

THE UNIVERSITY OF ZAMBIA

THE RELEVANCE OF ECONOMIC CRIMES

TO

PUBLIC SECURITY: THE RESPONSE

OF THE ZAMBIAN JUDICIARY

A DISSERTATION SUBMITTED TO THE

SCHOOL OF LAW

IN CANDIDACY FOR THE DEGREE OF

MASTER OF LAWS

BY

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LUSAKA

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APPROVAL

This dissertation of BILIKA HARRY SIMAMBA is approved as fulfilling part of the requirements for the degree of Master of Laws by the University of Zambia.

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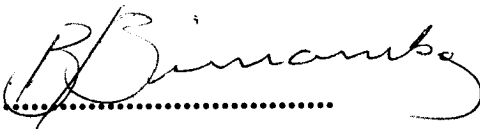
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DECLARATION

I, BILIKA HARRY SIMAMBA, do solemnly declare that this dissertation represents my own work, which has not previously been submitted for a degree at this University or any other University.

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Date: 04/09/89

DEDICATION

This work is dedicated to His Lordship the Chief Justice of Zambia, the Honourable Annel Silungwe, Deputy Chief Justice Mathew Ngulube, Mr. Justice Brian Gardner, Mr. Justice Ernest Sakala and Mr. Acting Supreme Court Justice Bonaventure Bweupe, who all sat to hear and determine the Case of Rao v Attorney - General.

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ABSTRACT

Traditionally, in Zambia and most of the common and civil law nations, emergency legislation was by and large never directed towards economic security both in formulation and application. Increasingly in Third World countries however, legislation has been introduced to allow detention on account of factors considered relevant to the economy. Where such legislation has not been introduced, old legislation which may never have directly dealt with "economic detentions", has often been interpreted so as to make such detention lawful.

This last approach has manifested itself in Zambia, breeding divergent bodies of judicial opinion. At present, there are a number of decisions by different Judges of the High Court for Zambia which have decided differently. The Supreme Court has however recently ruled in favour of the State in Rao v Attorney-General, a matter relating to illegal trafficking in precious stones. An examination of the judgments of the five judges reveals that the issue of economic crimes is far from settled.

The whole issue is as to the interpretation of the following provision in the Preservation of Public Security Act:

" 2. In this Act, the expression "public security" includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the preservation and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny and rebellion and concerted defiance of and disobedience to law and lawful authority, and the maintenance of the administration of justice."

Some High Court and Supreme Court Judges have held that this allows detentions for economic crimes while others have held otherwise.

It is particularly important to discuss this matter at the present time for at least two reasons. First, if the power to detain under emergency laws is, by construction or by amending legislation, extended to economic crimes, it has been argued that this will make destructive inroads into the enjoyment of individual liberties through a power to detain that is already too wide. Second - and this is the opposing argument - an attempt must be made to construe the power widely so as to help contain agro-economic maladies which in Africa, for the first time in World history, are leading directly to the loss of millions of lives, and life is one of the interests which emergency legislation was meant to safeguard and promote.

In Chapter I we shall lay the background in the form of emergency legislation and the judicial interpretation of it. Chapter II will directly address the issue as to whether economic crimes can properly be said to come within the meaning of "public security" as contained in section 2 of the Preservation of Public Security Act. Finally, in Chapter III we shall examine as to whether support can be found in international conventions for either view, if such conventions are construed with the African condition in mind. This discussion of international conventions in the contest of our local legislation will, I believe, give the work a further interesting and unique feature. Further, this conflict as to the relevance of economic crimes to public security re-opens some of the fundamental differences between the East and West as to the relationship between economic, social and cultural rights; and civil and political rights.

In the examination of this matter of public security, it will be convenient to assess some of the old and new approaches to the construction of statutes. These approaches, regardless of which approach one prefers, will have a significant bearing , not only on the proper scope of the Preservation of Public Security Act, but also on the entire matter of modern statutory construction, and therefore on the scope of many Acts of parliament and Statutory Instruments.

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CHAPTER ONE

DETENTION LAW IN GENERAL

I. Introduction

The Zambian courts are usually commended for the independence they have shown in matters of detention without trial. This independence, coupled with the fact that there have been over the years numerous challenges of Presidential detentions, has made available a large and important body of case law on the subject. In approaching the matter of detentions for crimes of economic relevance, otherwise known as economic crimes,¹ we should naturally first gain a good understanding of the law governing detentions.

II. An overview of detention law

Detention laws are contained in the Constitution, other Acts of Parliament, and Regulations; and of course in case law. We propose to deal with the legislation and the court cases interpreting that legislation, in that order.

A. Legislation stated

The principal legislation dealing with emergencies and detentions can be divided into three groups: that dealing with the declaration of emergencies; that conferring a power to detain; and that imposing certain duties upon the detaining authority by way of safeguards to the person whose right to personal liberty has been curtailed.

First, power to declare emergencies is contained in Article 30 of the Constitution² which proves:

- (1) The President may, at any time, by Proclamation published in the Gazette, declare that -
 - (a) a state of public emergency exists; or
 - (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.

There are therefore two kinds of declarations, one based on the here and now, and the other grounded in apprehension.

Declarations

Detentions under paragraphs (a) and (b) bring into force two statutes, respectively. An actual state of emergency brings into force the Emergency powers Act³ while a threatened emergency makes the provisions of the Preservation of Public Security Act⁴ available to the President and other persons specified there. There has never been a declaration under paragraph (a), but there has been one under paragraph (b) since June, 1964, three months before independence in October.

The continuance of either kind of emergency was subject to certain special provisions. The Constitution of 1964 provided that a declaration needed the approval of the National Assembly within five days if the House was sitting and twenty-one days if it was not, without which it lapsed. If approved by the National Assembly the emergency remained in force for six months, subject to a power of the legislature to renew it in further six-month periods.⁵ In 1969, the Constitution was amended to the effect that a declaration remained in force indefinitely unless revoked by the National Assembly.⁶

Second, a power to detain exists under regulation 33 of the Preservation of Public Security Regulations.⁷ Subregulation (1) provides that:

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

The power to detain extends to senior police officers. By

regulation 33 (6) of the same regulation.

"Any police officer of or above the rank of Assistant Inspector may, without warrant, arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation, and may order that such person be detained for a period not exceeding twenty - one days pending a decision whether a detention order should be made against him, and the provisions of subregulation (5) shall apply in respect of his detention during such period:

Provided that a person arrested under this sub-regulation 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 arrests him finds, on further inquiry, that there are no grounds which would justify his detention under this regulation".

Thus a police detention under sub-regulation (6) is meant as a prelude to a Presidential detention under sub-regulation (1). Further, a police detention is limited to 28 days while a Presidential one has no time limit.

And third, the safeguards. These are contained in Article 27 of the Constitution:

- "(1) Where a person's freedom of movement is restricted, or he is detained ... the following provisions will apply:
- (a) he shall, as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language he understands specifying in detail the grounds upon which he is restricted or detained;
 - (b) not more than one month after the commencement of his restriction or detention a notification shall be published in the Gazette stating that he has been restricted or detained.....;
 - (c) if he so requests at any time during the period of such restriction or detention not earlier than one year after the commencement thereof or after he last made such a request .. his case shall be reviewed by an independent and impartial tribunal....;
 - (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice.....";

There are of course other important provisions regarding emergencies and detentions; we shall deal with these in due course. The ones cited above however are the key provisions touching on the substantive law. Further, litigation on these abounds. And in order to do justice to the matter of economic crimes and to the human rights issues involved it is necessary to gain as full an

appreciation as possible of the nature and extent of the powers to declare emergencies and to detain, as well as the nature and extent of the safeguards. This necessitates a detailed examination of the cases.

B. Judicial interpretation of legislation⁸

(i) The nature of obligations under Article 27 of the Constitution

It was said a long time ago that "[t]he courts will not allow any individual to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment."⁹ In such cases courts have generally held that failure to follow prescribed form or omission of any step invalidated the procurement or continuance of such imprisonment. This has been the general attitude of Zambian courts with regard to the safeguards contained in Article 27, notably in relation to the grounds and publication in the Gazette of the fact of detention. In Chipango v Attorney - General,¹⁰ the Court of Appeal (now Supreme Court) reasoned that the two requirements were mandatory because failure to comply with the requirements as to grounds would detract from the ability of the detainee to secure his release and publication in the Gazette would guard against the possibility of a person being whisked away in secret and held incommunicado for an indefinite period. The court emphasised that the issue is not whether the applicant has or will in fact be prejudiced in obtaining his release but whether his constitutional safeguard has been infringed.

It is conspicuous that in other parts of Africa it has been held, with regard to similar safeguards, that breaches did not invalidate the detentions, being merely curable defects which at most would entitle the detainee to damages.¹¹

We shall now consider in more detail the safeguards as they have been interpreted in Zambia.

(ii) The declaration of an emergency

The need to declare an emergency (in this case a threatened emergency)

in 1964 as a result of the Lumpa Uprising has never been a matter for serious argument in Zambia. The courts have had however to deal with the contention that after the uprising was overcome, the continuance of the declaration was unnecessary and therefore outside the scope of Article 30.

The Court of Appeal said in the leading case of Re Kapwepwe & Kaenga¹² that:

"It is not open to the courts to debate whether it is reasonable for there to be in existence a declaration under Article [30] of the Constitution".¹³

Thus judicial review of the continuance (most likely a declaration too) of an emergency, even on an objective basis, was ruled out.

Another unsuccessful attempt was made, this time in Nkanka Chisanga Puta v Attorney - General.¹⁴ There it was also argued "that the continuance of the declaration... is unlawful and an abuse of power, since the reasons upon which the declaration was made no longer exist".¹⁵ It was further submitted that "the court should be competent to hold that the continuation of the proclamation is illegal even if such continuation could be justified by some other reasons which have appeared in the meantime".¹⁶ The court expressly approved the ruling in Kapwepwe & Kaenga, stating that this was "a matter purely for the president in power to decide". The "other reasons" for continuance of the emergency were not stated.¹⁷ The Significant feature of the judgment however is that the court found it unnecessary to inquire into the reasons for the continuance of the emergency.

Whereas the Supreme Court's holding is probably one which many courts in the Commonwealth would have preferred, it is disappointing that the court did not go into an evaluation of the reasons why the emergency was continued considering that Article 30 does not expressly state the discretion to be unfettered. At least an obiter pronouncement would have been of interest.

(iii) The decision to detain

It was sometimes said that President's discretion was not impeachable. The Supreme Court decision in Chisata & Lombe v Attorney - General¹⁸ explained the extent to which this statement was correct. In that case the State alleged that the first appellant convened meetings in which he preached the use of violence to achieve political motives and that violence was actually used when an explosive was thrown into a (named) social club. The second appellant was alleged to have been one of those who participated in the incident at that club. The State gave specific dates on which meetings were held and when the incident took place. Applications for the issue of writs of habeas corpus were rejected by the High Court. On appeal to the Supreme Court, the applicants by affidavit put up pleas of alibi and gave detailed accounts of their movements on the alleged dates. The State did not file any affidavits in opposition. It was argued on appeal that there was no onus on the detaining authority to prove the grounds of detention. It relied principally on the famous dicta of Baron J.P. (as he then was) in Kapwepwe & Kaenga on the nature of the power to detain or restrict, without trial, and which in part reads: ¹⁹

"The machinery of detention or restriction without trial (I will hereafter use 'detention' and cognate expressions to include restrictions) is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy; there may be insufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose; or information available may raise, no more than a suspicion, but one which someone charged with the security of a nation dare not ignore; or the activity in which the person concerned is believed to have engaged may not be a criminal offence; or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubts, or indeed to any other standard or to support any suspicion. The question is one purely for his subjective satisfaction. These are far-reaching powers. In particular it must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason the President believes it would be dangerous not to detain".

Cullinan J.S., speaking for the whole court, explained:

"I accept that the detaining authority is not prima facie obliged as such to support any suspicion, if his order is valid on the face of it. To that extent I agree that the detaining authority's satisfaction is not subject to review. I hesitate to think however that the learned Judge President by use of the term 'subjective satisfaction' meant to convey that the detaining authority's satisfaction was absolute and was not subject to the test of reasonableness where challenged on prima facie grounds. Nowhere else is that term used in the report cases before this court over the years - it was not used or expressly adopted by Doyle C.J. or Gardner J.A.... in their judgements in Kapwepwe & Kaenga. indeed ... the test of reasonableness was to some degree applied in that case".²⁰

The court then went on to refer to the words of Doyle C.J. in Eleftheriadis v Attorney - General²¹ where he said:

"I wish to make it clear from the outset that I do not question in any way the discretion of the detaining authority. The court cannot query the discretion of the detaining authority if it is exercised within the power conferred. The question here is one of vires".

