to mask the real motive, which is the desire of the government to increase its support in the Assembly.”

The diluting effect of nominated MPs is even compounded further by the fact that these MPs hold their seats as agents of the President, and therefore at the latter’s will and pleasure. The President has power at any time to revoke the nomination of any member and appoint any other person in that member’s stead. It cannot be overstressed that independence of will cannot be expected of a member subject to removal at the pleasure of the President. “With the risk of removal hanging over him, and anxious to remain in the President’s favour in order to ensure his re-nomination, a nominated member in Zambia… can ill afford to be too independent of the government at all events, not to the extent of voting against it.” Thus, as long as the President retains the power to nominate members of Parliament, the constitutional safeguard of parliamentary ratification will continue to be a facile formality.

Second and lastly, the power of the President to appoint MPs to ministerial positions jeopardizes the ability of the National Assembly to provide effective checks on the President’s powers. The executive, to make sure that the legislature remains compliant to its will and wishes, extensively uses this kind of patronage. The proportion of MPs enjoying executive patronage may be so high as to make the National Assembly a de facto organ of the executive. President Mwanawasa is a classical example of a President who has ‘poached’ opposition MPs in a masked attempt to increase his support in the House. The 2001 Presidential and parliamentary elections saw the ruling Movement for Multiparty Democracy (MMD) scoop 70 parliamentary seats whereas the opposition got an aggregate of 80 seats. This situation brought prima facie hope for an effective opposition in parliament. Sakwiba Sikota, the opposition United Party for National Development (UPND) Vice-President, expressed hope that Parliament would no longer

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211 Ibid.
However, in no time President Mwanawasa ‘embarked on a program’ to increase his supporters in the House. This was achieved through appointing opposition MPs to ministerial positions and catalyzing artificial defections of opposition MPs to the ruling MMD. As at 23rd July 2003, statistics at the National Assembly showed that there were 21 Cabinet ministers and 41 deputy ministers making a total of 62 members of the executive branch of government in Parliament and out of these six were surprise appointments of opposition MPs into the executive branch. The appointments of opposition MPs were disguised and termed as an extension of an olive branch by the President to the opposition. However, as observed by political and legal analysts, the move was aimed at interfering with the independence of the National Assembly since those appointed would forthwith hardly oppose Mwanawasa’s policies. Kawonga UPND Member of Parliament, Douglas Siakalima observed that “President Mwanawasa was doing this when he knew that a strong opposition was necessary in any democracy…. President Mwanawasa knew that ministerial positions went with a lot of rewards which could compromise the appointees.”

(a) Party Patronage

In this component, I will use the phrase party patronage to refer to ‘the support and loyalty given by members of Parliament to their specific political parties’. To make the discussion more relevant to my topic of research, I will focus mostly on the blind support that MPs of the ruling party give to the ruling government. The importance of this confined focus is even compounded by the fact that the ruling party has almost always had majority support in the House.

The concept of party patronage in Zambia seems to have been strengthened by article (2)(c) of the Constitution which provides in part:

(2) A member of the National Assembly shall vacate his seat in the Assembly-

(b) In the case of an elected member, if he becomes a member of a political party other than the party of which he was an authorized candidate when he was elected to the National Assembly... or having been a member of a political party, he becomes an independent.
What has been happening in the Zambian politics is that when an MP opposes the views of his political party, such an MP is viewed as a traitor and, most likely than not, expelled from the party. Party patronage is most apparent when it comes to voting. Member of Parliament usually vote according to what the specific political parties they represent want. Even where a Member of Parliament is opposed to a particular proposal, he or she will not vote according to what he or she fills is right or is in the interest of the people he or she represents. Conversely, how an MP votes will be dictated by the position taken by the party, a member of which he or she is; the MP’s mechanically toll the lines of their political parties. For instance, during voting on the motion, requiring that a winning Presidential candidate must have at least 50% plus one of the total number of votes cast in an election, all the ruling MMD MPs together with opposition MPs that have been given ministerial positions voted against the motion. A day before voting, President Mwanawasa had called a caucus for MMD MPs at which he allegedly instructed them to vote against the motion. Forum for Democracy and Development (FDD) President, Edith Nawakwi, condemned Mwanawasa’s action and emphasized that the MPs were supposed to be allowed to vote freely without influence from the President. She advised that the MPs represented the people and were thus supposed to uphold the views of the people as reflected in the Mung’omba Constitutional Review Commission Report.