The court in Chisata & Lombe went on:

"There the learned Chief Justice did not state what were the limits of the power conferred. He did not state that the discretion was not subject to the test of reasonableness. Bearing in mind other dicta of the learned Chief Justice in Eleftheriadis and indeed Kapwepwe & Kaenga ... it seems to me that [the passage from Kapwepwe & Kaenga] is an authority for no more than the proposition that provided that a detaining authority's discretion is not shown to be unreasonable, the court cannot then replace the detaining authority's discretion with its own discretion in the matter. That proposition is widely accepted".²²

Reliance was placed on a number of other authorities from other jurisdictions supporting the court's proposition.²³

Applying the principle as stated by the court itself to the facts of Chisata & Lombe, the court held:

"I am satisfied that both appellants have made out their case and have shown on the basis of uncontradicted evidence of alibi that it was not reasonable to suspect them of the alleged activities and hence that it was not reasonably necessary to detain them".²⁴

The case therefore clarified that the grounds for a Presidential detention can be challenged on a prima facie test of reasonableness, the unimpeached evidence of alibi being an example of ultra vires exercise of the power to detain.

The same applies to police detentions.²⁵ To this extent therefore, the Presidential or police exercise of the power is subject to review on similar basis to any other kind of discretionary power. The leading Zambian authority which states the general principle is Nkumbula v Attorney-General²⁶ where, following on many English and Commonwealth decisions, a court will quash any act or decision of an administrative authority if the authority acted in bad faith or from improper motives; failed to consider relevant facts; considered irrelevant factors; or took a view of the facts or the law which cannot reasonably be entertained.

Needless to say therefore that if existence of the grounds has to be proved (on a prima facie basis), if that is challenged, the grounds have to be shown to be existing at the time of detention. It is convenient to deal with this together with the related matter of furnishing grounds, which we consider below.

For the moment however, let us consider the approach the courts have taken to detentions on the grounds of alleged criminal activities. The constitution provides that:

"15 (3) Any person who is arrested or detained -

.....

(b) upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the law in force in Zambia;

and who is not released, shall be brought, without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions

It was unsuccessfully argued in Kapwepwe & Kaenga²⁷ and more feebly in subsequent cases that since the grounds of detention alleged criminal activities the decision to detain was in bad faith because the State could have prosecuted instead.

The rejection of the argument by the Court of Appeal was perhaps

predictable but it is the reasoning that is more pertinent: The State has a discretion to prosecute or detain but, in order to detain, the court has to be, in addition, satisfied, first, that the activities of the detainee were so serious as to threaten public security and, second, that unless the person is detained, he will persist in his activities.

The argument was (surprisingly) tried in Shamwana v AttorneyGeneral²⁸ and in Musakanya v Attorney-General²⁹ but was easily answered by reference to Article 29 which provides:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article 15... to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force of measures for the purpose of dealing with any situation existing or arising during that period, 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 unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question".

It is extremely doubtful that the court will ever take a different view.

We have just been dealing with situations where no actual prosecution has been commenced. We shall here briefly show what the courts prefer to do when there has been a prosecution but no conviction. In Re Buitendag³⁰ the applicant was acquitted by the High Court on spying charges under the State Security Act, but was detained immediately on release. The grounds alleged the same activities with respect to which he had been acquitted. On that basis, he alleged that his detention was unlawful. Cullinan J. having read the case record, concluded that the applicant had not been shown at the trial to have been "clearly innocent". Accordingly, he refused to declare the detention unlawful on that ground. He had support from Doyle C.J., as Cullinan himself observed, who in Kapwepwe & Kaenga³¹ said:

"It is common place for a person to be acquitted in circumstances which show that there is very strong suspicion that he committed the crime but reasonable doubts remains".

This approach is consistent with the position that the power to detain without trial can be properly used even on the basis of mere suspicion.

(iv) The grounds of detention

It will be recalled that there are three principal requirements regarding the grounds. They must be furnished as soon as reasonably practicable and in any case not more than 14 days after the commencement of the detention; they must be in writing and in a language the detainee understands; and they must specify the allegations in detail. These will be considered in turn.

(a) "[A]s soon as reasonably practicable and in any case not more than fourteen days"

As early as 1971 in Chipango v Attorney-General³² it was settled that failure to serve the grounds within 14 days rendered a detention invalid, even where the failure was due to an oversight or the grounds were served shortly after the expiry of 14 days. In that case they were served 16 days after the date of detention. There was an attempt by Cullinan J. in Re Puta³³ to blur the obligation to furnish grounds when he said:

"The emphasis is upon the obligation to furnish the grounds as soon as reasonably practicable rather than within fourteen days".

Happily, this was put right by Doyle C.J. In Re Thomas James Cain³⁴ when he said:

"... the words 'as soon as is reasonably practicable' are intended to impart a sense of urgency ... [The] true time limit is the period of fourteen days."

Further, as Doyle C.J. held in that case, where there are technically two detention orders but the detainee has been in continuous detention, the 14 days has to be computed from the date of the first detention.

Where however a police detention precedes a Presidential detention the position is different. In Sharma v Attorney-General³⁵ those were basically the facts and the Supreme Court had to consider whether the two detentions were, for the purpose of serving grounds, separate. Baron D.C.J. speaking for the whole court had this to say:

"[I]n one case the detaining authority is a police officer, the period of permissible detention is limited to twenty-eight days and the purpose is to make inquiries; in the other case the detaining authority is the President, the period of permissible detention is unlimited and the purpose is to exercise control for the preservation of public security".³⁶

That case also decided, overruling King v Attorney-General,³⁷ that the need to supply grounds extended to police detentions.

This approach of Baron D.C.J. has been criticised on the basis that the distinction is pedantic, since even for a Presidential detention it is the police who are the eyes and ears of the President. The answer, it seems to the present writer, will depend on what one regards to be more important than the other: that the period of detention is continuous or that the detaining authority for the two detentions is the same.

While on this matter, we must observe that Cullinan J. in Re Leonard Seegers³⁸ held that where the grounds are served during the period of a police detention and a Presidential detention ensues, it must not be assumed that the same grounds attach to the two detentions. On that ground, the court ordered the release of the applicant.

Of cardinal importance is the relationship between the furnishing of the grounds and the existence of the grounds at the time of detention. The leading authority here is probably Joyce Banda v Attorney-General.³⁹ There the State argued that the applicant having been released before the expiry of 14 days from the date of her (police) detention, there was no necessity to furnish her with grounds. The court referred to the statement obiter of Cullinan J. in Re Puta⁴⁰ that there was no constitutional obligation to furnish grounds in respect of a detention which has been revoked within 14 days. It also referred to Re Thomas James Cain⁴¹ where Dolye C.J. (also speaking obiter) said that ".....it is necessary to furnish grounds for an order which has been revoked before the expiry of the fourteen day period, but it is not necessary that the grounds should exist at the time the order is made". Baron D.C.J. observed that the first use of the word "necessary" by Doyle meant "necessary in order to validate continued detention" while the second use imported "necessary for a lawful detention abinitio". He then concluded,

citing in support his own statement in Shipanga v Attorney-General,⁴² that:

"These two necessities stem from completely different bases; the second is an obligation imposed by statute, while the first is imposed by a fundamental principle of the common law whose application is not affected by specific inroads made by the Regulations or any other law authorising the deprivation of liberty".

Thus even if the detainee is released before the expiry of 14 days or they are served within or after 14 days - the detention is still reviewable on prima facie grounds of reasonableness.

Recently the issue has been argued before the Supreme Court as to whether the grounds of detention have to be furnished, that is, signed, by the President. In Miyanda v Attorney-General⁴³ the grounds were signed by the Secretary to the Cabinet. It was argued that the purported grounds were null and void because, although the detaining authority was entitled to delegate its powers under Preservation of Public Security Act, no such delegation had ever been made to the Secretary to the Cabinet. The court held however that there was no requirement in Article 27 that the President had to furnish the grounds; and further that the furnishing of grounds being an aspect of executive power was a power which the President could delegate to the Secretary to the Cabinet in exercise of the president' right to delegate executive power under Article 53 (1) of the Constitution to officers subordinate to him.

(b) "[I]n a language he understands"

There has been litigation on this aspect centering around illiterate detainees. In Attorney-General v Million Juma⁴⁴ the respondent was served with grounds of detention in English, a language he could neither read nor understand. It was successfully argued in the High Court that the constitutional requirement that the grounds be in a language the detainee understands were mandatory. The Supreme Court, approving of the general approach reflected in the two High Court cases of Chakota & Others v Attorney-General⁴⁵ and Mutanda v Attorney-General,⁴⁶ held that the requirement was directory and not mandatory. Accordingly, where the grounds are in writing and are fully explained to the detainee

in his own language and there is a certificate to that effect, it can be said that there was no breach of Article 27.

(c) "[S] pecifying in detail"

Here it is convenient to begin with the dictum of Lewis C.J. in Herbert v Phillips & Sealey ⁴⁷ in the Court of Appeal of West Indies Associated States. The provisions at issue were in the Constitution of St. Christopher Nevis and Anguilla.

There he said:

"the object of requiring a detainee to be furnished with a statement specifying in detail the grounds upon which he is detained is to enable him to make adequate representations.... The statement must, in detailing the grounds of detention, furnish sufficient information to enable him to know what is being alleged against him and to bring his mind to bear upon it". ⁴⁸

These words were cited with approval in Kapwepwe & Kaenga, ⁴⁹ which itself became the leading authority in Zambia on the subject.

In that case, the grounds of detention alleged that during the months of December, 1971, January and February, 1972, Kapwepwe and other members of the United Progressive Party (UPP) conspired to engage in violence. It was further alleged, among other things, that they assaulted 18 people and also threatened them with death. The grounds did not specify the names and dates of the alleged activities.

With respect to Kaenga, it was alleged that between August, 1970, and 19th September, 1971, the detainee and others conspired to publish circulars which were subversive and claimed inter alia, that duly elected members of the Government, including the President, were not Zambian. Other incontrovertibly subversive activities were alleged with respect to the same period.

In arguing that the grounds did not specify the alleged activities "in detail", the applicants cited the dictum of Magnus J. in the High Court in Chipango v. Attorney-General ⁵⁰ where he said that the grounds must be "at least as particularised as they would have to be in a pleading in an ordinary action". Scott J. also sitting in the High Court rejected this approach saying:

"What we are here concerned with are grounds upon which the applicants have been detained and not the facts which might or might not support those grounds While some factual basis for these reasons must be shown, I cannot accept that the detaining authority is under the same obligation as a civil litigant".

The court of Appeal, consisting of Doyle C.J., Baron J.P. and Gardner J.A, disavowed the dictum of Magnus J. and approved that of Mr. Justice Scott which became of authority. And on that test the grounds in Kapwepwe & Kaenga⁵¹ were held to have specified "in detail" what the allegations were.

Thus vague grounds contravene Article 27 (1) (a). Further:

"Vagueness is a relative term. Its meaning must vary with the facts or circumstances of each case. What may be said to be vague in one case may not be so in another, and it could not be asserted as a general rule that a ground is necessarily vague if the only answer the detained person can do is to deny it. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague."⁵²

This has been the basic set of rules applied in Zambia. A few examples of their application will be given here.

In Gilbert Mutale v Attorney-General⁵³ grounds were held to be insufficiently detailed which alleged that " [b]etween 1st January, 1971, and 11th December, 1973, [the detainee] conspired with other persons in Zambia to commit crimes ...". Other cases dealing generally with grounds of detention are Munalula v AttorneyGeneral,⁵⁴ Ntombizine Mudenda v Attorney-General⁵⁵ and Musakanya v AttorneyGeneral.⁵⁶ And where the grounds are not sufficiently detailed, that defect cannot be cured by evidence given in court.⁵⁷

It is convenient here to deal with other matters related to vagueness through not necessarily vagueness of grounds. In In re Puta⁵⁸ the statement accompanying the grounds, not the grounds themselves, recited a wrong date of detention. Cullinan J. held that to be vague. And in 1971, before the law on vagueness was settled, there was the case of a Re K.A. Patel;⁵⁹ the detention order - not the statement containing the grounds themselves - referred to "Patel", and Chomba J. on the basis of this "glaring defect" ordered the release of K.A.

Patel. But this latter case can be regarded as deciding not on the law as to vagueness of grounds but rather on the independent basis of possible mistaken identity.

(v) Publication in the Gazette

In addition to what we have already said above about the mandatory nature of the obligation to publish the fact of detention and under what provision of law that detention is authorised, there is one matter to be reiterated and another to be stated: Continued detention after the thirtieth day (where there has been no publication) is unlawful, but there is no obligation to publish if the detainee is released within 30 days.⁶⁰

(vi) The right to damages

Before 1974 courts held that they had the power to award damages for an unlawful detention.⁶¹ By the Constitution of Zambia (Amendment) Act, No. 18 of that year, all courts of law were divested of the power to make orders for damages or compensation against the Republic of Zambia in respect of anything done under or in execution of any restriction or detention order signed by the President; the right was however reserved for claims arising from "physical or mental ill-treatment" or "any error in the identity of the person restricted or detained". The tribunal reviewing a case can however make a non-binding recommendation to the President that compensation, in an amount stated in the recommendation, should be paid. Thus now, no damages can be awarded merely for the fact of detention.⁶²

The amendment however did not affect police detentions under regulation 33(6) of the Preservation of Public Security Regulations. If such a detention is unlawful damages can still be awarded and the Supreme Court has done so in at least Joyce Banda v Attorney-General.⁶³

(vii) Miscellaneous

In winding up our examination of restriction and detention cases, a few miscellaneous ones may be considered. In re Kachilika⁶⁴ decided that the

same detention can be challenged a second time (presumably any number of times) if new grounds of challenge which were not reasonably foreseeable emerge. In Pasipanodya v Attorney-General ⁶⁵ the court allowed an unsigned detention order served on the detainee to be cured by the production in court of the signed original. The place of detention is as vital as the failure to serve grounds. In re Alice Lenshina Mulenga ⁶⁶ it was held that detaining a person in a place which has not been designated under regulation 33 (5) of the Preservation of Public Security Regulations for that purpose invalidates the detention. Here also, the reason in addition to reasons connected with health - has to be for the avoidance of holding persons incommunicado. And if a detainee admits engaging in the unlawful activity for which he is detained, it was held in Ngwira & two Others v Attorney - General, ⁶⁷ that that cannot be a ground for successfully challenging a detention.

III. Conclusion

There are a few points worth reminding ourselves of as we approach discussion of the issue of economic crimes. These will help us appreciate in a nutshell the present scope of the powers related to detentions, and the effect of these powers on the powers of the President in maintaining law and order and on the freedom of the individual. First, the power to declare a threatened emergency (or full emergency) is not impeachable at any level - subjective or objective. Second, the decision to detain is virtually unfettered, being impeachable only on a narrowly defined form of objective test. Third, the requirements of Article 27 as to grounds and publication in the Gazettee are mandatory, though ideas of substantial compliance (grounds served to illiterate persons or in the wrong language) and ideas relaxing strict construction in such matters (the signing of grounds by the Secretary to the Cabinet) have gained ground. Fourth, there is no maximum allowable period of detaining without trial. Fifth and finally, since 1974, the courts have no power to award damages for an invalid detention; the detainee has to show that he has,

over and above the mere fact of the unlawful detention, suffered physical or mental ill-treatment.

FOOTNOTES

1. Throughout this work, "economic crimes", "crimes of economic relevance" and similar expressions, are used in a special sense. We are not here referring necessarily to crimes committed with a view to alleviating the offenders poor economic station or position. Nor are we referring to crimes whose gravity or incidence creates an atmosphere of business insecurity. What we are referring to are mostly crimes whose gravity and prevalence actually damage or are likely to adversely and seriously affect the economy. This would include - if we can limit the examples to those common ones - any of the following crimes, when they are of a serious nature: the trafficking of precious stones, elephant tusks, rhino horns and the illegal externalisation of foreign exchange.
2. Cap. 1, Laws of Zambia.
3. Cap. 108.
4. Cap. 106.
5. App. 3, Laws of Zambia, 1965 ed., s.29.
6. Constitution of Zambia (Amendment) Act, No. 33 of 1969.
7. Cap. 106, p.11.
8. For a collection of detention cases (and other cases relating to fundamental rights and freedoms), see M. Ndulo and K. Turner, Civil Liberties Cases in Zambia (Oxford, African Law Reports, 1984).
9. Brett L.J., Dale's Case (1981) 6 G.P.D. 376 at p.463.
10. (1971) Z.R. 1 (C.A.).
11. Ooko v The Republic, High Court of Kenya, Civil case No. 1159 of 1966.
12. (1972) Z.R. 248 (C.A.).
13. Ibid., at p. 263.
14. (1983) Z.R. 114 (S.C.).
15. Ibid., at p. 125.
16. Ibid. This later part of the contention is difficult to follow unless it was meant to convey (the unlikely) that once the original circumstances giving rise to the declaration cease to exist, the declaration lapsed by operation of law.

17. The official policy of the Government has been that continual subversive activities originating from some hostile neighbouring countries made necessary the continuance of the emergency.
18. (1981) Z.R. 35 (S.C.).
19. Footnote 12, at p. 260 (C.A.).
20. (1981) Z.R. 35, at 39, 40 (S.C.).
21. (1975) Z.R. 69, at p.71 (H.C.).
22. Footnote 20, at p. 40.
23. e.g. Gopalan v State of Madras (1950) A.I.R. 27, Khudiram v State of West Bengal (1975)2 S.C.R. 61. The court also discredited earlier Indian dicta which relied on the principles of Liversidge v Anderson (1942) A.C. 206 - Chisata & Lombe p. 41 et al. See Chibwe v AttorneyGeneral 1980) Z.R. 22, where Sakala J. seemed to consider that the matter was not in the absolute discretion of the court.
24. Footnote 20, p. 53. Followed and explained in Ngwira & two Others v Attorney - General (1985) Z.R. 206 (S.C.). (See also Attorney-General v Kitenge (1985) Z.R. 165 (S.C.).
25. Joyce Banda v Attorney - General (1978) Z.R. 233 (S.C.).
26. (1972) Z.R. 111 (C.A.); also In Re Wijnberg (1973) Unreported.
27. Footnote 12.
28. (1981) Z.R. 270 (H.C., Chaila J.).
29. ((1981) Z.R. 1 (S.C.)
30. (1972) Z.R.156 (H.C., Cullinan J.).
31. Op. cit., p. 255.
32. Footnote 10.
33. (1973) Z.R. 133, at p. 137 (H.C.).
34. (1974) Z.R. 71, at p. 77 (H.C.).
35. (1978) Z.R. 163 (S.C.).
36. Ibid., p. 169.
37. (1977/HP/1247) Unreported.
38. (1978) Z.R. 117 (H.C.).
39. (1978) Z.R. 233 (S.C.).

40. Footnote 33.
41. Footnote 34, at p. 77. Emphasis added.
42. (1976) Z.R. 22, at p. 24 (S.C.).
43. (1983) Z.R. 78 (S.C.).
44. (1974) Z.R. 1 (S.C.).
45. (1980) Z.R. 10.
46. (1976) Unreported.
47. (1967) 10 W.I.R. 435
48. Ibid., at p. 452.
49. Footnote 12.
50. Footnote 10, at p. 34.
51. Footnote 19.
52. Naresh Chandra v State of West Bengal (1969) 46 A.I.R. 1335, at p. 1341.
53. (1976) Z.R. 159.
54. (1979) Z.R. 154.
55. (1979 Z.R. 245 (H.C., Silungwe, C.J.).
56. Footnote 29.
57. Mhango v Attorney-General 1976 (Unreported), Sithole v Attorney-General (1977) Z.R. 55, at p. 58. In these two cases, Cullinan J. conceded his error made in Tembo v Attorney - General, (1976) Unreported where he had allowed affidavit evidence in court to expand upon the grounds of detention. See also Mutale v Attorney-General (1976) Z.R. 55.
58. Footnote 33.
59. (1971) Unreported.
60. In re Puta, footnote 33.
61. e.g. Chipango v Attorney-General (1973) Z.R. 168 (C.A.); Kawimbe v Attorney-General (1974) Z.R. 244 (S.C.); and Attorney - General v Peter Musonda & Others (1975) Z.R. 220.
62. Article 29 (8), clause having been inserted by section 4 of the amendment Act. Though the intention of the clause is clear, the mere fact of detention does amount to physical and mental ill-treatment, where the detention is unlawful.

63. Footnote 39. See also Attorney-General v Peter Musonda and Others (1975) Z.R. 220; Mwaba v Attorney - General (1974) Z.R. 177; and Chisanga Puta v Attorney - General (1983) Z.R. 114 (S.C.).
64. (1979) Z.R. 227 (H.C.).
65. (1979) Unreported. But see cases at footnote 57 where it was held that affidavit evidence in court cannot cure otherwise defective or vague grounds of detention. It is possible to argue that those cases had to do with the adequacy of the grounds for the purposes of the validity of the decision to detain, while pasipanodya had to do with the mere authentication of the detention order. In our view, authentication of the order or the grounds cannot, especially in the matter of personal liberties, be divorced from the vires of a decision to detain.
66. (1973) Z.R. 243 (H.C.). Approved in Chisata & Lombe v Attorney - General. (1981) Z.R. 35 (S.C.).
67. (1985) Z.R. 206 (H.C., Sakala J.).

CHAPTER TWO
ECONOMIC CRIMES AND PUBLIC SECURITY

I. Introduction

In this chapter we address directly the point of this work. Can economic crimes endanger public security within the meaning of that expression as defined in section 2 of the Preservation of Public security Act? ¹ In order to do justice to the matter, we will have to consider the question in three principal parts. First, the current case law, in particular, the reasoning in the divergent decisions will be stated. Second, because of the difficult interpretational problems that manifest themselves in these decisions, we will have to state what, over the centuries, were the major approaches to the reading of statutes and what the modern approach is. Third, a critique of the decisions will follow in the light of the modern approach to the construction of statutes.

II. The current case law

A. Before Rao v Attorney-General ²

The controversy really began in 1980. Although that was not the first time that a person who was detained on the grounds of his alleged economic crimes challenged his detention, ³ it was the first time that the issue was directly addressed

by the Zambian courts. Further, 1980 was also the year in which the two opposing views can be said to have been established in the courts. For this reason, and also that subsequent judgments tended to express themselves as being aligned to one or other of the two 1980 decisions, it is important to analyse in detail the facts and reasoning in both cases.

In Silas Chibwe v Attorney-General⁴ the grounds of detention were that between 20th September, 1979, and 1st May, 1980, the applicant conspired with two other (named) persons in Zambia to unlawfully externalise three million kwacha.

Regarding whether the detention was for the preservation of public security, counsel for the applicant advanced two arguments. First, he contended that the Preservation of Public Security Act being a much earlier Act than the Exchange Control Act⁵ (to whose breach the grounds alluded) the mischief sought to be remedied by the latter Act could not have been in the contemplation of the framers of the earlier Act. On that ground, it was alleged, a breach of the Exchange Control Act was outside the scope of the Preservation of Public Security Act. Second, perhaps less cogently, it was argued on the applicant's behalf that where an Act such as the Exchange Control Act provides penalties, the regulations made thereunder must be allowed to deal with the situation otherwise the laws which contain penalty provisions would be rendered otiose if there was to be inordinate use of the Preservation of Public Security Act.⁶

In reply, the State urged the court to take judicial notice of the fact that Zambia was in great difficulties with respect to foreign exchange. It observed that certain development projects had suffered as a result. It was therefore submitted that the unlawful externalisation of large amounts of money, being detrimental to the economy, was a breach of "public security" within the meaning of the expression in section 2 of the Preservation of Public Security Act.

Sakala J., following the decision of Silungwe C.J. in Mudenda v Attorney-General⁷ (and referring to a similar decision of his in Maseka v Attorney-General)⁸

held that the definition of "public security" was inclusive and not exhaustive. He went on to say, agreeing with the State:⁹

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

He accordingly held that the ground in question was relevant to public security.

The contrasting case was the decision of Cullinan J. in Mike Waluza Kaira v Attorney-General.¹⁰ Here also, the grounds had to do with unlawful externalisation of money. It was alleged that between 1st August, 1977, and 1st January, 1979, in Zambia and elsewhere, namely Botswana and South Africa, the applicant unlawfully externalised half a million kwacha. It was further alleged that between 1st January, 1979, and 30th April, 1979, in Zambia and elsewhere, namely Botswana and South Africa, the applicant this time attempted to unlawfully externalise one hundred and fifty thousand kwacha. It was argued that the detention, being solely based on the alleged unlawful externalisation of money, had no relation to the preservation of public security and was therefore invalid.

Section 2 of the Preservation of Public Security Act stipulates as follows:

"In this Act, the expression "public security" includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to law and lawful authority, and the maintenance of the administration of justice".¹¹

Naturally, the question was as to whether the unlawful externalisation of a total of K750,000 came within this definition.

Considering that the illegal externalisation of money was not expressly covered in the definition, it was necessary to determine whether the word "crime" included the alleged crime for which the applicant was detained. To this end Cullinan J. broke the definition down into five groupings:

- "(i) the securing of safety of persons and property;
- (ii) the maintenance of supplies and services essential to the life of the community;
- (iii) the maintenance of public order;
- (iv) the maintenance of the administration law and lawful authority; and
- (v) the maintenance of administration of justice".

The word "crime" used in the definition does not fall into any of the five groups. It is apparently independent. The court had to determine whether the word should be construed widely as covering all possible criminal activities, or narrowly as embracing only those other crimes as are related to one or more, perhaps all, of the other elements of the definition.