It is clear from the foregoing discussion that even when a proclamation of a state of emergency is presented before the National Assembly, ratification will be a matter of course if the President has majority support in the House. By necessary implication, therefore, the constitutional requirement for ratification will at best be a mere formality. Probably what needs to be done, in addition to providing for the appointment of ministers from outside Parliament, is

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217 UNZA Radio, Lusaka Star Radio Programme, which comes at 08:30 hours, 18th August 2005.
218 Ibid.
that the President should not exercise the power of nominating MPs. Since this power is supported as necessary in order that the House might be given the benefit of the services of persons of experience and proven ability who might not wish to subject themselves to the ordeal of an election, this power should be diversified to allow opposition political parties, having a certain minimum number of MPs in the House, to nominate a given number of MPs.

Party patronage has been reinforced further by the existence of party whips. The party whip in Zambia is used to ensure that all members of parliament sponsored by the particular party toe the party line mechanically like robots without any room for independent and objective thinking. Professor Nwabueze notes that:

While admitting the necessity for party discipline in Parliament, the whip has unfortunately been applied in Africa so stringently as to become a negation of parliamentary independence. The reason is that party unity is interpreted as demanding that an MP must never speak, much less vote, against the government.\textsuperscript{219}

The role of the party whip in Africa, particularly in Zambia, reveals a big difference when contrasted with that of a party whip in Britain. Under the British arrangement, within reasonable limits a government MP may speak against a government measure though having done so he is expected not to vote against it. Occasionally, the government may withdraw the whip and allow members to vote freely according to their conscience.\textsuperscript{220}


In February 2003, President Mwanawasa indicated to the ninth National Assembly session that he would appoint opposition members of Parliament to ministerial positions. The President declared that he would go ahead with the appointments even if the parties to which the MPs

\textsuperscript{219} B.O Nwabueze, Presidentialism in Commonwealth Africa, supra note 210 at page 283.

\textsuperscript{220} Ibid.
belonged resisted.\textsuperscript{221} Earlier, the President had claimed that the appointments were intended to be an extension of an olive branch and purely aimed at fostering national unity. Some opposition leaders welcomed the proposed appointments, but only on condition that they should be allowed to choose which MPs President Mwanawasa should appoint so that Mwanawasa is not left to choose those MPs that he can easily manipulate.\textsuperscript{222} However, Mwanawasa rejected the proposed safeguard and instead went ahead to solely determine whom he should appoint.\textsuperscript{223}

Admittedly, there was nothing unconstitutional about the President appointing opposition MPs to ministerial positions. Article 46(2) of the Constitution\textsuperscript{224} permissively enacts:

\textit{Appointment to the office of minister shall be made from amongst members of the National Assembly.}

According to article 46(2) any Member of Parliament, whether independent, opposition or from the ruling party can be appointed minister. However, although there was nothing unconstitutional about the appointments, in my view, there was everything undemocratic. According to Professor Carlson Anyangwe, in a constitutional democracy there should be proper separation of powers and effective checks and balances.\textsuperscript{225} The idea of checks and balances presupposes that a specific function is assigned primarily to a given organ, subject to a power of limited interference to ensure that each organ keeps within the sphere delimited to it.\textsuperscript{226} The presence of opposition Members of Parliament in the House is a very essential ingredient of democracy. Since the MPs from the ruling party have been known to \textit{ipso facto} ratify any policy

\begin{footnotesize}
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\item[221] The Post, Wednesday, February 5, 2003.
\item[222] The Post, Thursday, February 6, 2003.
\item[223] The Post, Saturday, February 8, 2003.
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\end{footnotesize}
proposed by the executive, it is only the opposition members of Parliament that can be trusted as capable of censoring the executive.