Mr. Justice Cullinan, seeking to give some meaning to the word and after rightly observing that "[a]ll five groupings involve the prevention and suppression of particular acts which would well amount to crimes"¹² went on to say:

"It can be said therefore that the word "crime" is not connected with activities related to the five groupings in the definition, as those groupings automatically cover related activities which may or may not be criminal. It can thus be said that the word "crime" refers to all other criminal activities".¹³

He was not convinced however that the purview of the word had no bounds. He hesitated therefore to say:

"that the Parliament intended to cover the prevention and suppression of all crimes. I cannot see how for example even a marked prevalence of the offence of common nuisance could in any way endanger the security of the nation".¹⁴

He found support for his view in the words of the late Leo Baron D.C.J. in the Supreme court case of Joyce Banda v Attorney-General¹⁵ where with reference to the powers of a police officer under regulation 33(6) of the Preservation of Public Security Regulations, Judge Baron said:

"The police officer must have reason to believe that the person concerned,

if left at liberty, is likely to engage in activities prejudicial to public security. If what the police officer had reason to believe was not as a matter of law a good ground for detention under [regulation] 33 (1) then the arrest and detention under 33 (6) was unlawful ab initio. Suppose, for instance, the police officer believed that it was a valid ground of detention under regulation 33 (1) that the person concerned had committed a series of petty thefts from local stores ... It is, one would have thought, self-evident that the regulation does not give power to detain for reasons such as those".

Cullinan J. then observed, and pertinently, that if it had been Parliament's intention to cover all crimes it would have dealt with the prevention and suppression of crimes separately, perhaps at the beginning or end of the definition, rather than place it in the middle as is the case. He then concluded:¹⁶

"Suffice it to say, doing the best I can, that the only reasonable construction that I can place on the definition is that the word crime relate to all crimes having a connection with the above five groupings, that is, with public security as otherwise defined."

This matter of construction aside, counsel for the applicant invoked, for persuasive purposes, the obiter statements of Doyle C.J. in Eleftheriadis v Attorney-General¹⁷. The submission was that the Supreme Court there indicated that an act of conspiring (a year before detention) to corruptly procure import licences might not constitute a breach of public security. Cullinan J. rightly observed that the detention was invalidated in that case for the reason that in the circumstances of the case the court was not prepared to draw the inference of future apprehension. In passing, Doyle C.J. made a reference to "any question which might arise as to the reasonableness of the measures taken". About this statement, Judge Cullinan noted:¹⁸

"That the observation in my view refers to the reasonableness or otherwise of the necessity to detain the appellant in that case, on the basis of a solitary act of conspiracy committed a year before that rather than to question whether the particular conspiracy was an act contemplated by the relevant legislation."

On the basis of the "ambiguity" of Doyle C.J.'s remarks, the court concluded and rightly that Eleftheriadis was uncertain authority on the point.

Having noted, in effect, that there was no authority on the matter, it was then necessary to inquire as to the sort of crimes that could be said to be for the preservation of public security. The regulations have examples of these. In the

court's view, it was only that type of crime which had a connection with the objects contained in the definition which could, "in certain circumstances", result in detention. It had to be only "in certain circumstances" because "the commission of a crime having a connection with public security cannot itself give rise to the necessity to detain." ¹⁹

In support of this proposition, the court cited the well-known passage from the judgement of Baron J.P. (as he then was) in Kapwepwe & Kaenga ²⁰ as to the circumstances in which the machinery of detention or restriction without trial was intended to be used. It then reasoned: ²¹

"Although the above passage stresses that a person may be detained where he is not even thought to have committed a criminal offence, nonetheless it demonstrates that he cannot be detained simply because he has committed a criminal offence. It is only where the detaining authority regards, and I would add, reasonably regards the law as inadequate, for example for the reasons stated in the above passage, to deal with the situation, that the particular crime in itself may otherwise constitute a threat to public security".

The learned judge then observed, in effect, that unless a line is drawn somewhere, the ordinary law would be rendered otiose, together with the criminal sanctions found in the Preservation of Public Security Regulations themselves.

He stated that he was confirmed in his view by the following passage in the judgment of Baron, D.C.J., in the other case, Joyce Banda v Attorney - General: ²²

"The evidence is in my opinion overwhelming that the grounds for the plaintiff's arrest and detention were because she was a suspect in a murder investigation; judgement the arrest of the plaintiff and her detention for nine days was unlawful, and that this appeal should be allowed."

Mr. Justice Baron further held: ²³

"... the fact remains that an Assistant Commissioner of Police ordered the detention without trial, and without evidence sufficient to support a charge, of a person suspected of complicity in an offence which could not remotely be regarded as being connected with public security".

Mr. Justice Cullinan noted that in Kapwepwe & Kaenga the words "per se" were not used while in Joyce Banda they were. He concluded that from the cases, even though murder, for example, was a the crime of violence (bringing it within the definition of "public security", widely construed) such a crime in itself was not a ground for detention "unless the ordinary law was inadequate to deal with the situation and unless of course the commission of such crime did in the particular circumstances of the case result in a threat to public security".²⁴

But Cullinan J. still had to deal with the holding of Silungwe C.J. in Mudenda v Attorney-General that since the definition used the word "includes" it was not exhaustive. While agreeing with Silungwe C.J., Judge Cullinan stated that he was however particularly influenced by the former's subsequent observation:²⁵

"However, in accordance with the rules of construction of statutes, anything not specifically referred to in the section but which is shown to fall within the spirit and intendment of the said section would have to be governed by the [ejusdem generis] rule".

In Judge Cullinan's view, the word "crime" when so construed could not include the aspect of the nation's economy. He went on to note that it would have been quite simple to specifically include that aspect if that had been the intention.

As Judge Cullinan himself observed, it can be said that:

"the unlawful externalisation of large sums of money and the corresponding deficit in foreign exchange might indirectly affect the import of essential supplies and thus the maintenance of supplies essential to the life of the community".^{25A}

In considering whether such an effect would be proximate, he called to his aid the words of Magnus J. in Patel v Attorney-General²⁶ who, on considering the relevance of exchange control legislation to the aspect of "public safety" then contained in section 18 of the Constitution, had this to say:

"It could conceivably happen that complete financial anarchy might so weaken the economy that internal disaffection might be caused, leading to rioting

and civil disturbance. So might widespread unemployment, caused, say, by overpopulation. So might prolonged drought which disrupted agricultural production. One might think of many things which could, ultimately, affect public safety. None of them would justify involving this exception. Nor do I think that exchange control is sufficiently proximate to public safety to warrant the present legislation being adopted in the interests of public safety. Nor do I think that, when the exchange control legislation was drafted did the draftsman have in mind that they are doing so in the interests of public safety, nor, for that matter, did the Minister of Finance have this in mind in approving the Regulations.

Justice Magnus then referred, as Justice Cullinan observed, to the definition of Basu's Commentary on the Constitution of India²⁷ which reads:

'Public order' also includes public safety in its relation to the maintenance of public order. "Public safety" ordinarily means security of the public or their freedom from danger, external or internal. From the wider point of view, public safety would also include the securing of public health, by prevention of adulteration of foodstuffs, prevention of epidemics and the like. But from the point of view of "public order", it would have a narrower meaning and offences against public safety would include: creating internal distribution of essential commodities or services, including public servants engaged in essential services, including members of the Police to withhold their services or including public servants engaged in services essential to the life of the community to withhold their services ... In its external aspect, "public safety" would mean protecting the community from foreign aggression".

After observing that there is little difference between "public safety" and "public security" and that the two expressions are used apparently in the same sense in various regulations, the learned Judge then stated his holding as to whether the unlawful externalisation of money comes within the definition of "public security" as defined in the Preservation of Public Security Act. He said:²⁸

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

Quite clearly, the court here thought - at least it came dangerously close to saying - that economic malady can never affect adversely the safety of persons.

Bhagvatilal Dhyabhai Rao was in 1987 detained by the President of the Republic of Zambia under regulation 33 (1) of the Preservation of Public Security Regulations. The grounds of detention were that between 1st January, 1986, and 20th February, 1987, the appellant was involved in the illegal trafficking in, and smuggling of, emeralds between Zambia and unknown foreign countries. In general, the four grounds suggested that the illegal dealings were being done on a large scale and specifically stated that the transactions involved large but unknown quantities and values of emeralds. One ground specifically alleged that the appellant accepted a house and K32,000.00 from (a named person) in exchange for emeralds.

The fourth and last ground is the crux of the matter we now pursue. It stated that the appellant:

"knew or ought to have known that illegal trafficking in and smuggling of precious stones from Zambia to foreign countries is highly detrimental to the economy of Zambia in that Zambia has for quite some time past and is still facing a critical shortage of foreign exchange and the continuous illegal trafficking in and smuggling of precious stones which are one of Zambia's few foreign exchange earning products is bound not only to affect its economy adversely but is also likely to destroy it completely resulting ultimately in the downfall of the Zambian nation"³⁰

On behalf of the appellant it was argued, with the help of the High Court Judgement in Kaira, that an economic crime can never threaten public security. And on behalf of the State, in terms similar to Silungwe C.J.'s judgment in Mudenda, it was argued that the word "crime" as used in the definition of "public security" covers all crimes that affect public security. Counsel agreed with the trial judge, who said that "any economic instability brings insecurity" and since economic crimes will affect economic stability, such crimes are a danger to public security as defined in section 2 of the Preservation of Public Security Act.

These arguments again called for a decision on the scope of the word "crime". It can be held to mean one of three things: any crime regardless of gravity or kind - an extremity; any crime that by its nature falls within one of the five groupings in the definition of public security; any crime of sufficient gravity, whether or not it is of a kind falling within one of the groupings, which nevertheless endangers

In order to fully appreciate the way in which the court dealt with the basic issue and related ones, we have to set out in detail the remarkable judgment of Silungwe C.J. Also, this will help us to understand the view taken by each Judge since (as is usual in such cases) the other judgements in the case are expressed in terms of agreement, agreement with qualifications, or disagreement, with the Chief Justice's reasoning and conclusion.

(i) The Judgment of Silungwe C.J.

It will be remembered that in Mudenda v Attorney-General the Chief Justice accepted that the word "crime" should be construed eiusdem generis with the rest of the definition of public security. Nevertheless, the court went on to say that since the definition of public security reads "includes" and not "means", the offences set out were not exclusive; they were illustrative rather than exhaustive. Accordingly, it was held that the illegal trafficking of (large amounts of) emeralds, though not covered specifically or by class of crime, was a detainable violation as a threat to public security. That case did not directly address the issue of economic crimes. Read literally and out of context, the general words of the court there can be construed to mean that any crime, including the commission of a minor traffic offence, is detainable. It is important to note therefore that despite its potentially broad view, the court did not state that any crime of any description was covered.

Silungwe C. J. clarified this in Rao. He reiterated his words in Mudenda as to the effect of "includes" and the generis rule, and went on to say: ³¹

"In other words, any other class or grouping not specifically mentioned in the definition but which has sufficient [nexus] with public security would fall within the ambit of the definition. In the final analysis, it matters not whether the activity alleged in the grounds for detention is criminal or

otherwise; specifically referred to in the definition or not; provided it threatens, or is prejudicial to, public security."

His Lordship explained that it is in this light that Mudenda should be understood.

In applying this approach to economic crimes, the Chief Justice first took judicial notice of the "food riots" in December, 1986. He then observed that these riots led to loss of human life and property in the Copperbelt, Central and Lusaka Provinces and that these were caused by an increase in the retail price of mealie meal. The relevance of these riots to public security was stated in the following way:³²

"As the incidence of riots related to the supply of a commodity essential to the life of the community, public order was thus in jeopardy, the price increase was dropped by the Government and, shortly thereafter, public order was restored."

In the judge's view therefore, it appears that if doing of a particular thing provokes or is capable of provoking wide violent discontent resulting in the actual or threatened and significant loss of life, or significant damage to property, or both, that act can be a danger to public security.

This leads us to the issue of proximateness and the divergent views of Silungwe C.J. and Cullinan J. (as he then was) on the subject. As we saw, Mr Justice Cullinan in 1980 expressly rejected that loss of life and damage to property resulting from economic discontent can be said to be a proximate result of an economic crime. In 1988, after eight years of marked economic deterioration and after an actual experience of an economy-related riot, it was held in effect that such risk was proximate. In support of this conclusion, after rejecting Cullinan's suggestion that "proximate" means "direct", Silungwe C.J. relied on the fairly well-established definitions of "proximate". Words and Phrases Legally Defined³³ says that "proximate cause in fact means the same thing as 'dominant' or 'effective' or 'direct' cause". He also observed that in Stroud's Judicial Dictionary³⁴ it is stated:

"(4) The proximate cause of the loss of a ship is the effective and predominate cause, ascertained by applying common sense standards and not necessarily the cause which operates last".

He then noted accordingly that "proximate" was synonymous not only with "direct" but also with "dominant", "predominant" or "effective", the appropriate meaning to be ascertained from the circumstances. Cullinan's approach borders on being a pure form of causation while Silungwe's is a by - and - large one.

Silungwe C.J. then applied his test. After saying that, if anything, since the Kaira Case the economy had been even further weakened he said in relation to that case. ³⁵

"Surely, unlawful externalisation of large amounts of money, in an environment of a fragile or an already weakened economy is proximate to public security as it is prejudicial to the maintenance of supplies and services essential to the life of the community, ...for without money such essential supplies and services cannot be provided."

He then proceeded to give guidelines. ³⁶

"In some cases, such as those involving economic sabotage or crime, proximate to public security may, for instance, be related to the [value] of the property or the magnitude of the amount of money or other property involved, the volume of traffic, if any; or the method of operation."

His Lordship further explained that these illustrations were not intended to be exhaustive, each depending on the circumstances viewed as per the test of reasonableness contained in Article 26 of the Constitution. ³⁷

The Chief Justice proceeded to state that the shortage of foreign exchange was relevant to the maintenance of supplies and services essential to the life of the community in that the foreign exchange was necessary for the importation of petroleum products, drugs and medicines; and the sustenance of copper mining, expatriate personnel, and their allowances and perquisites. In conclusion he had this to say: ³⁸

"I have no doubt in my mind that, to deprive Zambia of the precious foreign exchange, through the illegal trafficking in, and smuggling out of, the country of large quantities of emeralds (or any other precious stones), is an activity that is manifestly prejudicial, and indeed proximate, to public security, because it affects the maintenance of essential supplies and services, and also public order, as demonstrated by the food riots already referred to. I am here satisfied that the measure taken here by the appellant was reasonable, in terms of article 26 of the Constitution. It follows that I would dismiss the appellant's appeal based on this ground".

(ii) The Judgment of Ngulube D.C.J.

The Deputy Chief Justice agreed with the Chief Justice to the extent that it is not all crimes that are detainable. His test was:³⁹

"But where the crime or the alleged criminal activity alleged has disturbing implications and ramifications of a public general nature such as where the detrimental consequences will affect the State, the Government, the general population or a section of the population - then there would be a sufficient public content in such activity to warrant the application of the law, so long as and if, were such activity not checked, there is recognisable from an objective point of view, a danger or likelihood of bringing about (potentially, immediately or eventually) the reverse and opposite of any of the matters sought to be safeguarded when section 2 of Cap. 106 defines 'public security'."

In Mr. Justice Ngulube's view however, an act has to fall within one of the five groupings. This is a narrower test than that expounded by the Chief Justice.

As to proximateness, Ngulube D.C.J. saw it as being relevant to both vires and reasonableness. He rejected Patel and also Kaira "which suggest that the activity is proximate only if it would lead immediately and directly to the mischief to be guarded against."⁴⁰ While he accepted the Chief Justice's common sense approach to causation, in an apparent marginal disagreement with his brother, he said:⁴¹

"[W] here it is reasonable to anticipate a domino effect as being likely, and where the test of reasonableness is otherwise satisfied under Article 26, it would not be [ultra vires] to detain in order to curb tendencies rather than wait until the danger actually falls upon us as was put .. by Magnus J. in Patel ...".

Perhaps it can be stated here - and does not need elaboration - that Magnus J. and Cullinan J. would be the first to reject this aspect of the principle of causation as put by Justice Ngulube.

In an apparent shift from the principles of causation in matters of criminal and civil liability he held:⁴²

"Proximateness in the context of legislation designed to save the Nation from danger must, in my considered opinion, be regarded as encompassing both the foreseeable consequences and potential consequences in any clearly discernible causal chain and that no activity should be considered to be too remote if it has an identifiable and sufficient connection with public security."

The final holding of Ngulube D.C.J. is markedly different from the one of the Chief Justice. The former concluded:⁴³

"The decision in this case cannot, for my part, turn simply on the legal proposition that detention for unlawful economic activity is per se ultra vires and I would dismiss the ground of appeal to the extent that this was the proposition made".

It is important that this conclusion does not give guidelines as to when an economic activity can endanger public security; nor does it agree, disagree nor consider the general rules laid down by the Chief Justice in this regard.

(iii) The Judgments of Gardner J.S. and Sakala J.S.

Gardner J.S. agreed with the Chief Justice on economic crimes and added:⁴⁴

"On this question the powers of the detaining authority are limited only by the question of reasonableness under Article 26 of the Constitution and such question must always be a question of fact."

He finally held as to proximate that he was in agreement with the Chief Justice and Deputy in that it was a question of fact - and we shall examine this latter though in this writer's view the two Judges were not in complete agreement on the issue.

It will be recalled that the Chief Justice laid much emphasis on the effect of major economic crimes on a weak economy. Having agreed with the reasoning and result propounded by the Chief Justice on the issue of economic crimes, Sakala J.S. (who in the High Court in 1980 decided Chibwe v Attorney-General) added the following caveat:⁴⁵

".... I wish to point out that I wholly agreed with the learned Chief Justice's observation that emergency legislation exists for the preservation of public security. In my opinion it follows that the state of the economy is not necessarily the criterion. The issue in my view is whether a particular act threatens the security of the nation despite the state of the economy.[A] particular act can threaten the security of the nation even if the economy is strong".

(iv) The Judgment of Bweupe A.J.S.

This was the only Judge who disagreed with the Chief Justice (and therefore effectively with all the other Judges) in the reasoning and result as far as the matter of economic crimes is concerned. He laid much emphasis on the eiusdem generis rule. In his view, the sad state of the economy was no excuse for bending the rule.

Citing a number of English decisions in support, he stated that the interpretation of any statute must be restricted to such matters as fall within the eiusdem generis rule and the word "includes" must not carry the extension beyond the borderline of doubtful cases. In this respect he was in general agreement with the Chief Justice as far as the principle goes but not the application of it. A further difference is in the two Judges' views as to the effect of the word "crime". Silungwe C.J. thought that an act, whether or not falling within one of the five groupings, may endanger public security. Bweupe A.J.S. had a much narrower application of the generis rule. In his view, "crime" was in group three, "..... the prevention and suppression of violence, intimidation, disorder and crime". He held that the word is connected with the other three.

In effect therefore there are three approaches as to the scope of the definition. The Silungwe Approach, that the act can be within one of the five groupings or can be outside those groups so long as it endangers public security as understood in law it is covered. The Cullinan Approach, that an act has to fall within one of the five groups. And the Bweupe Approach, which is that "crime" falls in only one of the groups, "the prevention and suppression of violence, intimidation, disorder and crime". Admittedly, the last approach is in essence the same as that of Cullinan J.

Bweupe, A.J.S. quoted extensively from Parliamentary debates showing the original intention of Parliament.⁴⁶ He also cited many authorities on the construction of statutes. His conclusion was emphatic:⁴⁷

"We know the circumstances under which section 2 was enacted. It was primarily enacted to detain without trial those engaged in activities of burning bridges, violence, intimidation, unlawful assembly, riots. We have therefore to visit section 2 in that light. To visit the section to include trafficking of emeralds, elephant tusks, rhino horns, cobalt, mandrax, illegal externalisation of foreign exchange by the sake of the word "includes" would mean carrying the extension beyond the border line of doubtful cases which was not the intention of Parliament".

III. The approaches to statutory construction

The interpretational issues that fell for determination in Rao, the different views taken by some of the Judges, and the importance of the answers as far as personal liberties are concerned, all combine to offer a great opportunity for a re-examination of the classical attitudes towards interpretation and their status today.

Here we are not directly concerned with maxims of construction. There is perhaps no need to elaborate on the statement that virtually every respectable maxim has a respectable opposing maxim. For this reason, we would rather address the principal approaches to the application of statutes for these will be more directly relevant to the solution of the matter that has called for discussion. The classical approaches and the modern approaches are best considered separately.

A. The Classical approaches

The classical approaches consist of the mischief rule, the literal rule and the golden rule.

The mischief rule was classically stated in Heydon's case:⁴⁸

"That for the sure and true interpretation of all statutes in general (be they penal, or beneficial, restrictive or enlarging of the common law) four things are to be discovered and considered: (1) what was the common law before the passing of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy hath the Parliament resolved and appointed to cure the disease of the commonwealth; (4) the true reason of the remedy. And then the office of all the judges is always to make such construction as shall press the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief and pro privato commodo, and to add force and life to the cure and remedy pro bono publico".

Next is the literal rule, as stated by Tindal C.J., in Sussex Peerage Claim as follows:⁴⁹

"The only rule for the construction of Acts of Parliament is that they should be constituted according to the intent of the parliament which passed the Act. If the words are in themselves precise and unambiguous, then no more can be necessary than to expand these words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver."

And then there was Lord Wensleydale, who formulated the golden rule as follows:

"[I]n construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but not farther".

This was in Grey v Pearson.⁵⁰

An appraisal is in order and is best executed from a historical perspective.

The mischief rule, or "equitable construction" as it was sometimes called, predominated in the fifteenth and sixteenth centuries. The approach was proper, at least to the extent that every Act has a purpose and the court must do its best to give effect to that purpose, within the letter of the law. It erred however in attaching greater importance to what was seen as the object than to the letter.

As rightly observed by Miers and Page,⁵¹ the shift from the mischief to the literal rule "began following the emergence of the doctrine of the legislative supremacy of Parliament, and considerably hastened by the development of more exact drafting styles in the nineteenth century". Further, the literal rule was a reflection of two important matters: judicial ambivalence towards legislation as a source of law (hence the maxim that statutes in derogation of the common law cannot be extended by construction) and judicial acceptance of the court's role as interpreters and not maker of law. The unsatisfactory aspect of the literal rule was, conversely, in its laying greater emphasis on the letter than on the object of the legislation. As Lord Reid said in A-G for Northern Ireland v Gallagher,⁵² the mischief rule can be used to aid construction of the words which Parliament has used.

Regarding the golden rule, only one matter needs to be stated. The grammatical construction of Lord Wensleydale's golden rule suggests that "repugnancy" and "inconsistency" has to be "with the rest of the instrument" (objective) while "absurdity" can be absurdity in the eyes of the court (subjective). E.A. Driedgar⁵³ argues at length that the rule has preponderantly been applied to objective rather than subjective absurdity, repugnancy or inconsistency.

B. The modern approach

Probably the best formulation of the modern approach is to be found in the words of Lord Simon in Ealing L.B.C. v Race Relations Board:⁵⁴

The courts have five principal avenues of approach to the ascertainment of the legislative intention:

- (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of the remedy;
- (2) a conspectus of the entire relevant body of the law for the same purpose.
- (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objects will be stated;
- (4) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation;
- (5) examination of the other provisions of the statute in question (or other statutes in pari materia) for the light which they throw on the particular words which are the subject of interpretation."

One of Driedgar's formulations helps to state the new rule (simplified here) using terminology familiar to most. He says an Act as a whole is to be read in its entire context so as to ascertain the intention of parliament (the literal rule), the object of the Act (the mischief rule), and the scheme of the Act (the golden rule). The three rules are therefore combined and given equal emphasis. This is the modern approach to the reading and application of statutes. Other protagonists of this emerging approach, who show only slight variations, as Miers and Page point out, include Lord Lloyd of Hampstead, Cross and Lord Diplock.

It is gratifying to see that the approach to statutory construction is now becoming more rational. To sacrifice the letter to the spirit is cardinaly wrong as Parliament does not enact laws directly in the form of the spirit. It does so in the form of words. To emphasise the letter at the expense of the object is to unduly ignore that words are, as in everyday speech, used with some purpose in mind. Further, words cannot be properly held to be clear and unambiguous until they are read in their entire context. And as there is the incontrovertible ideal

that one portion of a statute must not be read in a manner that brings it into conflict with another, the mischief and the letter must be read together and on equal footing with the other provisions of the statute one is endeavouring to understand.

IV. Critique

With this background of what we think is the modern approach to statutory construction, we can now proceed to examine the areas that were, or should have been, considered in Rao or which may arise in the matter of economic crimes. First, the intention of Parliament. Second, the ejusdem generis rule. Third, remoteness. Fourth, the reasonableness of a decision to detain. And fifth, whether or not different kinds of crimes present the same problems.

A. The intention of Parliament

One of the most commonly heard arguments against detaining for economic crimes is reflected in Bweupe A.J.S.' judgement: those crimes were not in the contemplation of the framers of emergency legislation in the colonial days. We need to remind ourselves therefore as to what in law amounts to "the intention of Parliament".

(i) The intention of Parliament in general

Speaking on the matter in Director of Public prosecution v Schildkamp,⁵⁵

Lord Reid elaborated:

"It may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act..... If we take these matters into consideration, then we are in effect searching for the intention of the draftsman rather than the intention of Parliament. And then it becomes very relevant to ask - could any competent draftsman have adopted this form of drafting if he had intended the result for which the appellants contend?"

The words of Driedgar on the same matter are even more telling:⁵⁶

"The 'intention of Parliament' is, in a sense, a fiction. It is not an intention formulated by the mind of Parliament, for Parliament has no mind; and it is not the collective intention of the members of Parliament for no such collective intention exists. The only real intention is the intention of the sponsors and the draftsman of the Bill that gave rise to the Act; but that is not the intention of Parliament. The 'intention of Parliament' can only be an agreement by the majority that the words in the bill express what is known as the intention of Parliament."