The effect of appointing opposition members of Parliament to ministerial positions is that such MPs would no longer be able to check on the executive since they would become part of the executive. Moreover, the doctrine of collective responsibility will oblige all ministers, including those from the opposition, to endorse government policies in Parliament. In respect of the declaration of state of emergency, the proclamation will be ratified as a matter of course with little or no debate at all. Therefore, one would conclude that the appointment of opposition members of Parliament to ministerial positions works at best to relegate the National Assembly to the insignificant role of a mere rubber stamp.

4.4. SUMMARY.

Although the Constitution allows the President to declare a state of emergency only after consulting the Cabinet, the safeguard is at best a mockery. With the risk of removal hanging over him, and anxious to remain in the President’s favour to ensure re-appointment, a minister can ill-afford to be too independent, at least not to the extent of criticizing the proposals of the appointing authority.

Above all, even the requirement of Parliamentary ratification of a declaration of a state of emergency seems to be a mere formality in the Zambian set up. The ruling party has always had majority support in the House. Even when the MPs from the ruling party are fewer than those from the opposition, strategies of ‘poaching’ opposition MPs have become common practices in the Zambian politics.
saw that unlike the emergency laws of other countries, the Zambian emergency laws are couched in a way that leaves a lot of room for abuse.

Chapter three discussed the legislative and judicial safeguards on the powers of the President to declare a state of emergency. We saw that the constitutional safeguards on the rights of detainees are not only inadequate but also poorly framed. Chapter three further discussed the importance of an independent judiciary in safeguarding the rights of detainees in a state of emergency. It was discovered that although Judges have at times tried to interpret the law *in favorem libertatis*, such efforts have been frustrated by the law which allows the authorities to re-detain a person under a Presidential detention order once the police detention order has been held to be illegal.

In chapter four, we saw that the constitutional provision requiring the President to declare a state of emergency only after consulting Cabinet is a facile and ineffective safeguard. We discovered that since the members of Cabinet are appointed and serve at the pleasure of the President, they usually lack independence of will. Chapter four revealed that even the National Assembly could not be trusted to provide objective safeguards. We saw that since independence, the ruling party has had the necessary majority required to secure ratification of a Presidential declaration of a state of emergency. It was revealed that MPs from the ruling party invariably ratify Presidential declarations without any critical debate.

5.2 Recommendations.

It is the thesis of this dissertation that the absence of a definition of the concept of state of emergency in the Constitution has been the major factor in facilitating the abuse of emergency powers. For this reason, the first recommendation is that the Constitution should clearly
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circumscribe the circumstances that should actuate the President to invoke extraordinary powers. It is only in this way that the courts can have something to refer to when questioning the President’s exercise of emergency powers. Thus, I would recommend that resort to emergency powers should only be had when the Republic is threatened with war, invasion, general insurrection, disorder, natural disaster and other circumstances that authentically constitute a threat to the life of the nation. Whether a particular situation authentically constitutes a threat to the life of the nation should not be a matter left for the sole determination of the President. Conversely, the courts should have power to determine the authenticity of alleged emergency circumstances. In my view, it is important to leave the list of circumstances, which should be regarded as constituting exceptional threats, open-ended because it is not possible to provide a list that can capture all potential exceptional threats to the life of the nation. However, if the courts are not given powers to question the declaration of a state of emergency, such an open-ended list would be liable to abuse and in any case would be just as bad as not circumscribing the circumstances at all.