Driedgar goes further, stating that the intention of parliament can conveniently be regarded as composed of four elements, namely:⁵⁷

1. The expressed intention - the intention expressed by the enacted words;
2. The implied intention - the intention that may legitimately be implied from the enacted words;
3. The presumed intention - the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
4. The declared intention - the intention that Parliament itself has said may be or must be or must not be imputed to it".

Further, and even more relevant to the definition of "public security",

Driedgar goes on to say:⁵⁸

"But we must keep in mind the distinction between the intention of Parliament as expressed by the Act as a whole, and the intention of Parliament expressed by a particular section. The expression 'intention of Parliament' usually denotes the intention of a statute as a whole rather than the intention of a particular provision".

Thus "crime" in section 2 of the Preservation Public Security Act must be read in the context of the entire Act, and we would add, the entire law.

The purpose of setting out the above observations is to show that a matter can still be in the scope of an Act, that is, within the intention of Parliament, even if it was not specifically contemplated by the sponsors of the legislation.

(ii) Application of law to a problem that was not contemplated

Since the words of the politicians moving-much less those supporting - a Bill are not conclusive, there is an obvious need for guidelines as to what should nevertheless be held to be within the scope of the Act.

Here, the words of Lord Wilberforce in Royal College of

Nursing v Department of Health and Social Security⁵⁹ in the

House of Lords are instructive:

"Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend express meanings if it is clear that the Act in question was designed to be restrictive or circumscribed rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot do under the law: they cannot fill gaps".

These words of Lord Wilberforce reinforce what we have already said about the fictional nature of what is called the intention of Parliament. Let us reiterate at this stage therefore that economic crimes can still be within the scope of the Act even if such crimes were not originally contemplated.

B. Noscitur a sociis: Ejusdem generis

As to this issue, it will be convenient to begin with the often quoted words of Stamp J. in Bourne v Norwich Crematorium⁶⁰, which are in essence an ordinary principle of language. He said:

"..... words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the..... language".

This rule is what often referred to as noscitur a sociis.

Three simple examples should suffice. The House of Lords held in I.R.C. v Frere⁶¹ that "interest" in the phrase "interest, annuities or other annual payments" in the Income Tax Act, 1952, must mean annual interest. In Muir v Keay,⁶² section 6 of the Refreshment Houses Act, 1860, referred to houses "for public refreshment, resort and entertainment.". There "entertainment" was held, not to mean a theatrical, musical or similar performance, but "something connected with the enjoyment of

refreshment-rooms," the "reception and accommodation of the public who resort to the place in question".

And in R v Goulis⁶³ the court had to determine whether the word "conceals" in the expression "removes, conceals or disposes of any property" contained in the Criminal Code should cover failing to disclose, without active concealment. It was said:⁶⁴

"It is an ancient rule of construction (commonly expressed by the Latin maxim, noscitur a sociis) that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general".

Applying this principle, "conceals" was held to mean a positive act of concealment.

One species of noscitur a sociis is the eiusdem generis rule, which is in the words of Lord Halsbury in Thames & Mersey Marine Insurance Co. v Hamilton, Fraser & Co. "that general words may be restricted to the same genus as the specific words that precede them".⁶⁵ In that case, the words "all other perils, losses and misfortunes" in an insurance contract were confined to perils of the sea, as all the preceding words referred to perils of the sea. We need not belabour the reader with further examples of this well-known rule, but emphasise that it may be overridden by other aspects of context and that, unlike its mother principle, it applies only where general words are preceded by specific words. Arrangement is of the essence.

The principle that falls for consideration therefore, in relation to the definition of "public security", is not eiusdem generis but noscitur a sociis - though this should be of no consequence as to result. In this connection, we have already stated the Silungwe, Cullinan and Bweupe Approaches.⁶⁶

We have no major problem with the approach taken by Silungwe C.J. He seemed to be saying (with the hindsight which Magnus J. and Cullinan J. did not have), in simple terms, that any activity whether or not it falls within one of the five groupings can be a threat to public security if it is capable of endangering on a large scale law and order.

With Judge Cullinan's interpretation we cannot agree. "[T]he only reasonable construction", he had said, "I can place on the definition is that the word 'crime' relates to all crimes having a connection with thefive groupings, that is, public security as otherwise defined"⁶⁷. Cullinan's approach is commendable to the extent that he tried to restrict the scope of "crime". In so doing however, he adopted a construction that rendered the word otiose⁶⁸, apparently because he saw no mid-way; in fact his words suggest that he saw his construction as only a lesser evil. The Chief Justice found a mid-way by stating that certain crimes not in one of the five groups can be included (if they satisfied the guidelines he laid down) but that not all crimes of any description were included. Indeed it would be interesting to observe what would be the reaction of Baron, Magnus and Cullinan to Silungwe's formulation, considering that the latter seems to have effectively excluded the petty offences, which were the concern of the three judges.

Also, Mr. Justice Cullinan's application, is such it can be called, of the noscitur a sociis principle (which was in Rao itself, Kaira and Mudenda improperly called ejusdem generis) is unusual. As we saw, noscitur a sociis dictates a restriction of the scope of otherwise wide words. The judge did not do this. Whereas he set out to restrict the scope of "crime", he wound up depriving it of all meanings, though, in fairness, reluctantly.

As to Bweupe A.J.S.'s approach, he seemed to think that the noscitur a sociis principle dictated a restriction of "crime" to what was originally contemplated. This also seems to be a rare (though purposeful) application of the maxim, reminiscent of the days when the mischief rule held sway. Perhaps we should restate here that Ngulube D.C.J. did not find it necessary to address the noscitur principle, having as we noted, found it necessary only to reject the contention that economic crimes can never endanger public security, that having been the argument before the court.

As for Mr. Justice Sakala, he agreed with the Chief Justice that economic

crimes can endanger public security, but declined to accept that this can only be so in a weak economy. Now, in our formulation economic crimes can endanger public security only in a weak economy. This is because in a strong economy, it is still possible to separate economic well-being from the preservation of life, and therefore public security. Silungwe C.J.'s formulation also clearly laid much emphasis on the existence of a fragile economy, for in a good economy the likelihood of destructive economy-related reactions remains slight and in that sense and to that extent therefore remote.

C. Remoteness

Regarding remoteness, both Silungwe C.J. and Ngulube D.C.J. rejected expressly the concept of causation preferred by Cullinan J. The latter Judge thought that damage to human life and to property, caused by economy-related riots, was too remote an effect of committing an economic crime because the cause was not direct.

The Chief Justice, however, with the hindsight of economy-related riots causing loss of lives and extensive damage to property in three major provinces of Zambia, was of the view, in effect, that such loss of life and damage to property can be said to the "effective" result - actually or potentially - of the commission of economic crimes, and this result was therefore not remote. Now, admittedly, loss of life and damage to property in economy - related riots and loss of life and damage of property due to the failure to safeguard what is specifically safeguarded in the definition of "public security", differ in the manner of causation. The former is indirect while the latter is direct. This is our difficulty with this aspect of the Chief Justice's idea of proximate. It seems to suggest that any acts which will indirectly cause violent discontent destroying human life and property is not remote.

Here lies the problem: prostitution, homosexuality, the abuse of drugs and alcohol, can and have in many parts of the World caused violent protest taking lives and damaging property; are prostitutes, homosexuals, abusers of drugs and alcohol, and their abettors to be detained under emergency legislation?

To avoid this possible absurd result in other cases, Silungwe C.J. could have taken a different route but to the same result, at least in Rao. It is common knowledge that thousands of people in Zambia are in danger of dying of starvation - perhaps some have already died - unless the Government continues to supply them food. Economic crimes which take away the country's resources will actually or are likely to significantly diminish the state's ability to keep these people alive. To this extent, the prevention and suppression of such major crimes is aimed at preserving numerous lives - a distinct aim of the definition - and, more specifically, such measures can be said to fall within "the maintenance of supplies and services essential to the life of the community". On this formulation, the anomaly of prostitutes, homosexuals, drunkards and drug pushers being detained without trial is eliminated.

To drive the point home, our formulation closes the door to the following arguments of Leo Baron:⁶⁹

"Certainly the consumption of mandrax will adversely affect the health of the people consuming it, but even assuming the effects were widespread and there could be said to be a connection between widespread drug abuse and public security, to assert that the fabric of Zambian society (is bound to be) shattered is totally unrealistic.

One could well say that the fabric of Zambian society is threatened by excessive consumption of alcohol; is it conceivable that suppliers of alcohol could be detained as people threatening public security (and it must be remembered that the fact that selling alcohol is not an offence makes no difference if activity threatens public security). And more realistically, is it inconceivable that prostitution, which must surely threaten the fabric of society, can be dealt with by detention without trial. I venture to think that even the man living on the immoral earnings of prostitutes could not conceivably be regarded as a threat to public security".

Then there is the view of Ngulube D.C.J. His view that in matters of the state we must try to prevent what he called a "domino effect" and not wait until a situation has arrived is, quite simply, too open - ended. Though the Judge somewhat qualified this by referring to "foreseeable consequences and potential consequences in any clearly discernible causal chain", his reference to a "domino effect" - unless the metaphor was not well chosen - leaves unanswered the pertinent issues raised by Baron, Magnus and Cullinan as to remoteness of consequences.

D. Reasonableness of measures

Under Article 26 of the Constitution, the measure of detaining has to be reasonable. The majority of the court in Rao agreed with Silungwe C.J. who cited with approval Chisata & Lombe v Attorney-General⁷⁰ where the Supreme Court held that:

"..... Article 26 of the Constitution indicates that the measures taken must be 'shown' to be unreasonable, seemingly it is the detainee who must undertake that burden".

Rao failed to prove unreasonableness.

Now, more generally, there should really be two aspects of reasonableness, that is, as to the decision to detain and as to the length of the detention. It is advisable to deal with these separately in detention matters where both aspects are an issue.

The reasonableness of detentions for economic crimes has additional considerations. Though an economic crime can be proximate to public security, two important distinctions remain with classical violations. First, in the classical cases public security is, according to our view, endangered more directly. Economic crimes have an indirect effect in that what is preserved by their suppression may never be used for the preservation of the people. Second, the threat from economic crimes is in the apprehension of the collective effect, while a single act of classical violations such as spying or sabotage can alone be devastating. The purpose of mentioning this is to show that, in general, an economic crime is of necessity less serious than most classical threats to public security, therefore some could feel that there may be need for more liberal safeguards regarding detentions for the former.⁷¹

E. Distinction between different kinds of "economic crimes"

Both on the formulation of the Chief Justice and our formulation as to how certain kinds of economic crimes can endanger public security, it would be difficult to show that the illegal trafficking, once widespread in Zambia, of methaqualone hydrochloride

(mandrax) was a danger to public security. On the contrary, the economic benefits accruing to the country alleviate, albeit taintedly, the concern of the two formulations. It could be argued however that mandrax, even if it is not sold or distributed locally - the grounds never directly alleged this - the quantities in which it was usually found or trafficked were such that if, being a prescription drug, it accidentally became available to the public, it would seriously endanger the lives of large sections of the population.

This difficulty comes in focus in for example two decisions of Sakala J. (as he then was) in the High Court of Zambia. In Chibwe as we saw he had decided that "to conspire to unlawfully externalise three million kwacha from a country whose economy is experiencing great difficulties in foreign exchange is certainly prejudicial to public security which activity if left uncontrolled would lead to certain economic consequences and hardships on the people.....".

In Ngwira & two Others v Attorney-General⁷² Sakala J., again faced with the contention that illegal trafficking in mandrax was not a threat to public security, could only say:

"While I accept that the word 'crime'cannot mean 'all crimes', the offences disclosed in the grounds of detention..... cannot be said to be 'petty'".

On that basis he held the detentions intra vires. It will be remembered that in Joyce Banda v Attorney-General⁷³ suspicion in the obviously grave matter of murder per se was held not to be a valid ground for detention. Sakala J.'s judgement in Ngwira and the Supreme Court's in Banda are difficult to reconcile. It is also important that Sakala J. did not venture to show how trafficking in mandrax endangered public security.

VI. Conclusion

When the Preservation of Public Security Act, Cap. 106, was enacted, before the attainment of independence in 1964, economic crimes were not in the minds of the legislators. However, these are still within the scope of the Act because the prevention and suppression of economic crimes is, as was the Act then, aimed at the preservation of life and property. The word "includes" in section 2 of Cap. 106 cannot justify the application of the Act to matters which are not in the general

scheme of the Act as, among other reasons, this would render the ordinary criminal law otiose. Bearing in mind therefore the general mischief originally aimed at (mischief rule), the words used (the literal rule), and the scheme of the Act (golden rule), major crimes that take away the States resources, diminishing its ability to preserve life, can properly be regarded as being within the scope of the Zambian Preservation of Public Security Act. As we have seen however, the matter has not been settled and is likely to remain so for some time. The appeal in Rao v Attorney-General was allowed on other grounds.

FOOTNOTES

1. Cap. 106, Laws of Zambia.
2. S.C.Z. Appeal No. 24 of 1987.
3. For example, In In re Thomas James Cain v Attorney-General (1974) Z.R. 71 (H.C.), one of the grounds of detention was that the applicant had been involved in externalising large amounts of currency. The issue was however not decided upon. See also Eleftheriadis v Attorney-General (1975) Z.R. 69 (1980) Z.R. 22.
4. The applicant had been detained on 25th June, 1979, but was released pursuant to a revocation order dated 19th September, 1979. The grounds for this earlier detention were an alleged conspiracy to unlawfully externalise ten million kwacha. This detention was not in issue in the case discussed here.
5. Cap. 593.
6. The law, even at this time, had already been well-established that the President was empowered to detain regardless of whether the act or activity amounted to a criminal offence.
7. (1979) Z.R. 245 (H.C., Silungwe C.J.).
8. (1979) Z.R. 136 (H.C.).
9. Footnote 4, p. 35.
10. (1980) Z.R. 65 (H.C.).
11. Emphasis added.
12. Footnote 10, p. 78.
13. Ibid.
14. Ibid., pp. 78,79.

15. (1978) Z.R. 69 (S.C.).
16. Footnote 10, at p. 79.
17. (1975) Z.R. 69 (S.C.).
18. Footnote 10, pp. 79.80.
19. Ibid., p. 80.
20. (1972) Z.R. 248 (C.A.).
21. Footnote 10, p. 81.
22. Footnote 15, p. 240.
23. Ibid.
24. Footnote 10, p. 82.
25. Footnote 7, p. 31.
- 25A. Footnote 10, p. 82
26. (1988) Z.R. 99 at p. 124 (H.C.).
27. Vol. I, at p. 627.
28. Footnote 10, p. 84.
29. Footnote 2.
30. Ibid., Ground 4.
31. Ibid., J 8. Note that the judgement of each judge is numbered separately.
32. Ibid., J 9.
33. 2nd Ed., Vol. 4, p. 215.
34. 4th Ed., Vol. 4, p. 2173.
35. Footnote 2, J 11.
36. Ibid.
37. See infra under "Reasonableness of measures".
38. Footnote 2, J 14.
39. Ibid., J 5, 6.
40. Ibid., J 7.
41. Ibid.
42. Ibid., J 8.

43. Ibid.
44. Footnote 2, J 5.
45. Ibid., J 5.
46. In England and other Commonwealth jurisdictions, the extent, if at all, to which Parliamentary debates (Reports of Royal Commissions, etc.) should be used to interpret written law has been the subject of different opinions. Bweupe A.J.S. freely referred to the debates. In England, the law is clear that Parliamentary debates cannot be used: R v Hertford College (1878) 3 Q.B.D. 693; AttorneyGeneral v Sillen (1863) 2 H. & C. 431, per Pollock C.B. and Bramwell B; Herron v Rathmines, etc., Commissioners (1892) A.C. 498, per Lord Halsbury L.C.
47. Footnote 2, J. 10.
48. (1584) 3 Co. Rep. 7a; 76 E.R. 637, 638.
49. (1844) 11 Cl. & Fin. 85, 143; 8 E.R. 1034, 1057.
50. (1857) 6 H.L.C. 61, 106.
51. D.R. Miers & A.G. Page, Legislation (London, Sweet & Maxwell, 1982) p. 185.
52. (1963) A.C. 349, at p. 366.
53. Construction of Statutes, 2nd. Ed., (Toronto, Butterworths, 1983) pp. 3745. Generally see P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th Ed., (London, Sweet & Maxwell, 1969); and S.G.G. Edgar, Craies on Statute Law, 17th Ed., (London, Sweet & Maxwell, 1971).
54. (1972) A.C. 342 at p. 361.
55. (1971) A.C. 1, at p. 10.
56. Footnote 53, at p. 106.
57. Ibid.
58. Ibid.
59. (1981) 1 A11 E.R. 545 (H.L.) Emphasis added.
60. (1967) 2 A11 E.R. 576.
61. (1965) A.C. 402.
62. (1875) L.R. 10 Q.B. 594, Lash and Blackburn J.J. at pp. 597, 598.
63. (1981) 33 O.R. (2d) 55, a Canadian case.
64. Ibid., pp. 60, 61.

65. (1887) 12 A.C. 484, at p. 490.
66. Supra, under "In Rao v Attorney-General".
67. Footnote 10, p. 79.
68. In proper cases it is in order to hold certain words in a statute to be superfluous. There is a presumption however that all words perform a function.
69. For lack of a better source, see V.J. Mwaanga, The Other Society: A Detainee's Dairy (Lusaka, Fleetfoot, 1986) at p. 77.
70. Supra.
71. See also arguments of Baron in Mwaanga, footnote 69, pp. 77-79, where he argues basically that detaining for mandrax trafficking would fail the test he laid down in Kapwepwe & Kaenga as to the purpose of detention without trial.
72. (1985) Z.R. 208, at pp. 218. See also, among others, Pende Punda Banga v. Attorney-General (1987/HN/168), Abdoulaye Ndiaje v Attorney-General (1987/HN/168) and Peter Greenwell Manda v. Attorney-General (1987/LTR/170), all three unreported.
73. (1978) Z.R. 233 (S.C.).

CHAPTER THREE

AN INTERNATIONAL DIMENSION

1. INTRODUCTION

We have already stated that the Zambian courts first addressed squarely the issue of economic crimes and public security in 1980. Since then to date, no exploration has been made by the Bench or Bar as to the concepts international law can offer for the elucidation of the matter. This is not surprising; courts and litigation lawyers are generally ambivalent towards the use of general international law or treaty obligations in resolving legal problems arising at a municipal level. This ambivalence notwithstanding, there are at least two reasons why an examination of the problem from an international perspective is necessary.

First, where international law or an obligation of a treaty has been appropriately invoked, the courts regard it as undesirable to construe national laws so as to bring them into conflict with international obligations. On the basis of the general

presumption that the legislature does not intend to exceed its jurisdiction, within the limits allowed by the language used, legislation must be interpreted so as not to be inconsistent with the comity of nations or the established rules of international law; the court will try to avoid a construction that would give rise to such inconsistency unless plain and unambiguous language leaves it with no option.¹

However, if the language is clear, it must be applied even if a conflict between international law and municipal law is the consequence.²

Second those who hold that economic crimes are or are not relevant to public security, according to their own conception of what that term should and should not include, are - whether or not they also accept that the courts have construed the relevant legislation in the way they should have - likely to turn to international human rights norms to fortify their positions. For this reason it is worth examining the issue from the international law aspect, in particular, the principal international conventions, for any guidance they may offer regarding the relevance of economic crimes to public security.

We must also observe that the subject-matter of this entire work is, at least at a general level, relevant to the reasons leading to the adoption of the Covenant on Economic, Social and Cultural Rights; and the Covenant on Civil and Political Rights³ as two separate instruments instead of one as originally postulated in 1950. This original intention was adopted by the General Assembly of the United Nations at its fifth session, it having been generally accepted that the two groups of rights had a close connection. The Assembly was of the view that the enjoyment of civil and political freedoms and that of economic and cultural rights is interdependent and that where the individual is deprived of his economic, social and cultural rights, he does not represent the human person who is considered by the Universal Declaration of Human Rights of 1948⁴ to be the ideal of the free man. It turned out that this confluence of views was more apparent than for most practical purposes real: The East European countries laid more emphasis on the economic, social and cultural

rights of the population as a group while the countries of the West seemed to accord paramountcy to the civil and political rights of the individual. The discussion that ensues in this chapter therefore, does have a strong ideological aspect but it must not, by all means, be seen as a general alignment with one of the two protagonist groups. Keeping these two important matters in mind, but also remembering that international law content has influenced the content of much national law, we shall now proceed to deal with the UN instruments; the African Convention on Human and People's rights;⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.⁶

II. The United Nations instruments

The Universal Declaration of Human Rights of 1948, in the first paragraph of its preamble re-affirms "the recognition of the inherent dignity of all people." Article 3 declares "the right of life". And Article 23 (1) states that "[e]veryone has right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Clause (3) of the same Article goes further and stipulates that [e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection". Then Article 25 (1) expands on Article 23 providing that a person has "the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control". The right to free education "at least in the elementary and fundamental stages" is expressed in Article 26(1). Thus not only must human beings have simply the right to life, that life must be coupled with certain minimum standards of economic and social well-being, examples of which have just been set out above.

Then there is the international Covenant on Economic Social and Cultural Rights, 1966. As with the Universal Declaration, the Covenant, also in the first paragraph of the preamble, declares the "recognition of the inherent dignity" of the human family. The preamble further declares the "[the rights contained in the Charter of the United Nations] derive from the inherent dignity of the human person". For our present purposes, it will suffice to say that Article 6 of the Economic Covenant also confers the right to work as does Article 23 of the Universal Declaration; that Articles 11 and 12 of this Covenant, in words similar to Article 23 of the Declaration, set out certain general aspects of economic and social wellbeing; and that Article 13 of the former confers the right to education in more detail, but to the same general effect, as Article 26 of the Universal Declaration of Human Rights.

As to the third major UN instrument, the International Covenant on Civil and Political Rights, also of 1966, the first matter to be noticed here should be "the inherent right to life" stipulated in Article 6(1). Second, Article 9, after declaring the right to liberty, provides that "[nobody] shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law".

Very pertinent is Article 4. It provides: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State 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, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination.....".

Paragraph (2) of Article 4, however, does not allow derogation from, among other provisions, Article 6(1), which contains the right to life.

III. The African Charter on Human and Peoples' Rights

This Convention pays roughly equal attention to the two groups of rights. Right from its preamble there is expressed the conviction that:

"It is..... essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic social and cultural rights is a guarantee for the enjoyment of civil and political rights".

This basic approach receives fuller expression in the Charter itself.

Let us look at the specific provisions. Article 4 stipulates that every human being" shall be entitled to respect for his life and the integrity of his person". The "right to work under equitable and satisfactory conditions" and to "receive equal pay for equal work" are conferred by Article 15. Clause (1) of Articles 16 provides that "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health"; and under clause (2) "[s]tate parties to the Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick". Article 17 (1) states that "[e]very individual shall have the right to education". The "aged and disabled" are catered for in Article 18(4) which lays down that they "shall..... have the right to special measures of protection in keeping with their physical or moral needs". And independently of the right to "respect for his life" conferred on the individual by Article 4, Article 20 stipulates that "[a]ll peoples shall have the right to existence". There are many other specific economic, social and cultural rights protected. The Charter, in Article 22 provides:

- "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of this right to development".

This right to development, which is also accorded separate and specific mention in the Preamble to the African Charter on Human and Peoples' rights is unique among international human rights instruments.

IV. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 2(1) of the European Convention stipulates that "[e]veryone's right to life shall be protected by law" and that "[no] one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction [for] a crime for which this penalty is provided by law". As in other Conventions, at least in general, there are exceptions, in clause (2), in the case of deprivation of life resulting from "the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection". By the use of the word "intentionally" in clause (1) and the nature of derogations permitted in clause (2), it is evident that the Article was directed towards the protection of life from active deprivation on the part of the state or individuals within the society.

The European Convention reflects essentially the Western approach to human rights: an emphasis on civil and political rights. In fact, in the whole Convention there is no mention of what may, in classical terms, be referred to as an economic or social right. Even the right to life which, as we elaborated in Chapter II, is relevant to economic and social rights is, as we have just observed, framed and qualified in a way suggesting that it was thought of as a civil liberty. Probably the closest the European system of rights comes to recognising economic and social rights in the same way it does individual freedom is in the Protocol. In Article 2, it provides that:

"No person shall be denied the right to education. In exercise of any of the functions it assumes in relation to education and to teaching, the State shall protect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

The right to education is dealt with only in a Protocol and is framed so as to demand a positive duty on the State not to, again, actively interfere with its exercise. This approach, at least broadly, epitomises the differences (within the limits of our discussion), of the conception of rights in the European Convention on the one hand, and the UN instruments and African Convention on the other.

V. Concluding remarks

The purposes of referring to the international instruments are basically the same as those stated in Chapter II. We shall re-state them here in the international context. First, the right to life as stated in many international conventions does not envisage it in the context of economic well-being or deprivation. It is thought of and framed in a way clearly suggesting that it needs protection only from "violence" in the more usual sense.

It is not every declaration of an emergency in Africa that can be legally or morally supported; nor is it easy to support all major court decisions in Africa regarding the interpretation of emergency-related laws. It is however easy to say that in the context of agro-economic maladies directly leading to loss of human life by the millions, there is no essential difference between the preservation of life in the classical sense and the preservation of life through the prevention of further economic deterioration. Accordingly therefore, special measures aimed at preventing major crimes or other activities that substantially reduce, actually or potentially, the state's ability to prevent life-threatening economic deterioration are defensible in the context of the realities of the situation in Africa today.