In addition, the Constitution should allow the President to declare a state of emergency ‘only with regard to the specific location where the emergency exists’. The importance of such a provision is to avoid situations where the President would have the latitude to rely on threats affecting, and confined to certain parts of the country, to declare a country-wide state of emergency. In my view, a localized threat should only justify a declaration of a nation-wide state of emergency when there is an objectively authentic possibility of the threat spreading to other parts of the country. Whether such possibility exists should be a matter for determination by the courts of law and not a subjective perception of the President.
In order to improve the safeguards on the powers of the President to declare a state of emergency, I would recommend that the requirement that the President should declare a state of emergency after consulting Cabinet should be replaced by a provision that enjoins the President to consult a more independent and impartial committee. In this respect, I would recommend that a Defence and Security Committee of the National Assembly should be established with power to decline to approve a declaration where the alleged threat to the life of the nation does not exist. This would be a more reasonable and effective safeguard than consultation with the Cabinet since the Cabinet consists of ministers, all of whom are appointed by the President and serve at the latter’s pleasure. Hence, the ability of the Cabinet ministers to provide real safeguards on the powers of the President may be compromised by the fear of being fired if perceived to be too critical of the views of the appointing authority. Conversely, the Defence and Security Committee of the National Assembly may comprise, *inter alia*, of opposition Members of Parliament who owe no personal obligation to sing the chorus of the President or to automatically endorse the perceptions of the President. Such a committee may, therefore, be in a better position to provide objective and constructive safeguards on the President’s powers.

Second, the High Court should be made competent to hear applications challenging the validity of a declaration of state of emergency, any extension thereof, and any action taken, including any regulation enacted under such declaration. It is only when the courts have jurisdiction to question the authenticity of an emergency declaration that there can be an effective check against abuse of the powers by the President.

Notwithstanding the absence of any express statutory provision conferring powers on the High Court to question the declaration of a state of emergency, I would recommend that the High Court should base its jurisdiction on article 94 of the Constitution, which gives it unlimited and
original jurisdiction to hear any complaint arising under any law. The meaning of ‘unlimited and original’ jurisdiction was clarified in the case of Zambia National Holdings and United National Independence Party v. Attorney-General. 227 The Supreme Court observed in that case that:

As a general rule, no case is beyond the competence and authority of the High Court; no restriction applies as to the type of cause and matters as would apply to the lesser courts.

Thirdly, the detaining authorities should not have power to detain persons indefinitely. In any case detainees should not be detained for more than one month unless the court so orders. It is recommended that a detainee detained for more than a month, without the authority of the court, should be entitled to be released unconditionally.

Fourth, the President should not have powers of detaining suspects during a state of emergency. In fact, the powers of the President to detain a person under the laws of Zambia have been challenged as unjustified in a democratic country, which professes support for human rights. 228 Indeed, since a President is a politician and not a professional police officer, in a democracy, he is not supposed to exercise detention powers. Being a politician, the President might use detention powers to lock up opposition leaders whom he perceives to be threats to his stay in office. Divesting the President of detention powers is not enough if the President can still have indirect influence on the operations of the police. I, therefore, recommend further that to ensure that the police operate independently, the office of the Inspector General of Police (I.G) should be a constitutional office. Security of tenure of the I.G should be guaranteed by subjecting the appointment and dismissal of the I.G, by the President, to Parliamentary ratification.

Fifth, other safeguards on the rights of detainees should be that:

(a) An adult family member or close friend of the detainee should be notified of the detention as soon as is reasonably possible and in any case not later than twenty-four hours of detention.

(b) A legal representative of the detainee should be allowed to see the detainee within twelve hours of detention. In this way the police would have no time to torture or ill-treat the detainee since there would be fear that the legal representative may notice any actions of torture or of ill-treatment once he visits the detainee.

(c) Detailed grounds of detention should be furnished within five days of detention.

(d) A notification of detention should be published in the Gazette within seven days of detention.

(e) A detainee should be entitled to appear before a court of law not later than ten days after detention and the court should be empowered to order release of the detainee if it is satisfied that the detention is not necessary to restore peace and order.

(f) If a court of law finds the grounds of a detainee’s detention unjustified and orders his or her release, such a person should not be detained again on the same grounds unless the state shows good reason for re-detention.