FOOTNOTES

1. Bloxham v Favre (1883) 8 P.D. 101, per Sir James Hannen P.
2. Niboyet v Niboyet (1878) 4 P.D. 1; Mortensen v Peters (1906) 8 F. (J.) 93. For a short discussion of the doctrines of "incorporation" and "transformation" as to the applicability of international law in national law see the words of Lord Denning M.R. in Trendtex Trading Corporation v Central Bank of Nigeria (1977) Q.B. 529, at p. 552 (C.A.).
3. UN, A Compilation of Human Rights Instruments (New York, 1978).
4. Ibid.
5. Richard B. Lillich, International Human Rights Instruments (New York William S. Hein, 1985). See also generally the American Convention on Human Rights.
6. Ibid.

CHAPTER FOUR

GENERAL CONCLUSIONS AND SUMMARY

It is now appropriate to make some observations regarding matters that are connected with our subject-matter and the effect of those matters on personal liberties.

I. The continuance of the emergency

The Supreme Court has maintained its holding that the power of the President to declare an emergency is absolute. In the court's own words, that is "a matter purely for the president to decide". A declaration once validly made, is not reviewable on any grounds - not even on a prima facie basis. The extent of this power has been criticised. The principal reason for such criticisms has been the possibility of abuse. Further, disapproval of the Court's position has been fuelled by the fact that the emergency declared in 1964, almost a quarter of a century ago, continues in force and there is no sign that it will be revoked in the near future.

One of the criticisms often heard in connection with the absolute power to declare emergencies is the lack of a definition of "emergency". The lack of a definition however is unlikely to profoundly influence or control the decision to declare or not to declare an emergency and therefore the extent to which personal liberties can be enjoyed. There are two principal reasons for this. First, even if a definition were to be enacted, it would depend on how wide or narrow its formulation would be. And where the legislature is dominated by the executive, it is likely that the definition would be so wide or infused with so much discretion as to defeat the very purpose of its creation. Second, even if a narrow definition or one carefully circumscribing the power was enacted the courts have shown that they are in their view unable to interfere with the power.¹

It is worthy of note that while refusing to interfere with an emergency declaration, the courts have, as we saw in Chisata & Lombe, impeached on a prima facie basis a decision to detain. Admittedly, a court should exercise more restraint in relation to the impeaching of an emergency declaration than in relation to the

legality of an individual detention. That the courts have taken a different stand in the two issues is not very surprising. What is significant is that in the case of an emergency declaration, it is not reviewable at all by any court not even the Supreme Court. It is possible therefore to argue that the power to declare is arbitrary and therefore objectionable. If this is considered to be a very serious problem, original jurisdiction can be given to a full Bench of the Supreme Court to determine on a prima facie basis whether a declaration has been properly made or continued. Such a power, if given, should be restricted by, for example, a provision that the Supreme Court shall not entertain more than one such application in six months.

Still on the continuance of an emergency proclamation, it is very important to note that since 1969 a proclamation remains in force until revoked by the National Assembly. This means that a member of the Backbench has to take it upon himself to move a motion challenging the President's exercise of the power to make or continue an emergency.

Quite apart from the law at present as to the absolute power to declare and continue an emergency, it has been argued, as we saw, that the continuance of the emergency is unnecessary. Some have argued that after the 1964 Lumpa Uprising was crushed, there was no need to continue the emergency. The Government argued then, and still does now, that the presence of hostile neighbouring regimes made necessary the continuance of the emergency. The Government was referring to once Portuguese ruled Angola and Mozambique; the rebel government of Ian Smith in the then Rhodesia (briefly Zimbabwe - Rhodesia) which was heavily supported by South Africa. In 1975 the two Portuguese colonies gained political independence while in 1980 Zimbabwe was born. Up to 1980, the present writer has no problem holding that the emergency was properly continued-though there could be arguments in relation to late 1964 after the Lumpa rebellion was terminated and November, 1965, when Ian Smith came to power. From 1965 to 1980, Zambia especially in the seventies, was virtually at war with the Smith regime. Rhodesian forces were bombing

almost at will any spot in Zambia, destroying bridges, planting landmines and killing thousands of people. After 1980, the security situation improved considerably as only the small Namibian border is not always peaceful. (There are sometimes skirmishes however). This has led to arguments that the moderately unstable Namibian border is not such a serious matter as to justify the continuance of the proclamation in the whole country.

II. Extent and manner of use of detention powers

The extent to which detention laws affect the enjoyment of personal liberties depends as much on the scope of those powers as on the frequency of their use and the extent of that use in individual cases. In Zambia there have never been mass detentions outside of the Lumpa Uprising, which itself was good cause for declaring an emergency. This notwithstanding, it has been estimated that from 1964 to 1977 about sixty-six people on average per year were detained for a period of over thirty days.²

In general, the number of persons detained has remained substantially the same but with the added feature that in the eighties the State has increasingly detained for economic crimes, hence the need for this study.

The question that has arisen very often in the courts and outside in relation to the use of the power to detain is that it is being used where the ordinary criminal law should take its course. This has arisen not just in relation to economic crimes but also in relation to crimes such as murder and aggravated robbery. The cases of Joyce Banda and Gilbert Mutale, respectively, are examples of this. There has been a tendency especially to detain habitual and hardened criminals who commit very serious offences and who it has been difficult to convict. The good faith of these detentions cannot generally be doubted. Their vires however can be arguable.

III. Some notable trends after independence.

Upon the attainment of independence, the former colonial masters generally bequeathed a system of government similar to their own. If the system was not

very similar, at least it tried as much as possible to emphasise the same values as were emphasised in their mother countries. To this end, in Zambia for example, until 1969, Part III of the independence Constitution (which contained the fundamental rights and freedoms) could only be amended in a national referendum in which more than half the registered voters supported the amendment. By a constitutional amendment, also after a referendum, this is no longer the case. It is instructive to note the changes in attitudes towards personal liberties in relation to legislation, the attitudes of the courts, and the law and practice relating to the judiciary.

A. Post-independence legislation relating to safeguards

The most readily discernible fact about emergency - related legislation is that there has been a relaxation of the safeguards available to the detained (or restricted) person. The 1964 Constitution required that the grounds of detention be furnished within five days; that a publication of the fact of detention appear in the Gazette within fourteen days; and that a detainee have automatic review of his detention by a tribunal within a month and at six-monthly intervals thereafter.³ We observed in Chapter I that the period of furnishing grounds was extended to fourteen days while that of publishing in the Gazette was extended to thirty. Reviews of detention can now take place one year after the commencement of the detention or one year after the last review. The State said it introduced the amendments due to the practical difficulties of complying with the old requirements.

Notwithstanding this explanation by the State, the amendments were criticised as a sad sign of diminishing respect for personal liberties. For the other side it could be argued that the 1969 measures were more balanced in that they laid equal emphasis on personal liberties and the right of the public not to have detentions invalidated on technical grounds.

As to the 1974 amendment, it is significant in two respects. First, the form in which it was originally introduced, that is, its attempts to completely divest the courts of the power to determine the legality of detentions can be said to sum up the position

of the State in the matter; the powers of the courts to at least hear and determine the legality of a detention and to award damages at least for physical or mental ill-treatment were given as a concession by the Government only after heated debate in the National Assembly. Secondly, the fact that damages can no longer be awarded merely for the fact of an illegal detention, it has been said, has removed a substantial deterrent on those who advise the President whether or not to detain.

B. The attitudes of the courts

The criticisms made of "watering-down" legislation have been accompanied by similar criticisms levelled at the courts. It has been said that the expatriate judges who stayed on after independence were more protective of personal liberties than what became an increasing number of indigenous judges. The supreme tribunal in Zambia at the time that the pioneer case of Chipango was decided in 1971 (the Court of Appeal) comprised Doyle C.J., Pickett J.P., and Gardner J.A., all expatriates. It is there that it was established that the safeguards relating to the grounds and publication of detentions in the Gazette were mandatory. That is perhaps neither here nor there, for it cannot be known as to whether an indigenous bench would have decided differently. In fact many of the decisions decided by Zambian judges show some boldness. It is interesting however to note that the judgements, for example, of Doyle C.J., Baron D.C.J. and Cullinan J.S. show remarkable leaning towards the individual while those of some Zambian judges tend to show a leaning towards the State, that is, the people.

This brings us to the independence of the judiciary in general.

IV. The independence of the judiciary

Let us begin with appointments. According to Article 108 (1) of the Constitution, the Chief Justice and other Judges of the Supreme Court are appointed by the President, that is, in his discretion. Puisne judges however are, as per Article 110 (1), appointed by the President "acting in accordance with the advice of the Judicial Service Commission".

Now the composition of this commission has gone through stages. At independence the Constitution provided:

"104 (1) There shall be a Judicial Service Commission for the Republic which shall consist of -

- (a) the Chief Justice, who shall be Chairman;
- (b) the Chairman of the Public Service Commission or such other member of that Commission as may for the time being be designated in that behalf by the Chairman of that Commission;
- (c) such Justice of Appeal or puisne judge as may for the time being be designated in that behalf by the Chief Justice; and
- (d) one other member who shall be appointed by the President".

This last member, subsection (2) provides among other things, must hold or must have held high judicial office.

By Act No. 27 of 1973, the one-party Constitution, the Attorney-General, who under the current structure is also Minister of Legal Affairs, was added to the list.⁴ And by Act No. 18 of 1974 the original section 104 (c), which had survived in the one-party Constitution, was replaced by a provision making the Secretary to the Cabinet a member of the Commission. The consequence as can be seen increased the non-judicial element on the body. These changes have been frowned upon in some legal and judicial circles.⁵

These criticisms have usually been made together with those levelled at the practice of transferring judges from the Bench to some other institution and those levelled at the law regarding the tenure of High Court Commissioners. The Chairman of the African Bar Association and well-known legal practitioner in Zambia, Rodger Chongwe, in a speech delivered in Lusaka on 29th July, 1988,⁶ put his views on public record.

As to transfers of judges from the Bench (which practice allows them however to maintain their terms and conditions of service) he asserted that this erodes the independence of the judges. Chongwe, of course, had in mind at least the following cases. Mr Justice Cullinan was in the early eighties transferred from the Supreme

Court to be Director of the Legal Services Corporation, a statutory body that acts as lawyer for parastatal bodies. High Court Commissioner Edward Chisengalumbwe was in 1986 transferred back to the Ministry of Legal Affairs to work as Deputy Permanent Secretary. In 1988 Judge Ernest Sakala, who briefly served on the Supreme Court, was transferred from that court to be Investigator-General (Ombudsman). A well known case is that of Mr Justice Fred Chomba, who is currently Minister of Legal Affairs and Attorney-General. He had held that office before in the early eighties. He was first transferred from the Supreme Court to become InvestigatorGeneral, later Minister of Home Affairs, later still, back to the Supreme Court and now as we said is Minister of Legal Affairs and Attorney-General.

Regarding High Court Commissioners, Chongwe stated that these persons are always suspect due to the fact that they have not the security of tenure of judges.⁷

It is sometimes said by private practitioners that such arrangements account for the fact that some highly intellectual and experienced judges will give very incisive judgments in ordinary cases but seem to be more timid in cases directly involving the President, such as detention matters.

V. A final word

We have in this work discussed the general detention laws; the specific issue relating to economic crimes; and some international instruments that may have a bearing on that issue. We have also considered some more general matters that may have a bearing of the rulings of the courts on issues relating to economic crimes. Now, it is often alleged even more generally that in issues such as the one that gave rise to this study, the fact that a state is one-party as in the case of Zambia has very strong part to play. This may or may not be so. In any case, that issue is beyond the scope of this study.

FOOTNOTES

1. See also Nigeria: Williams v Majekodumni (1962) 1 All. N.L.R., 324 at p. 336, per Ademola C.J.; Adegbenro v Attorney-General (1962) 1 ALL. N.R.R., 324.
2. Dr S.K.C. Mumba, "Preventive Detention in Zambia", an unpublished seminar paper delivered at the University of Zambia in June, 1984, p. 10. Figures were compiled from the Gazette, where detentions have to be notified within 30 days.
3. 1964 Constitution, section 24.
4. Article 115 (b).
5. The removal of all Judges however is subject to strict provisions. They can be removed only for inability to perform their functions or for misbehaviour and, even then, a tribunal has to be appointed for the purpose - Article 113.
6. Times of Zambia, 30th July, 1988, P.I. See also L. Shimba, "The Status and Rights of Judges in the Commonwealth Africa: Problems and Prospects" (1987) 3 Lesotho L.J.1.
7. See section 111 of the Constitution. Though removal of High Court Commissioners is by the President acting in accordance with the advice of the Judicial Service Commission, no tribunal need be appointed as in the case of Judges.

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A

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2. Constitution of Zambia, 1973, Cap. 1.
3. Emergency Powers Act, Cap. 108.
4. Exchange Control Act, Cap. 593.
5. Interpretation and General Provisions Act, Cap. 2.
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