(g) Above all, legislation should be enacted to confirm the role of the courts in safeguarding human rights, including giving the courts a mandate to supervise effectively the detention of prisoners, supervise and call into question the activities of the security services, and order the release or transfer of those detained who appear in the court’s judgment to have been tortured or ill-treated.
(h) Acts of torture and other ill treatments should be made punishable offences under criminal law. In addition, all statements and other evidence obtained through torture should be prohibited by law in any legal proceedings, except against a person accused of torture as evidence that the statement was made. If statements obtained through torture are admitted in evidence the court would by implication be encouraging torture. In any case, the police would start considering torture as just one of the lawful many methods of extracting evidence from a suspect.

(i) There should be a review of the detention by an independent and impartial tribunal within one month of detention and automatic periodical reviews should be held monthly thereafter.

(j) The review tribunal must have power to release the detainee and order punitive damages against the state. The findings of the review tribunals should be binding. The Mvunga Constitution Review Commission found that the majority of the petitioners supported the creation of review tribunals, but felt that these tribunals should have power to make binding decisions and to review detentions by the executive within three months of such detentions and to make decisions that are binding on the detaining authorities.\(^{229}\)

(k) The powers and mandate of the Human Rights Commission (HRC) should be broadened to allow the Commission to compel co-operation by the authorities, through imposing administrative and legislative sanctions when the exercise of the powers to investigate and take remedial action is obstructed. The HRC should also be empowered to enforce its recommendations through a court of law.

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The executive should be obliged to make monthly reports to Parliament on the number of people detained, the respective grounds of detention, places of detention and state of their health.

Sixth, article 25 of the Constitution, which provides for derogations during a state of emergency, should be amended to bring it into conformity with article 4 of the International Covenant on Civil and Political Rights. Article 25 of the Constitution of Zambia allows derogation from the freedom of thought, conscience and religion, which the ICCPR\(^\text{230}\) recognizes under article 18 as non-derogable even in times of public emergency. The Constitution of Zambia should not allow any derogation from freedom of thought if the country is to have a good record of human rights observance.

It became apparent in the discussion that even the most effective safeguards would not be translated into practical safeguards if the courts were not independent. There is need to have a judicial system that is free from the executive influence and where all Judges do not serve at the pleasure of the executive. It is recommended therefore, that although the President, subject to parliamentary ratification, should do the official appointment, there should be an independent commission to nominate candidates for appointment. The President should not have a hand (direct or indirect) in determining the composition of the commission. It is recommended further that the names of the nominees should be published in the Gazette and other media having a nation-wide circulation to allow people to scrutinize the nominees before the names can be submitted to the President for official appointment. Once appointed, the President should not transfer a judge to any other sector of the judiciary or the executive or the legislature.

We noted in the main body of this dissertation that the Cabinet and the National Assembly have been ineffective in their role of providing a watchful eye on the President. It is

\(^{230}\text{Article 4(1).}\)
recommended that measures should be put in place to ensure that members of Cabinet do not serve at the pleasure of the President. First, the Cabinet ministers should be appointed from outside Parliament, subject to parliamentary ratification. Second, the President should be obliged to present reasons to Parliament for firing a Cabinet minister.

It is recommended in respect of the legislature that there should be separation of powers between the executive and the legislature. Above all, MPs from the ruling party should be allowed to debate and vote freely without undue influence from the executive. My recommendation is that this would only be feasible if voting is done by secret ballot so that MPs are not inhibited by fear of reprisals from their parties. Furthermore, the power of nominating MPs should not be left to the President. Instead, all political parties, with at least ten percent representation in the House, should be allowed to nominate at least one MP.

Lastly, in order to strengthen separation of powers between the executive and the legislature, the President should not have powers of nominating Members of Parliament because this practice works, at best, to dilute the composition of House to the disadvantage of the opposition political parties. The presidential powers of nominating MPs has the final result of turning the National Assembly into a mere rubber-stamp; Members of Parliament, who are dear to the President never object to the President’s appointments, declaration of state of emergency and other matters requiring the ratification of the House. However, since the power of the President to nominate Members of Parliament is supported as necessary in order that the House might be given the benefit of the services of persons of experience and proven ability who might not wish to subject themselves to the ordeal of an election, this power should be diversified to allow opposition political parties, having a certain minimum number of MPs in the House, to nominate a given number of MPs.
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